THE LITTLEST IMMIGRANTS:
THE IMMIGRATION AND ADOPTION OF FOREIGN ORPHANS

by

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(ABSTRACT)

This dissertation examines a unique class of immigrants: foreign orphans adopted by American families. Those children accounted for 18,000 adoptions in 1984 and 1985, or 20 percent of non-relative adoptions in the United States. This rapidly increasing class of immigrants is subject to Federal regulation of immigration and to State regulation of adoption. Visa petitions for foreign orphans, filed by adopting American citizens, are the only immigration petitions for permanent residence that are subject to a State veto. Regulation of intercountry adoption in the United States exposes adopting citizen parents to significant variations in requirements, costs, time, etc., and even in the ultimate issue of Federal approval of their immigration petition — all based on the State in which they reside.

This dissertation will make a case for changing the U.S. Code to eliminate the interjurisdictional confusion in which 50 systems of orphan immigration take the place of a unitary Federal system of immigration. The dissertation uses Supreme Court opinions with a more traditional policy analysis to show that the current system conflicts with fundamental constitutional values of individual rights and federalism. Conversely, the advocated change is shown to be on solid

constitutional ground. The dissertation does not argue that the current system is "unconstitutional," but that the system fosters inequity and interjurisdictional confusion which Congress can and should correct.

The dissertation examines the immigration and adoption elements involved, provides new data on American and intercountry adoption, and reviews American and foreign procedures. This establishes that intercountry adoption is a major alternative in American family building, that the system is safe, the children are healthy and that the system is closely regulated by the U.S. Immigration and Naturalization Service, the State Department, and, in foreign countries, by national ministries, juvenile courts and other institutions. Problems often associated with intercountry adoptionm are shown to be based on misinformation and a lack of familiarity with the extent of Federal and foreign regulation.

Conversely, the State role is shown to be duplicative and based on less than compelling constitutional grounds. The dissertation challenges the notion that State jurisdiction over family relations justifies a State role in intercountry adoption and shows that some State policies on foreign adoption are based on unrealistic assumptions about States' administrative and technical capacities. Similarly, the dissertation shows that mandating a role for American adoption agencies in intercountry adoption (as some States now require) is inappropriate, and that a pre-emptive State role does not add constructively to the regulatory system. The State role adds to delays and costs incurred by citizens, with no additional public benefit.

To and . To for the motivation and inspiration. To for her patience and her partnership.

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Special thanks go to Dr. John Rohr. He was far more than a committee chairperson. If this work qualifies as a disciplined and useful effort, much of the credit belongs to John Rohr.

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INTRODUCTION

> Some journeys begin in the heart. Two weeks ago, a group of adults waited nervously at Boston's Logan Airport for the flight from Miami to touch down --with a very special cargo. 'They're coming, they're coming!' a voice shouted. 1/

The above quote nicely captures the emotions involved and the anticipated celebration by relatives and friends upon the arrival of a very special group of children: foreign orphans who are being adopted by American citizens. These are the children of intercountry adoption, "the littlest immigrants." They may enter in small groups, accompanied by adult escorts, with their new American parents anxiously waiting at an airport, as in the scene described above, or they may arrive one at a time, accompanied by their new American parents. These "very special" children now acount for 20 percent of non-relative, or out-of-family, adoptions in the United States.

Like the children involved, the system by which they come to the United States is also very special. Because the children are both adoptees and immigrants, adopting families must contend with Federal regulation of immigration and with State regulation of adoption. The marriage that has been forged between the disparate systems of adoption and immigration has produced a hybrid regulatory system that is complex and cumbersome at best and, worse, can seem prohibitively and arbitrarily difficult.

In most cases, adopting parents must cope with the U.S. Immigration and Naturalization Service (INS), the State Department, one or more State governments, a foreign national government, foreign juvenile courts, foreign child

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1/ Newsweek; February 13, 1984: p. 60.

welfare agencies and, eventually, their own State courts. In addition, most parents must deal with an American adoption agency and a foreign adoption agency, plus the possibility of a state government in a federal system and/or a municipality in a foreign country.

These children's importance in American family building and the hybrid regulatory system to which their immigration is subject are the generic topics of this dissertation. The adoption element is generic because it provides the basic subject matter of this work and establishes a fundamental requirement of any dissertation: that the topic be significant. The topic indeed is significant -- and critically so -- to an ever increasing number of American families, who already number in the tens of thousands. However, despite the basic importance of the adoption element in intercountry adoption, the regulatory system that has evolved is the more central issue investigated here.

This dissertation approaches its topic in a non-traditional manner. That is, the traditional dissertation identifies a problem, lays claim to a lack of bias, conducts "objective" research and, finally, reaches a conclusion. This dissertation does not follow that road. Rather, this dissertation sets out to make a convincing case for a very specific change in Federal policy and in the United States Code. This change would offer at least one feasible way in which Congress could make the system less cumbersome, less expensive, less exclusive and more available to Americans who seek to build families through adoption. The proposed change also would rest on solid constitutional grounds, whereas the current system appears to conflict with a number of important constitutional values.

By analyzing a particular policy, the dissertation is not a study of policy science, per se, but it contributes to the field of policy analysis by using

constitutional values, and Supreme Court opinions to define those values. as a tool of policy analysis. This goes beyond the practice of using the constitution as a teaching tool, or even using it as a general guide to public action. More important to this type of dissertation, the Constitution and Supreme Court opinions lend structure and discipline to the exercise and help to avoid strident polemics.

As the dissertation describes in some detail in Chapter Six, opportunities to adopt in the United States have plunged since 1970. Not so coincidentally, intercountry adoption has, in the meantime, grown persistently and rapidly. Table 1 shows that intercountry adoption increased by an average rate of 11 percent per year from 1969 through 1985, and that the growth rate continues, while adoption overall in the United States has declined. In 1985, 9,417 foreign children entered the United States under orphan visas, compared to 8,597 in 1984, 7,138 in 1983 and 5,818 in 1982. In the last five years for which immigration data is available (1981 - 1985), 36,000 American citizen families fulfilled the desire to adopt by undertaking an intercountry adoption.

Table 1 shows the growth of intercountry adoption compared to the sharp drop in non-relative adoption in the United States. The table includes original estimates of adoptions in the United States from 1976 through 1985. The table is based on a survey of the 48 continental States. Each State was asked for data on the number of non-relative adoptions from 1975 through 1984; 1985 is estimated here, based on a best-fit line from 1976 through 1984. Only nine States could respond with routinely reported information; individual officials in 7 other States kindly made special efforts to pull information together; 32 States could not respond. This attests to the abysmal state of adoption data in the United States and to the size of the void that this dissertation can help to fill.

Table 1
INTERCOUNTRY AND OTHER NON-RELATIVE ADOPTION
IN THE UNITED STATES: 1965 - 1985 (ESTIMATED)

YEAR	Total	Inter-country	US-Born	% Inter-country
1965	76,700	1,457	75,250	1.9
1966	80,600	1,686	78,925	2.1
1967	83,700	1,905	81,800	2.8
1968	86,300	1,612	84,700	1.9
1969	88,900	2,080	86,825	2.3
1970	89,200	2,409	86,800	2.7
1971	82,800	2,724	80,075	3.3
1972	67,300	3,023	64,275	4.5
1973	59,200	4,015	55,175	6.8
1974	49,700	4,770	44,925	9.2
1975	47,700	5,633	42,075	11.2
1976	45,450	6,552	38,900	14.4
Transition Quarter		1,998		*
1977	42,825	6,493	36,325	13.5
1978	42,800	5,315	37,475	12.4
1979	43,425	4,864	38,550	10.8
1980	43,375	5,139	38,225	11.8
1981	44,925	4,868	40,050	10.8
1982	45,750	5,818	39,925	12.7
1983	44,800	7,138	37,650	15.9
1984	43,075	8,597	34,475	20.0
1985	45,000	9,417	35,600	20.9

* Federal fiscal year changed in 1976 from July-June to Oct.-Sept.

SOURCES: Total non-relative adoptions to 1975 from Children's Bureau, Dept. of Health and Human Services; 1976 to 1984 pro-rated on data from 16 States; 1985 is a best-fit line from 1979-1984. Intercountry data from Immigration and Naturalization Service, Statistics Division, Washington, D.C., and the Visa Office, Department of State, Washington, D.C. "US-born" is the difference between Total and Intercountry, rounded to multiples of 25.

The table also attests to rapid and profound changes in American adoption. As recently as the early 1970's, intercountry adoption, at about 2,000 per year, accounted for only 2 percent of all non-relative adoptions, compared with 20 percent by 1984. The dissertation shows that the rapid increases experienced in the past 15 years, both in absolute numbers and relative importance, are not likely to slow down soon. Consequently, the topic of this dissertation is one of growing importance in American family building.

Tables 2 through 5 show the regions and major countries from which the children come. The children represent about 70 countries each year, but the table shows that 5 countries (Korea, Colombia, India, the Philippines and El Salvador, in that order) account for five out of six adopted foreign children, while six other countries account for half the remainder. Despite this concentration, the 70 or so countries per year indicate that the children indeed come from everywhere.

However, public policy in the United States has not kept pace with the change in intercountry adoption. The system by which intercountry adoption is regulated in the United States is cumbersome, costly, confusing and sometimes intimidating. The root of the confusion lies with a constitutionally unique provision in the Immigration and Nationality Act, in which Congress effectively delegates to the States certain Congressional powers over immigration in the case of intercountry adoption. 2/

2/ See P.L. 82-414, as amended. and 8 USC 1101 (b)(1)(E) and (F).

TABLE 2
IMMIGRANT ORPHANS: WORLD TOTALS (1948 ACT - FY 1985)

	Africa	Asia	Canada	Europe	Lat.Am.	Oc.*	Total
1948 Act	1	1		4,052		11	4,065
Act of 7/53	1	324		140		1	466
Refugee Rel'f Act of 1953	16	2,093		1,622	11	20	3,762
1957 Act	31	6,395		4,285	183	43	10,937
FY 1963	14	796		637	26	8	1,481
FY 1964	6	1,022		591	66	15	1,680
FY 1965	7	874		518	43	15	1,457
FY 1966	6	879		746	41	14	1,686
FY 1967	12	881		982	14	16	1,905
FY 1968	10	953		630	3	16	1,612
FY 1969	15	1,155	257	549	82	22	2,080
FY 1970	16	1,349	339	587	98	20	2,409
FY 1971	27	1,672	345	488	183	9	2,724
FY 1972	23	2,114	355	361	152	18	3,023
FY 1973	13	2,976	289	388	332	17	4,015
FY 1974	25	3,591	188	325	630	11	4,770
FY 1975	21	4,229	133	265	977	8	5,633
FY 1976	22	5,049	97	196	1,179	9	6,552
T.Q.'76	10	1,490	23	70	405	0	1,998
FY 1977	26	4,934	57	159	1,312	5	6,493
FY 1978	15	3,773	93	141	1,289	4	5,315
FY 1979	19	3,145	66	141	1,493	0	4,864
FY 1980	25	3,435	64	114	1,500	1	5,139
FY 1981	11	3,223	48	96	1,488	2	4,868
FY 1982	26	4,264	12	72	1,436	8	5,818
FY 1983	12	5,341	8	96	1,672	9	7,138
FY 1984	21	6,469	5	91	2,000	11	8,597
FY 1985	10	7,053	13	62	2,260	19	9,417

SOURCES: Visa Office, State Department of State, and Statistics Division, Immigration and Naturalization Service, Washington, D.C. Immigrant orphans from Canada and sovereign countries of Latin America were not reported until FY 1969; data for Latin America prior to 1969 shows only European colonies.

* "Oc." denotes Oceania (Australia, New Zealand and the South Pacific).

TABLE 3
IMMIGRANT ORPHANS, BY COUNTRY-OF-ORIGIN

	ASIA									
	China-Taiwan	Hong Kong	India		Japan	Philip-Korea	Thai-land	Viet-nam?	Total Asia	
1948 Act	1								1	
Act of 7-53	3			287		15			324	
Refugee Relf Act of 1953	47	27		1,315	461	84			2,093	
1957 Act	415	347		1,385	3,701	174			6,395	
FY 1963	51	77		168	370	39			796	
FY 1964	71	106	5	179	520	31		30	1,022	
FY 1965	54	66	5	116	466	40	10	31	874	
FY 1966	77	55		127	436	63	19	49	879	
FY 1967	70	56		91	478	72	25	47	881	
FY 1968	61	56		95	515	98	16	67	953	
FY 1969	75	46		91	746	72	28	49	1,155	
FY 1970	65	42	12	92	845	141	24	89	1,349	
FY 1971	50	34	7	88	1,174	153	22	89	1,672	
FY 1972	55	19	9	88	1,585	136	28	119	2,114	
FY 1973	40	13	8	57	2,183	205	70	324	2,976	
FY 1974	58	11	17	71	2,453	223	126	561	3,591	
FY 1975	66	14	37	57	2,913	244	139	655	4,221	
FY 1976	79	18	22	62	3,859	323	180	424	5,044	
T.Q.'76	19	6	14	12	988	78	22	323	1,489	
FY 1977	52	17	85	52	3,858	325	89	347	4,920	
FY 1978	49	14	149	47	3,045	287	38	60	3,759	
FY 1979	65	6	231	46	2,406	297	27	1	3,139	
FY 1980	51	14	319	36	2,683	253	13	1	3,434	
FY 1981	56	19	314	38	2,444	278	11	2	3,216	
FY 1982	60	18	425	32	3,349	327	18	2	4,269	
FY 1983	62	29	411	36	4,417	302	12	3	5,341	
FY 1984	69	29	483	45	5,245	425	19	88	6,469	
FY 1985	98	51	496	54	5,714	516	27	0	7,053	

SOURCES: Visa Office, State Department of State, and Statistics Division, Immigration and Naturalization Service, Washington, D.C.

TABLE 4

IMMIGRANT ORPHANS:
SOUTH AMERICA,
CENTRAL AMERICA & CARIBBEAN

	Costa Rica	El Salvdr.	Guatemala	Honduras	Mexico	Other C.A./Carib.
FY 1969					26	29
FY 1970	9				21	35
FY 1971	23		5		71	9
FY 1972	7			5	44	19
FY 1973	14			13	85	36
FY 1974	23	48	24		129	72
FY 1975	94	69	31	25	162	57
FY 1976	115	86	42	37	137	52
T.Q.'76	38	35	17	9	46	18
FY 1977	83	132	52	32	156	69
FY 1978	87	98	51	26	152	69
FY 1979	100	139	75	21	139	56
FY 1980	62	179	78	21	144	89
FY 1981	48	224	82	16	116	82
FY 1982	107	202	103	38	73	97
FY 1983	90	240	105	111	111	86
FY 1984	96	367	112	169	190	98
FY 1985	66	309	172	205	130	182

SOURCES: Visa Office, State Department of State, and Statistics Division, Immigration and Naturalization Service, Washington, D.C.

NOTE: Immigrant orphans from sovereign countries in Latin America and the Caribbean were not recorded by INS until FY 1969. Prior to FY 1969, totals shown on page one of this table for South America represent only those immigrant orphans who entered from European colonies in the region. Years for which no data appear indicate only that INS did not report those countries separately in those years.

TABLE 4 (continued)
IMMIGRANT ORPHANS,
SOUTH AMERICA,
CENTRAL AMERICA & CARIBBEAN

	Brazil	Chile	Colombia	Peru	Other So.Amer.	Total Latin Amer/Carib
FY 1969					27	82
FY 1970			13		20	98
FY 1971	7		23	6	11	183
FY 1982	8		35	4	16	152
FY 1973	20		107	7	35	332
FY 1974	20		245	18	60	630
FY 1975	26		379	15	83	977
FY 1976	25	17	554	15	65	1,179
T.Q.'76	5	10	178	2	31	405
FY 1977	39	34	575	11	62	1,312
FY 1978	15	36	599	35	66	1,289
FY 1979	25	90	626	72	79	1,493
FY 1980	48	92	653	54	60	1,500
FY 1981	62	106	628	54	51	1,488
FY 1982	66	118	541	24	51	1,440
FY 1983	55	173	609	19	61	1,672
FY 1984	118	154	585	34	55	2,000
FY 1985	240	207	624	40	85	2,260

SOURCES: Visa Office, State Department of State, and Statistics Division, Immigration and Naturalization Service, Washington, D.C.

TABLE 5
IMMIGRANT ORPHANS: EUROPE

	Germany	Greece	Italy	Poland	Total
1948 Act	1,156	1,246	568	214	4,052
Act of 7/29/53	54	4	4		140
Refugee Rel'f Act of 1953	197	506	464	1	1,622
1957 Act	438	1,360	1,539	184	4,285
FY 1963	1	177	259	43	637
FY 1964	58	139	208	43	591
FY 1965	87	116	169	23	518
FY 1966	320	112	148	35	746
FY 1967	563	56	134	15	982
FY 1968	349	45	80	11	630
FY 1969	290	46	33	8	549
FY 1970	307	52	37	11	587
FY 1971	295	53	14		488
FY 1972	204	43	18	8	361
FY 1973	197	50	10	5	388
FY 1974	177	18	12	22	325
FY 1975	128	25	15	25	265
FY 1976	102	25	11	20	196
T.Q.'76	32	6	3	9	70
FY 1977	62	20	4	14	159
FY 1978	37	25	9	14	141
FY 1979	38	15	2	28	141
FY 1980	21	14	6	20	114
FY 1981	12	17	6	21	96
FY 1982	6	9	2	13	63
FY 1983	11	8	5	31	96
FY 1984	7	8	4	29	91
FY 1985	6	10	0	31	62

SOURCES: Visa Office, State Department of State, and Statistics Division, Immigration and Naturalization Service, Washington, D.C.

Sections 101(b)(1)(E) and 101(b)(1)(F) of the Act define "child" to determine which foreign orphans qualify as "immediate relatives" of American citizens, thereby entitling them to admission to the United States. The Section includes three groups of adoptive foreign children. Section 101(b)(1)(E) addresses American families that live abroad and adopt a child during their overseas residency. Subsection (E) requires that a child reside abroad with an American citizen family for at least two years following legal adoption in a foreign country, and that the child be under 16 years of age when the adoption is legally recognized abroad. Upon satisfying these requirements, and if the child is otherwise eligible for immigration, Federal law treats the child as a bona fide member of an existing family unit.

As full members of existing families, children who have resided abroad with their American families are entitled to IR-2 visas. However, because INS data does not distinguish adopted children from other children under IR-2 visas, this class of foreign adoptees is not counted as a distinct class and is not included in the data quoted throughout this dissertation. Also, because these children already are members of existing American citizen families, they generally are not a major concern of this dissertation, but they are significant to it in certain parts.

Section 101(b)(1)(F) of the Act addresses the two classes of adoptive alien children who constitute intercountry adoption and the principal subject matter of this dissertation. Under 101 (b)(1)(F), a child is defined as

> under the age of 16 at the time a petition is filed in his behalf to accord a classification as an immediate relative ... (and) who is an orphan because of the death or disappearance of, or abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care of the child which will be provided the

> child if admitted to the United States and who has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and his spouse who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United states for adoption by a United States citizen and spouse who have complied with the preadoption requirements, if any, of the child's proposed residence.

Section 101(b)(1)(F) makes an important distinction between two groups of children. The petitioning families of one group of children will have received a final order of adoption from a foreign court prior to the entry of the child into the United States. Provided the adopting parents have personally viewed the children before or during the adoptive process, these children enter the country under an IR-3 visa. The petitioning families of the second group of children will bring their children home under various types of custody orders from foreign courts, but not yet with a final order of adoption. This class of children enters the United States under an IR-4 visa. Whether one receives a final order of adoption abroad or not depends upon the law and practice of the foreign country at issue.

The last clause in 101(b)(1)(F) adds an important requirement before the Federal Government will issue an IR-4 visa: "citizen parents (must) compl(y) with the preadoption requirements, if any, of the child's proposed residence." As a result, citizens' petitions to the Federal Government for IR-4 visas on behalf of alien orphans depend upon the adoption laws of the 50 States. IR-4 visas accounted for 8,280 children in 1985, or 88 percent of all immigrant orphans.

The current system by which these littlest immigrants are admitted (or excluded) is a constitutional hybrid that tries to merge immigration and adoption. All intercountry adoptees enter the United States as "immediate relatives" under immigration law. Like other immigrants entering as immediate relatives, their

immigration petitions to the Federal Goverment are filed by American citizens (in this case, by the adopting citizen parents). However, unlike other immigrants, intercountry adoptees are the only class of immigrants whose petitions for admission into the United States as permanent resident aliens are subject to a pre-emptive State veto. Further, all three classes of children are the only aliens whose legal basis for admission as permanent resident aliens by the Federal Government, i.e., the status of "immediate relative," can be voided by a State following admission to the country.

A single, Federal system of immigration is thus replaced by 50 State systems, each with its own administrative system, adoptive criteria, statutory restrictions, etc. The Federal decision to admit or not to admit this class of immigrants, based on the Federal petitions filed in behalf of the children by prospective citizen parents, thus dissipates into 50 different systems, with no guarantee of consistent treatment.

If the result of the Federal delegation of authority over this class of immigrants were merely of academic interest, this dissertation would be without a significant topic. However, the delegation causes very real problems and confusion for citizens when they petition the Federal Government for a visa on behalf of a foreign orphan whom the family seeks to adopt. Ultimately, Federal treatment of the immigration petition is largely subject to the caprice of geographic location of a family's home within the United States. Time, expense and even the question of eventual success or denial of the child's admission by the Federal Government can depend entirely on where a family lives in this country.

For example, a family residing in Brewster, New York could obtain a home study (required by the Federal Government, the States, foreign national

governments, foreign courts and foreign agencies) from an independent, State-licensed social worker for as little as $400. The family could then work directly with a foreign orphanage in, say, Colombia. The family could expect to complete such an adoption, including travel and all other expenses, for about $5,000 (in 1984). However, if the same family moved to neighboring Danbury, Connecticut, and sought to adopt the same child, the family would be required to work strictly through a full-service, State-licensed adoption agency for all services and could be assured of spending about an additional $1,200. The family also would have to contend directly with its State government, the possibility of added criteria, and the often confused and inappropriate application of American family case law to foreign adoption laws, practices and traditions.

Finally, many families must contend with two or more States if a home study or other adoptive services are performed by an out-of-state agency, through the Interstate Compact on the Placement of Children; 47 States have signed the Compact, but the extent of enforcement and/or incorporation into State codes is not consistent among those 47 States. The Compact too often can become an inadvertent bureaucratic nightmare and the source of State officials' exercising a considerable degree of extra-legal discretion.

In addition, the system simply is over-regulated, particularly in the case of an IR-4 visa, which accounts for the vast majority of children. Everyone along the line reviews exactly the same documents and, in most cases for exactly the same reasons. The results can mean pointless delays that cost adopting parents time and money, may discourage prospective parents from trying to navigate a confused system, or be harmful to the waiting child.

However, the source of the problem does not rest with the States. Federal law, as it now stands, places the States in an impossible position. In effect, a State adoption official in Boise is expected to have the administrative and legal resources necessary to determine whether all procedures required by upwards of 70 nations and their political subdivisions have been fully met when a resident of Idaho petitions the Federal Government for an IR-4 visas in behalf of a foreign orphan. This becomes ludicrous when one recognizes the typically spartan staff support that intercountry coordinators enjoy in most States. More often than not, the "State" is represented by a single professional whose staff support is limited to a shared typist.

Yet, if a State chooses not to become actively involved in intercountry adoption, it risks severe criticism when the inevitable happens, i.e., when such an adoption does not work out. Conversely, if a State chooses to become actively involved, its citizens who seek to adopt abroad may complain bitterly of "red tape" and arbitrary behavior. In fact, many States have chosen to avoid active involvement, while other States have taken the opposite approach. The result is unequal treatment for American citizens who seek to adopt a child through Federal immigration procedures.

The basis for the Federal delegation also rests with a certain degree of constitutional confusion. The standard assertion is that family relations, including adoption, are matters of State jurisdiction. The logic holds that only the States can confer legal status on an adoption. Since only the States can determine whether a foreign orphan is adoptable after entering the United States, the States, as a function of their police power, have a self-evidently valid role in a citizen's immigration petition to the Federal Government. However, based on

Congress' plenary powers in immigration and on long-standing practices toward two of the three classes of foreign orphans admitted to the United States, this dissertation disputes this premise at some length.

The IR-4 visa (for a foreign child for whom a final adoption decree has not been obtained abroad) is the most obvious source of jurisdictional confusion between the Federal Government and the States in intercountry adoption. However, children admitted under IR-2 (a bona fide member of the family for two years) and IR-3 visas (for new members of a family for whom a final adoption decree has been obtained abroad) also are affected by this jurisdictional confusion. Although the States are not consulted about the admission of these two classes of children, the basis for their admission to the United States, i.e., their adoptive status, is subject to later review by the States.

Since only the States are said to have authority in adoption, the logic holds that a foreign order of adoption has no legal standing in the United States. Therefore, to protect the status of an adoptive relationship, a family must petition a State court for an American adoption decree, even though the Federal Government already has recognized a foreign decree as the basis for admitting the child as an immigrant. Ostensibly, a State court could deny the adoption petition and, thereby, deny the very basis for the child's admission to the country as an immigrant. Does the child then suddenly take on a new immigrant status? Is the adoptive relationship in the United States really without legal protection and status only because a State-sanctioned adoption has yet to take place? Can a State really void, after the fact, the basis for Federal action in classifying an alien as an immediate relative and admitting that alien as an immigrant?

This dissertation argues that nothing of the sort could be the case. In fact, by classifying the IR-3 child as an "immediate relative" and by unilaterally recognizing the foreign adoption decree as the basis for the child's immigration, the legal adoptive status is already established by the Federal Government. The notion that a later State decree is necessary to establish legal protection of the adoptive family relationship in the United States is, at best, redundant.

Just as the Federal Government has acted in fact to recognize the legal status of the adoptive family relationship in an IR-2 or IR-3 visa, the very same Federal action is taken in an IR-4 visa. The IR-4 child (without a final foreign decree) is admitted, as are the other two classes of adoptive children, as an "immediate relative." The nature of that "immediate" relationship is one of parent-and-child, an adoptive relationship upon which the Federal Government admits an alien to permanent residence in the United States.

The Proposal

. This dissertation recommends a specific change in Federal immigration law to eliminate a significant level of duplication and, in most cases, additional costs and delays in the the process by which these littlest immigrants come to the United States. The proposal would amend Section 1101(b)(1)(F) of Title VIII in the U.S. Code to eliminate the States from the system and to acknowledge the authority of the Federal Government to confer legal adoptive status on the children as a function of Federal regulation of immigration.

This dissertation proposes to delete the last clause in 101(b)(1)(F) of the Act: "citizen parents who have complied with the preadoption requirements, if

any, of the child's proposed residence." In its place, this dissertation would add a new subsection that borrows language commonly used in State adoption decrees:

> Upon admission to the United States by the Federal Government, each child qualifying under subsections (E) and (F) above shall, for all sorts and purposes, be fully recognized throughout the United States as the child of the adopting petitioners.

This change would have two principal purposes. First, it would free citizen parents from exposure to 50 different sets of requirements and the very real possibility that their immigration petition to the Federal government will be more cumbersome, more costly and even unsuccessful due to the geography of their home within the United States. Secondly, the proposed change would eliminate the ambiguity associated with the legal status of the adoptive relationship for any adopted foreign child (IR-2, IR-3 or IR-4 visa), as well as the considerable "red tape" involved in the Interstate Compact. This would counter any notion that a State action could reverse or deny the family status that has been recognized by the federal Government as the basis for a child's immigration.

To a large degree, this recommendation would do no more than formally recognize a Federal action that in fact already takes place. That is, the Federal Government already overtly recognizes foreign adoptions under IR-2 and IR-3 visas for purposes of immigration, and does so on the basis of an independent review and evaluation of petitions. Similarly, the Federal Government in fact already extends a legal status to IR-4 children, i.e., those without a final foreign order of adoption, by recognizing the children as "immediate relatives" for purposes of immigration.

This dissertation argues that, in fact, the adoptive relationships involved are entitled to full legal status that merits recognition throughout these United States, by virtue of Federal jurisdiction in immigration. That is, the Federal Government admits these three classes of aliens as "immediate relatives." The nature of that "immediate" relationship can only be that of parent-and-child; it is hardly a relationship between spouses or siblings. Consequently, this dissertation argues that the Congress should recognize in statute that which exists in fact; Congress should explicitly establish a de jure adoptive relationship, under Congress' plenary powers over immigration.

The proposed change also would eliminate the States completely from citizens' petitions for IR-4 visas and would eliminate a restrictive, secondary delegation of State authority to private organizations. That is, seven States now require that all adoptive services be performed only by licensed adoption agencies, and all but three States restrict licenses for performing home studies to licensed adoption agencies (Alaska, Iowa and New York license individual social workers, as well as agencies. to perform home studies). Most States include agencies licensed by other States with reciprocal relations under the Interstate Compact for the Placement of Children, but some States (e.g., Virginia) insist that an agency be located within the State. Though "agency" includes public agencies, public agencies simply do not have the staff to provide services to families unless the families are adopting children under direct public care. Consequently, petitioning families usually have no choice but to work through private organizations, which, in effect, function as an arm of the State.

Therefore, elimination of the State role in 101 (b)(1)(F) would also eliminate an indirect Federal mandate that families work through private

organizations. However, this in no way would restrict families from availing themselves of private services; it would only eliminate the mandate that families obtain, and pay for, such services, which can cause substantial variations in the cost, time and administrative requirements that confront a family that seeks to fulfill a requirement under federal immigration law.

This recomendation will be anathema to adoption professionals, most State officials and even to Federal immigration officials. Again, only the States are assumed to have the authority to confer legal status upon adoptive relationships and only the States, so the logic would suggest, are equipped to address the best interests of the children and to ensure against abuses in intercountry adoption. Further, as an agency that contends with the immigration of about a 500,000 aliens per year, INS has no desire to be mistaken for an adoption agency. Consequently, this dissertation argues for a change that is not likely to be eagerly embraced by immigration and adoption professionals.

Accordingly, the burden of establishing a convincing case rests with this dissertation. To show that the recommended action is reasonable, the dissertation must establish two basic points: (1) that the current system rests on weak constitutional and policy grounds; while (2) that the proposed change rests on solid constitutional and policy grounds. The policy element in the second task will require some effort to disabuse policymakers and other influential persons in this field of a number of misconceptions and unfounded assumptions about the presence and nature of problems, and the capacity of various organizations to identify and then address any such problems if they were to exist.

Constitutional Values

This dissertation will use constitutional values as a tool for analyzing current policies in intercountry adoption. The central position taken is that Congress has unwisely delegated to the States much of its plenary power to decide on the admission of this class of immigrants to the United States. The dissertation will show this delegation to be justified neither by a compelling governmental interest nor by the more modest test of a rational connection to a reasonable governmental interest. The States' role will be shown to be contrary to important constitutional values, as well as being redundant and incapable of addressing governmental interests at issue.

The dissertation will examine in detail various constitutional values that indicate that the current system is inappropriate. By constitutional values, I do not suggest an effort to determine whether something is "constitutional" or "unconstitutional" in a strictly legal sense. Rather, I refer to "regime values," which are those fundamental values, however vaguely defined, that the overwhelming majority of Americans have shared for some generations. In that sense, regime values are in the tradition of "higher law," in which an action may be legal, but still may conflict with one or more of a handful of truly fundamental values that the community at large accepts as its basic precepts.

The dissertation, as Part Two will explain, will use the opinions of the Supreme Court to identify those regime values related to intercountry adoption. The premise is that the constitution offers the best source of meaningful statements about American regime values and that the Court offers the best vehicle for teaching us about the nature of those values, and for structuring any effort to employ those values in the analysis of a particular public policy.

Chapter Five will elaborate on this discussion further, but the central conclusion is this: a number of individual rights that the Court has deemed to demand protection under our Constitution may be at risk in the current system of regulating intercountry adoption in the United States. Similarly, some long-established principles of Federal-State relations in immigration are also at risk. Again, the point is not whether something is "legal," but whether something is consistent with our basic public principles, our regime values. The important conclusion is not whether the current system is "constitutional" or not; any such conclusion would be arguable. Rather, the important conclusion is that the proposed change is on solid constitutional grounds.

Finally, the position taken by this dissertation, and the recommendation herein, also is at odds with most discussions about Federal-State relations in recent years, as the message here is "let the Feds do it." However, the recommendation is perfectly consistent with the Reagan Administration's position that the Federal Government: (1) should be active only in areas that are inherently governmental and inherently Federal; and (2) act in a way that eliminates unnecessary layers of bureaucracy. The dissertation will show that all responsibilities in intercountry adoption, including the extension of a legal adoptive status, should be exclusively Federal, under the Federal Government's jurisdiction over immigration.

Organization of the Dissertation

This dissertation is organized into three parts and seven chapters. Part One consists of two chapters that provide basic background information to place intercountry adoption in an immigration context. Chapter One concentrates on

the historical context, while Chapter Two primarily provides a procedural context. Chapter One outlines the statutory history of American immigration policies in general, then focuses on the statutory treatment of intercountry adoption from its inception in 1948.

Chapter Two then outlines Federal and foreign governmental procedures. The chapter first identifies a number of common misconceptions about legal risks in other countries, then shows that the Federal Government has an extensive system of regulation and oversight in intercountry adoption. Other jurisdictions and institutions in the United States cannot hope to match the administrative capacity of the Federal Government to recognize problem (nor to take effective remedial action) under the laws and regulations of foreign countries and political subdivisions all over the world. The on-site capacity offered by the U.S. Consul, which actually issues visas to all immigrants, is identified as the most powerful Federal resource that that exceeds the capacity of any State or of private agencies. The chapter also shows that the foreign countries involved have extensive regulatory and child care systems in place and that those systems have legal and ethical integrity. That is, commonly held notions that illegal and/or unethical practices characterize foreign countries simply do not hold up under scrutiny. Rather, Chapter Two shows that the major foreign countries involved treat and regulate intercountry adoption ethically and effectively.

Part Two, which consists of Chapters Three, Four and Five, examines constitutional values under the current hybrid system. The term "constitutional values" is carefully chosen to connote those basic values, shared by the overwhelming majority of the American people, by which we conduct our business of governing and which we expect government to protect. Chapter Three

examines constitutional values in immigration and shows that Federal jurisdiction over immigration, and all matters pursuant to it, is plenary; police powers of the States, under which the States regulate adoption, do not equal the constitutional authority of Federal powers in matters of immigration. Therefore, Congress has unquestionable authority to implement the recommendations of this dissertation. Conversely, the chapter also identifies a number of constitutional values associated with immigration that may be violated by the current system.

Chapter Four examines constitutional values associated with a Federal role in family law. The Chapter shows that Federal courts are not shy about entering this field. The most common motivation for Federal action is the protection of constitutional rights under the Fourteenth Amendment. However, the chapter shows that Federal courts routinely examine the substance of family relations at issue and, thereby, make independent assessments of the very questions said to be the sole reserve of the States. Though the chapter does not challenge the predominant power of the States in family law, it shows that State authority in the field is less exclusive than Federal authority over immigration.

Chapter Five builds on the points made in Chapters Three and Four to consider whether the current statute and its hybrid system of regulation conflict with the fundamental rights of citizens who petition the federal Government for IR-3 visas or, especially, IR-4 visas for their adoptive children. The chapter compares the character of intercountry adoption to various rights associated with family law that Federal courts have held to be protected by the Constitution. The chapter suggests that a number of fundamental rights may be violated under the current system.

However, Part Two does not go so far as to conclude that the current system is unconstitutional. Rather, Part Two argues strongly that the change proposed in this dissertation is more consistent with our constitutional values than is the current system of regulating intercountry adoption. The current system may violate some basic constitutional values, while the proposed change is fully consistent with those values, both in matters of Federal-State relations and individual rights.

Part Three then examines the adoption context of intercountry adoption. Chapter Six introduces new data to give an important sense of scale to intercountry adoption in the United states. Based on immigration data and a survey of the 48 continental States and the District of Columbia, the chapter shows that intercountry adoption has increased by an annual average of 11 percent for 16 years (1969 to 1985), while non-relative adoptions in the United States have plunged. The opposite directions of these two trend lines make intercountry adoption a self-evidently important element in American family building, now accounting for more than 20 percent of non-relative adoptions in this country.

The chapter introduces new information on the children and parents in intercountry adoption to correct a number of misconceptions about intercountry adoption. First, the children are shown to be overwhelmingly in good health; this is not startling news to parents of intercountry children, but it flatly contradicts some popular perceptions. The information also contradicts another misconception by showing the adopting parents to be middle-class, not rich. The chapter also introduces information on the degree to which adoption agencies now participate in intercountry adoptions and cites an original questionnaire to indicate that some degree of religious discrimination exists in agency practices.

Chapter Six will also show that the State clause in Section 101(b)(1)(F) of the Immigration and Nationality Act conflicts with a number of important constitutional values in order to address non-problems. Hence, if the test of compelling governmental interest is applied, the statute comes up short. The dissertation also will shown that the States generally lack the administrative capacity to add constructively to the extensive and effective Federal and foreign regulatory systems already in place, especially to the expertise on foreign law and practices and the logistical advantages offered by the U.S. Consul's on-site staff.

Chapter Seven then reviews the substance of State actions prior to the Federal Government's admission of the immigrant orphan into the United States and the orphan's entry into an American family. The vehicle for pre-placement services is the home study, or "family assessment," which is normally conducted by a private organization. The chapter reviews the intellectual assumptions and professional assumptions of the home study, then reviews the professional literature that assesses the effectiveness of the home study. The chapter shows that the intellectual and professional assumptions of the home study are badly inflated. The family characteristics that the home study is said to evaluate cannot be identified "objectively" by any methodology. Those characteristics simply cannot be "known" in advance nor even in retrospect. Similarly, the chapter shows that the evidence available from the community of adoption professionals indicates that the involvement of an agency has no effect, either positive nor negative, on the success of an adoptive placement.

The chapter extends these findings from domestic adoption to intercountry adoption. The chapter argues that families may voluntarily choose for many good reasons to contract for services from a private adoption agency,

but that no rational basis exists on which to require participtiion by American adoption agencies.

In sum, the State clause in Section 101(b)(1)(F) delegates a plenary Federal responsibility to the States. This delegation appears to conflict with a number of fundamental constitutional norms and fails the test of compelling governmental interests. In addition, the State clause might well fail the less demanding test of bearing a rational relationship to a reasonable governmental interest. The States' principal interests are: (1) to protect the child's best interests; and (2) to protect the State from public charges in the case of adoptions that fail. The latter interest is shown to be utterly at odds with constitutional norms, as States cannot regulate or restrict immigration on that basis.

The former interest is reasonable enough because adoptions do indeed fail, but the State clause lacks a rational connection to it. First, the States do not add constructively to the system that is already in place. INS, in fact, has far more experience dealing with the three different classes of adopted aliens than any single State has in adoption. Secondly, no evidence exists to sustain the claim that the principal vehicles for protecting the best interests of the child (the home study and other pre-placement services) bear any relationship to the expressed governmental interest.

The dissertation concludes that the problem lies with Congress, not the States. The States have been placed in an impossible position because Congress has failed to acknowledge its own responsibilities in providing legal status to the children and families joined by intercountry adoption under Federal powers of immigration. In fact, Federal actions may well extend to the children of intercountry adoption a legal adoptive status that demands recognition in any

jurisdiction in the United States by virtue of a Federal recognition of either a final adoption decree or a temporary order from a foreign country as the basis for the alien child's immigration. In any event, the States now take significant actions in an arena in which their administrative capacity and their jurisdictional authority are questionable. In short, the problem lies with the Federal code, which must be amended by the Congress of the United States.

PART ONE: BACKGROUND

Part One places intercountry adoption in its immigration context. Chapter One provides the historical and political context by outlining Congressional policies in the field. Chapter Two offers a detailed review of current Federal practices and procedures, along with the practices and procedures of various foreign governments. The chapter shows that intercountry adoption is regulated extensively by both the Federal Government and foreign governments. The chapter also shows that the Federal and foreign systems have legal integrity and that foreign systems treat intercountry adoption seriously. As it establishes its central points, Chapter Two also provides something akin to a "how-to" guide to intercountry adoption.

CHAPTER ONE

IMMIGRATION POLICY & ADOPTION

This chapter provides an historical and political frame of reference to place intercountry adoption in its immigration context. Section One reviews early restrictive policies in American immigration that later influenced intercountry adoption. Section Two then reviews the evolution of immigration policy toward alien orphans.

Section One: Exclusionary Immigration Policies Prior to World War II

Prior to World War II, intercountry adoption would have been severely restricted by national quotas and the exclusion of Asians under general immigration policy. The exclusion of Asians began with the Chinese Exclusion Act of 1882, which was passed in response to widespread resentment toward the sudden influx of Chinese immigrants, primarily into Western States. 3/

The Chinese Exclusion Act barred all Chinese from entry into the United States. This policy remained in effect for the next 61 years, until, in 1943, the practice of excluding the nationals of a major war-time ally had become too awkward to be sustained. 4/ Another wave of national restrictions in immigration policies developed from the Immigration Commission, the so-called

3/ 22 Stat. 58.

4/ 57 Stat. 600.

Dillingham Commission, established by Congress in the Immigration Act of 1907 to make comprehensive recommendations on immigration policies. 5/ The commission was established largely in response to the growing resentment against the large number of immigrants then entering from Southern and Eastern Europe.

In addition to establishing a number of tests that would regulate the entry of individual immigrants, the Dillingham Commission recommended two broadly restrictive policies. First, the Commission recommended barring all Asians by establishing an Asiatic Barred Zone. Secondly, the Commission recommended the use of Census data to establish national quotas for immigration from different countries.

Congress enacted the first national quota system in 1921. 6/ Based on the 1910 Census, visas for each country were restricted to 3 percent of U.S. residents who had been born in the respective country. The law banned all Asians and "non-whites," but exempted immigrants from sovereign countries in the Western Hemisphere from the restrictive quotas. This permitted unlimited immigration from independent countries in the Western Hemisphere, which was dominated at that time by Canadians, not by Mexico and Latin America.

The National Origins Act of 1924 7/ tightended in the national quotas. Visas could not excede 2 percent of the "white residents" who identified a particular country as their "national origin." The new quota was based at first on the 1890 census and, beginning in 1927, on the 1920 Census, which remained the

5/ Immigration Act of 1907 (34 Stat. 898).

6/ 42 Stat. 5.

7/ National Origins Act of 1924 (43 Stat. 153).

basis for national quotas until the system was discarded in 1965. In effect, this restricted the majority of visas to people from Northern and Western Europe.

In addition to national and racial exclusions, American immigration policy traditionally has struggled between the noble notion of "send me your poor, your tired and huddled masses," and the fear that immigrants will take jobs away from Americans or, conversely, that immigrants will take no jobs at all and become public charges. These reservations have been expressed in immigration law since the 1870's in a number of restrictions aimed at foreign workers and those who might become public charges. The public charge exclusion remains among the criteria that an individual must meet in order to enter the United States. It has been included in a host of statutes since 1882 (e.g., substantial head taxes at American ports and evidence of employment prior to entry).

After passing the Chinese Exclusion Act in 1882, Congress passed a second statute that year to exclude "lunatics and idiots. 8/ The Act repeated the exclusion of individuals likely to become public charges and excluded aliens with communicable diseases. Under the 1891 Act, immigrants had to be medically inspected at the port of entry, hence the Ellis Island experience. Since the 1917 Act (not fully implemented until 1924), immigrants have undergone medical examinations in the foreign country before embarking for the United States.

The public charge and public health provisions remain important elements in the process by which the Federal Government issues visas to all immigrants, including children of intercountry adoption. The concern about public charge is implemented in intercountry adoption by various requirements to

8/ 22 Stat. 414.

establish that the petitioning citizens are morally and financially capable of raising a child. The concern about public health is implemented by requiring that the child, like other immigrants, be examined by an embassy-approved physician.

Section Two:
Origins of Intercountry Adoption

Intercountry adoption and special provisions for all adopted children in immigration law are strictly post-World War II developments. Their origins are closely linked with the unprecedented, large-scale presence of the American military in foreign countries at the end of the war and with the post-war thrust in immigration policy toward family unification.

Prior to World War II, intercountry adoption simply did not exist to any significant degree. Prior to World War II, and for the first three years after the war, no special provisions existed in immigration law for adopted children. If intercountry adoption existed at all during those years, the children were treated like any other immigrant. That is, they too were subject to national quotas and racial exclusion. The same was true of other family-based relationships, such as alien spouses, fiancees, and stepchildren. If a particular national quota was filled, these aliens were unable to obtain visas. This is not to suggest that pre-war immigration policy was coldly insensitive to the family hardships that certain American citizens could face, but simply that family unification was not a major problem in immigration policy prior to World War II.

However, with the very high demand for visas from war-torn Europe, national quotas were filled quickly and persistently. In addition, after World

War II, the United States found itself in an unfamiliar position of international dominance, with an unprecedented military presence in foreign countries. American servicemen were marrying and becoming engaged to European woman, some of whom had children from previous marriages. The U.S. immigration system faced a sudden and major increase in the number of American citizens returning home with multi-national families.

At the same time, the utter devastation of entire national economies in Europe created a level of demand for immigration visas that overwhelmed the quantity available to most European countries. As a result of the national quotas and the saturated demand for visas under those quotas, thousands of servicemen were unable to obtain visas for their alien fiancees, alien wives, stepchildren and adopted children upon returning to the United States.

Americans stranded abroad with alien fiancees were the first to receive special statutory relief. The War Brides Act of 1945 9/ authorized non-quota visas for alien spouses of honorably discharged military personnel, provided they met other immigration tests, e.g., racial tests, public charge, health, etc. This enabled married military personnel to obtain visas for their spouses without being subject to national quotas. The same Act included the children of alien spouses.

This was followed by the Fiancees Act of 1946, which granted non-quota visas to fiancees of American military men. 10/ The War Brides Act accounted for 118,000 visas, and the Fiancees Act accounted for 5,000 more. 11/ These two

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9/ 59 Stat. 659.

10/ Fiancees Act of 1946 (60 Stat. 339).

11/ Gordon, Charles; Immigration Law and Procedure; Matthew Binder (New York) 1973; p. II-138.

Acts constituted the beginning of an emphasis on family unity in post-war immigration policy.

These Acts were followed in 1948 by special statutory treatment for orphans adopted from abroad. The Displaced Persons Act of 1948 12/ was a general response by the Congress to the post-war situation in Europe. All national quotas were chronically over-subscribed. To relieve the huge backlog of visa applications, Congress authorized visas in excess of national quotas, provided that the excess would be "mortgaged" against future quotas when the Act expired in 1953. In addition to the general objective of relieving the backlog and providing humanitarian aid to Europe, the Displaced Persons Act of 1948 included the first provision for intercountry adoption.

The 1948 Act reflected the traditional concern about immigrants becoming public charges, and also reflected a new concern that aliens might abuse the new flexibility in immigration policy. The Committee Report on the House bill noted that

> The general purpose of (Section 6) is to safeguard against the possibility of displaced persons becoming public charges. Under this section, non-relatives and voluntary agencies would furnish bonds enforceable in the courts to save the government from expense in the event that any person admitted under the Act should become a public charge. 13/

The Act authorized 5,000 non-quota visas for European orphans. The restriction of orphan visas to Europe was consistent with the racial tests in immigration law at the time: only European orphans would have been "otherwise

12/ Displaced Persons Act of 1948 (62 Stat. 1009, P.L. 80-774).

13/ H. Rept. 80-1854, p.4 (1948 Act).

eligible for immigration." Krichefsky notes that some European orphans had been placed in the United States prior to passage of the Act, but only under rather special, large-scale and one-time efforts by various organizations. 14/ The first such effort involved 231 Polish orphans placed with adoptive American families by the Catholic Committee for Refugees (CCR). Krichefsky notes that most of these children had been transported to the United States via Mexico by the CCR. In addition, the U.S. Committee for the Care of European Children had brought nearly 1,600 European orphans to the United States. 15/

As Table 2 shows, a total of 4,065 European orphans, who otherwise were eligible for immigration, entered the United States under non-quota orphan visas. The table shows that Greece, Germany and Italy were the principal countries-of-origin, as they accounted for three-fourths of the visas.

Before the 1948 Act expired, Congress undertook a comprehensive review and codification of all U.S. Immigration laws, resulting in the Immigration and Nationality Act of 1952. 16/ Besides codifying immigration law, the 1952 Act included several major changes.

The Act required that all aliens seeking to enter the United States must obtain either an immigrant visa or a non-immigrant visa from the U.S. Consul (State Department) in the foreign country. The Act also identified specific procedures for obtaining a visa. Only the Consular Officer could issue a visa, but he could not do so unless he was convinced that the alien was eligible under U.S. law to enter the United States. Then, after obtaining a visa, the alien had to

14/ Krichefsky, Alice; "Immigrant Orphans"; 7 IN Reporter 19; INS; 1958.

15/ Ibid.

16/ P.L. 82-414; 66 Stat. 163; VIII U.S.C.

establish his or her eligibility to enter the United States to the satisfaction of an officer of the INS at an American port of entry. A negative decision by the U.S. Consul could not be appealed. However, if an INS officer was not convinced that the alien was eligible to enter the United States, and therefore refused entry to the alien, the case could be reviewed by a "Special Inquiry Officer," whose decision could be appealed to the Board of Immigration Appeals.

In addition, the 1952 Act retained the system of national quotas and added a racial quota for all Asians. This built upon the 1943 Act, which had opened the door (a bit) to immigration for Chinese nationals and other Asians.

Section 201(b) of the 1952 Act provided that any immediate relative of a U.S. citizen was entitled to a non-quota visa, if the relative was otherwise eligible for immigration. Section 204(a) added that any citizen was entitled to file a preliminary petition to have immediate relatives classified as non-quota immigrants. The emphasis on family unity and family relationships continues to be a major thrust in U.S. immigration policy; over 100,000 immediate relatives now enter the United States annually under the current terminology of "preferential" visas. In intercountry adoption, this theme of family unity has been reflected in the name of the standard form that INS later designed and required for a preliminary petition in the case of an alien orphan: "Petition to Qualify an Alien Orphan as an Immediate Relative" (the so-called I-600 petition).

Family unity was a major theme of the 1952 Act. The Senate Report leading up to passage of the Act held that the new codification of immigration law should preserve the unity of immigrating families and of American citizens living abroad. As part of the emphasis on the family, the Senate report

recommended more liberal treatment for children. 17/ The Conference Report in 1952 held that the Act successfully implemented "the underlying intention of our immigration laws regarding the preservation of the family unit." 18/

Adopted children were the only group of family-based aliens omitted from the effort to preserve the family unit. This was a conscious omission, not an oversight. The legislative history on intercountry and foreign adoption is very limited. However, a single footnote in the Senate Report indicates that Congress feared that the inclusion of adoption would invite bogus adoptions strictly for the purpose of circumventing the immigration laws of the United States. 19/

Nevertheless, the special provisions for intercountry adoption in the Displaced Persons Act of 1948 continued through June 30, 1953. When that Act expired, the problem addressed by the special orphan visas remained. American families were still stranded overseas with adopted children for whom visas could no longer be obtained. The same problem also had begun to appear in Japan and Korea, as a result of the United States' large military presence.

Congress responded with two separate Acts in 1953 that addressed intercountry adoption. First, in the Act of July 29, 1953, the Congress provided relief to families who had applied for orphan visas prior to the expiration of the 1948 Act, but who were unable to obtain a visa prior to expiration. 20/ Congress authorized a one-time allotment of 500 visas for this purpose, but explicitly added

17/ Senate Report No. 1515, 81st Congress, 2nd Session 468, 1950.

18/ 1952 Conference Report (H.R. Report 82-1365, second session).

19/ Report 1515, Section 2.18b; Joanne P. Hopkins, "Adoption by Custom Qualifies for Fifth Preference Status"; Texas International Law Journal (Vol. 16: 533) 1981.

20/Act of July 29, 1953 (P.L. 83-162).

that Japanese orphans would be eligible within the 500 visas. Over 60 percent of the 500 visas went to Japanese children. (See Table 6.)

The second and more significant action taken by Congress in 1953 was the passage of the Refugee Relief Act of 1953. 21/ That Act extended the "mortgage" on quota visas from Europe, extended the special orphan provisions of the 1948 Act, and authorized 4,000 non-quota orphan visas through 1957.

The Refugee Relief Act included 2 major provisions that would enable a broader segment of American society to consider intercountry adoption. First, the Act included all children otherwise eligible for immigration. For the first time, this meant that Asian children were eligible for the special visas, since the 1952 Act had made Asians eligible for immigration. Secondly, an orphan could be adopted abroad or, for the first time, could obtain an orphan visa prior to a final adoption decree from abroad, provided that the American citizen couple could assure the Federal Government (i.e., INS) that the child would be adopted here.

This provision in the 1953 Act marks the beginning of the distinction, now identified under the IR-3 and IR-4 visas, between children for whom a final adoption decree had been obtained abroad versus those children for whom no final decree had been obtained abroad. The latter group would enter under their adoptive parents' legal custody and/or an interlocutory (temporary) order from a foreign court, but not a final order of adoption. The Act added a restriction that limited families to 2 petitions, except where "necessary to prevent separation of brothers and sisters." Krichefsky 22/ notes that this restriction was added to "abuse". Again, the legislative history is very limited, and Krichefsky fails to

21/ Refugee Relief Act of 1953 (67 Stat. 400, P.L. 83-203).

22/ Krichefsky, 1958.

TABLE 6

DISTRIBUTION OF ORPHAN VISAS UNDER EARLY ACTS OF CONGRESS

	1948 Act		Two Acts Of 1953		1957 Act	
	Number	%	Number	%	Number	&
Germany	1,156	28.4	251	5.9	438	4.0
Greece	1.246	30.7	510	12.1	1,360	12.4
Italy	568	14.0	468	11.1	1,539	14.1
Other Europe	1,082	26.6	533	12.6	948	8.7
Sub-Total	4.052	99.7	1.762	41.7	4,285	39.2
Japan			1.602	37.9	1,385	12.7
Korea			461	10.9	3,701	33.8
Other Asia	1	____	354	8.4	1,309	12.0
Sub-Total	1		2.417	57.2	6.395	58.5
Other Regions	12	0.3	49	1.2	257	2.3
Total	4,065		4,228		10.937	

Source: Statistics Division, Immigration and Naturalization Service, Washington, D.C.

identify the nature of the "abuse" that the Act sought to address. Presumably, though, the abuse was the same as that identified in the 1952 Senate Report, i.e., bogus adoptions to circumvent immigration laws. The 1953 Act also included the historical concern that Congress had included as a general provision in the 1948 Act about public charges, but this time, unlike 1948, the House Report explicitly associated this concern with the children of intercountry adoption.

> Section 5 will permit (qualified) orphans to come to the United States in the care of specified individual sponsors or private or public agencies if they are ready and willing to assume guardianship over the homeless children and to guarantee that they will not become public charges and that they will be cared for properly. ... The bill contains provisions relating to the submission of assurances by the citizen-sponsors ... for the purpose of making certain that these immigrants ... will not become public charges. 23/

The 1953 Acts authorized a total of 4,500 non-quota orphan visas. When the Refugee Relief Act expired on July 30, 1956, all 4,500 orphan visas had been filled, but not all of the children had yet entered the United States. 24/ In addition, other families were still trying to obtain orphan visas when the allotted 4,500 were filled.

To relieve the plight of those families, the Attorney General used authority first granted in the 1924 Act to grant immigration parole to all orphans in excess of the 4,000 visas authorized by the Refugee Relief Act. Under this parole program of 1957, foreign orphans were allowed to enter as probational immigrants if: (1) they were otherwise eligible for orphan visas; (2) orphan petitions had been filed prior to expiration of the Act; and (3) petitions had been

23/ Conference Report on 1953 Act (House Report 83-974, first session.

24/ Krichefsky, 1958.

denied only because the authorized number of visas had been fully subscribed. The Attorney General, still acting under authority from the 1924 Act, could review each case later and change the probational status to one of permanent resident alien. A total of 925 children entered under the 1957 parole program.

The Acts of 1953 and the parole of 1957 foretold major changes in intercountry adoption. First, the direct link to a military presence, though historically critical, had weakened. Families residing in the United States could now obtain non-quota visas for foreign orphans. Secondly, Asian children were included. Table 6 shows the immediate importance of this change, as a majority of the special orphan visas suddenly went to Japanese and Korean children . Japan was the most common country-of-origin under the 1953 Acts and Korea was the most common under the 1957 parole. This shift in countries-of-origin from Europe to Asia was sharp and permanent. Under the 1953 Acts and the 1957 parole, a total of 5,153 orphans entered the United States; over 3,000 were Asian children who would have been excluded under pre-1952 immigration law.

The legislative histories of the 1948 Act and the 2 Acts of 1953 fail almost completely to mention intercountry adoption. However, the temporary nature of the orphan provisions in the 1948 Act and the two Acts of 1953 indicate that Congress perceived the problem being addressed as a temporary concern that would subside with the return to post-war normalcy. However, the problem failed to go away and the demand for orphan visas continued.

The Amendments of 1957 and 1959

When the Refugee Relief Act expired on June 30, 1956, Congress undertook its most extensive treatment of intercountry adoption in the 1957

Amendments to the Immigration and Nationality Act. 25/ The Amendments addressed family unity in a number of ways. First, individually-based exclusions were relaxed for immediate relatives of citizens. The Amendments also addressed various classes of children, including: (1) illegitimate children of citizens; (2) children adopted abroad by citizens with whom the children lived abroad for at least two years in a bona fide family relationship; and (3) the same alien orphans who had received special treatment under the 1948 and 1953 Acts.

The Amendments also permitted unmarried American citizens to file petitions for special orphan visas. Again, the Congress was implicitly recognizing that intercountry adoption was becoming an attractive option for family building to a broader range of Americans. The Act also authorized unlimited visas through 1959, rather than a fixed quantity as had been done in earlier Acts. Congress later extended the unlimited orphan visas through fiscal year 1963. 26/

The 1957 Amendments also included, for the first time, a requirement that orphan petitions satisfy the preadoption requirements of the State in which the petitioning adoptive parents reside, if no final order of adoption had been obtained prior to the child's entry. Again, legislative history sheds little direct light on the purpose of this provision. 27/ However, the requirement follows the logic of earlier concerns about bogus adoptions for the purpose of circumventing immigration laws. The 1953 Act had required some assurance that a child not yet adopted under a final foreign decree would be adopted in the United States; now

25/ 1957 Amendments (71 Stat. 639; P.L. 85-316).

26/ 1959 Amendments (73 Stat. 490; P.L. 86-253).

27/ See Ng Fun Yin v. Esperdy (S.D.N.Y.) 1960; Senate Report (1515, Note 3, Section 2.18b); Joanne Hopkins in Texas International Law Journal, 1981.

the adoptive parents' State government would provide the necessary evidence. The Amendments added specific criteria that petitioning adoptive parents had to meet before an orphan visa could be issued.

> 1. evidence that the family was financially and morally capable of providing good and proper care, and that they could be expected to do so;
>
> 2. an affidavit of support from the prospective parents that pledged their financial responsibilities to the child upon his or her entry into the United States;
>
> 3. if the family could not obtain a final order of adoption abroad, ... all preadoption requirements had been met in the child's proposed State of residence; and
>
> 4. adequate assurances that the child would be adopted upon entry into the United States. 28/

These provisions remain a critical part of the institutional relationships in intercountry adoption. States regulate adoption in the United States. If an orphaned child is to be admitted as an immigrant by the Federal Government without a final order of adoption from a foreign country, the Federal system of immigration and the State system of adoption are forced onto common ground.

Some States in fact had entered intercountry adoption before the 1948 Act, when they voluntarily cooperated with the Committee for Care of European Children to place European orphans with American families. 29/ However, the 1957 Amendments gave the States a statutory role in determining whether or not the immigrant orphan could enter the United States. This remains the case today and is constitutionally unique in immigration law. That is, States may effectively

28/ 1957 Amendments (71 Stat. 639; P.L. 85-316).

29/ Krichefsky, 1961.

deny a citizen's petition to the Federal Government for classification of an alien child as an immediate relative for subsequent entry as an immigrant to the United States. The citizen petitioners may meet all other requirements, e.g., affidavit and evidence of financial and moral capacity to care for the child, and the child may meet all Federal requirements regarding health and the definition of "orphan" under immigration law. In addition, both the petitioners and the child may meet all the requirements of the foreign government, or those of most other American States. Yet, a petition for immigration to the Federal Government may be denied for an alien orphan for whom no final adoption decree has been obtained abroad, based only on State adoption policies in the parents' State of residence.

Table 7 indicates the degree to which the 1957 and 1959 Amendments opened intercountry adoption to families who were not in a position to obtain a final order of adoption from abroad. The 1948 and both 1953 Acts involved only children with final orders of adoption. Since the 1957 and 1959 Amendments, IR-4 visas (orphans without final foreign decrees) have accounted for a steadily greater share of orphan visas, increasing from just 29 percent under the 1957 and 1959 Acts to 87.5 percent from 1983 to 1985. Nearly all the increase in intercountry adoption since 1957 has come from IR-4 visas. Most of those adoptions could not have taken place without the 1957 provisions, which meant that families no longer had to go abroad for extended periods.

The 1957 Amendments also recognized foreign proxy adoptions and treated them as final adoptions, thus exempting them from State preadoption requirements. Proxy adoption was then the common means for Korean courts to transfer parental authority under Korean law to adoption agencies (see Chapter Two.) However, this provision was repealed four years later, when the "orphan

TABLE 7

IR-3 VISAS (FINAL FOREIGN ADOPTION DECREES)
AS A PERCENTAGE OF ORPHAN VISAS
FY 1983 through FY 1985

	TOTAL	IR-3	% IR-3	% IR-4
Chile	534	1	0.2	99.8
El Salvador	916	15	1.6	98.4
Korea	15,396	449	2.9	97.1
Brazil	413	15	3.6	96.4
Portugal	55	3	5.5	94.5
India	1,390	79	5.7	94.3
Hong Kong	109	2	7.3	92.7
Bolivia	61	5	8.2	91.8
Colombia	1,818	172	9.5	90.5
Guatemala	389	98	25.2	74.8
Ecuador	49	17	34.7	65.3
Phillipines	1,243	433	34.8	65.2
Domin. Rep.	130	54	41.5	58.5
China/Taiwan	209	100	47.8	52.2
Japan	165	82	49.7	50.3
Peru	93	68	74.2	25.8
Mexico	431	322	74.7	25.3
Honduras	471	407	86.4	13.6
Poland	91	82	90.1	9.9
Costa Rica	244	233	95.5	4.5
Vietnam	91	88	96.7	3.3
Panama	45	44	97.8	2.2
Other	809	380	47.0	53.0
Total	25,152	3,155	12.5	87.5

Source: Visa Office, U.S. Department of State.

program" was codified into immigration law. 30/ Thereafter, proxy adoptions were treated as cases without final orders of adoption from the foreign country.

The 1959 Amendments also added procedures to those specified in 1952 and 1957 for obtaining orphan visas. 31/ The Amendments required that an INS officer conduct an investigation in the child's country to confirm the child's status as an orphan. This responsibility typically has been delegated to the U.S. Consular Officer by the Attorney General. The investigation also is expected to determine whether the child requires any special care or diet, or if the child has physical or mental handicaps not previously identified by the citizen petitioner(s). Under the Amendments, only with the completion of the investigation by the Consul in the foreign country, including the medical examination required of all immigrants since 1891, and only upon the Attorney General's advance approval of the petition from the adopting parents, could the Consul issue an orphan visa.

The 1961 Codification and the I-600A

After 13 years of temporary Acts, the 1961 Immigration Act gave alien orphans a permanent place in immigration law. The 1961 Act, which went into effect in fiscal year 1963, codified and made permanent the non-quota visa provisions for alien orphans by adding the orphan provisions to the Immigration and Nationality Act of 1952. 32/

30/ 1961 Act (75 Stat. 650; P.L. 87-301).

31/ 1959 Amendments (73 Stat. 490; P.L. 86-253).

32/ 75 Stat. 654.

The Act also instituted some changes that began to fill some voids in the data on alien orphans. Prior to 1961, not all alien orphans were recorded by INS. Prior Acts had authorized non-quota orphan visas only where national quotas were filled. In most cases, quotas were chronically over-subscribed, but it is very likely that at least some orphans were admitted over the years under quota visas. Secondly, orphans from Canada and sovereign countries of Latin America were not recorded, since those countries were not subject to quotas. Therefore, any intercountry adoptees who entered from the Western Hemisphere were left uncounted. The 1961 Act did not address children from the Western Hemisphere, so they continued to go uncounted as immigrant orphans. However, by no longer restricting special orphan visas in other parts of the world to cases in which quotas were over-subscribed, one hole in the INS data had been filled.

Two years later, in 1963, INS introduced a major administrative change that eased the petition process and made intercountry adoption feasible for more Americans. Prior to 1963, a citizen family could not file a petition without full documentation on the child. As a result, the INS investigation could begin only after a child had been located and all documents secured. Under the best of circumstances, such an investigation takes time. This caught most families with long delays, including lengthy and costly stays in foreign countries or lengthy and costly arrangements for foster care for an orphan for whom a visa could not yet be obtained, but for whom the family was responsible in a foreign country.

In 1963, INS acted administratively to allow an advanced petition (the I-600A) that would inform INS of the intent to petition on behalf of an alien orphan. All information on the prospective parents could be reviewed and investigated in advance of locating a foreign orphan. This further reflected a

shift away from the predominance of military families stationed abroad to a more general population residing in the United States.

When the advance investigation is concluded, INS notifies both the petitioning family and the Consul in the foreign country of the advance approval. However, note that a stable average of about 4½ percent of all I-600 and I-600A petitions are rejected. 33/ Following notification from INS, the Consul can review all documents on the child and investigate the child's orphan status as soon as the child is identified. On the strength of the Consul's investigation of the child's status and independent review of the adoptive parents' petition, plus the required advance approval of the Attorney General (INS), the Consul can then issue a visa for the child on relatively short notice.

The system, of course, does not always work like a fine Swiss watch. Advance processing sometimes fails to meet its purpose because families sometimes are not prepared, since adoption is not always a predictable event, be it in the United States or elsewhere. In addition, some States insist on reviewing original documentation on the child before they will advise INS that preadoption requirements have been met. This requires getting original documents to the United States, with proper translations, after the child has been located, despite the preceeding review by the INS, the investigation by on-site Consular Officers and reviews by foreign governments. Consequently, serious problems can arise and lead to long and costly delays that may be detrimental to the child, or cause long and costly stays in foreign country for the parents. Still, the I-600A has been

33/ Form G-23, INS Headquarters, Washington, D.C.

a valuable innovation for the majority of petitioning families, including those residing in States that wish to review original documentation on a child.

INS makes the case succinctly for the I-600A, whatever the circumstances. In a publication on intercountry adoption, INS outlines the I-600A and the most time consuming element in the process: a fingerprint check of the petitioning adoptive parents.

> The purpose of the fingerprint check ... is to determine whether or not the adoptive or prospective adoptive parent(s) have ever been arrested. Whether a person has been convicted, the number of convictions, the nature of the offense(s), and whether the individual is considered to be rehabilitated are all factors in a decision on whether he or she is able to care for a child or children properly.
>
> It is Service policy to expedite all orphan cases for humanitarian reasons. Nevertheless, it does take a certain amount of time.... That is why prospective parents are encouraged to use the advance processing procedures well in advance of locating a child. 34/

The I-600A may seem less than exciting, but it has been proven a valuable effort by INS to accomodate families; it has made a real contribution.

1965 Amendments: An End to National Quotas

The 1965 Amendments provided landmark legislation in immigration policy by ending the system of national quotas and substituting hemispheric quotas: 120,000 visas annually for the Western Hemisphere and 170,000 annually for the rest of the world. 35/ Each country is limited to 20,000 visas annually.

34/ "The Immigration of Adoptive and Prospective Adoptive Children"; U.S. Immigration and Naturalization Service (M-249), Washington (Nov. 1984), p. 9.

35/ 1965 Amendments (79 Stat. 911; P.L. 89-236).

These changes partly reflected the social upheavals occurring in the United States in the 1960's. The still rather blatant discrimination in immigration law against Asians and Black Africans and the not very subtle discrimination against Eastern and Southern Europeans were inconsistent with social changes brought by the Civil Rights movement then taking root in the United States. In addition, the entire system of national quotas had become increasingly unworkable; witness the use of a single quota for Asians, the "mortgaging" of future quotas under the 1948 Act, its extension under the 1953 Act, then the cancelling of the respective national "mortgages" in 1957.

Yet, despite an impulse toward less discrimination in immigration policy, the 1965 Act reacted to the change that had taken place in the pattern of immigration from the Western Hemisphere, which previously had not been subject to quotas. A number of Caribbean countries had recently become independent, greatly increasing the potential for otherwise unlimited immigration from the region. Secondly, immigration in the Western Hemisphere had shifted markedly from the dominance of Canadians to a new and increasing dominance by Latin Americans. Through 1900, 7 of every 8 immigrants from the Western Hemisphere had been Canadian. As late as the 1940's, Canadians still accounted for two-thirds of the figure. That began to change sharply in the late 1940's. Under the new hemispheric quotas, immigration from the Western Hemisphere, i.e., from Latin America and the Caribbean, would be restricted to 120,000 annually, with a maximum of 20,000 from any single country.

The 1965 Act also changed the terminology of American immigration. "Quota/non-quota" distinctions were dropped in favor of "non-exempt" (i.e., quota) and "preferred" (i.e., non-quota). The Act identified a list of immigrants who

were to be "preferred" and, therefore, were not to be subject to the hemispheric quotas. Family relationships constituted the majority of preferred immigrants, along with narrowly defined preferences for certain classes of workers.

Now that the Western Hemisphere was subject to quotas, and since the 1961 Act stipulated that orphan visas were to be used exclusively for intercountry adoption, rather than waiting for national quotas to be filled, all alien orphans from Canada, the Caribbean and Latin America, for the first time, were recorded by INS as immigrant orphans. The Act went into effect in fiscal year 1969, the first year in which all immigrant orphans were recorded.

As of this writing, at the end of 1985, the 1957, 1961 and 1965 Acts are the most recent major changes in immigration law regarding the immigration of alien orphans. Efforts to develop new landmark immigration legislation remain controversial, but are considerably less likely to become law than seemed the case during 1984. In any event, the immigration controversy that has raged in recent years and the controversial bills it has generated have not addressed intercountry adoption. Rather, the controversy, which may take years to settle, has focused on the issues of amnesty for certain illegal aliens and on sanctions against employers who employ illegal aliens (knowingly or unknowingly, depending upon the bill). As in most attempts at immigration reform, perhaps with the exception of 1957, intercountry adoption remains too small a portion of overall immigration to penetrate the intensity of the current controversy. Given the pitch of the current controversy, this is a merciful blessing.

Nevertheless, three other Acts of Congress since 1965 have explicitly addressed intercountry adoption. In 1975, Congress reinstated the provision that non-married citizens over 25 years of age could petition on behalf of an alien

orphan. 36/ That provision had been enacted in the 1957 Amendments, but was omitted in the codification of 1961. In 1978, Congress repealed the limitation of two petitions per family. 37/ Finally, in 1981, Congress raised the maximum age for eligible children from 14 to 16 years. 38/ The maximum age, first set at ten years in the 1948 Act, had been raised to 14 in 1957. The 1981 Amendments also raised from 16 to 18 the maximum age at which an adopted alien orphan could apply for citizenship without having to satisfy a lengthy residence requirement.

Summary

This chapter has summarized Federal statutory policies in intercountry adoption. Statutory provisions for intercountry adoption were initiated in 1948 to relieve the plight of military families stranded overseas with adopted children for whom visas could not be obtained. Along with special statutory treatment for alien spouses and alien fiancees, Congressional treatment of intercountry adoption constituted a precedent for the fundamental changes that would occur in general immigration law, i.e., the emphasis on family unification.

Since 1948, intercountry adoption has been greatly influenced by changes in general immigration law, e.g., the repeal of anti-Asian discrimination, hemispheric quotas, etc. However, the chapter has shown that Congress continues to encourage intercountry adoption and that INS continues to implement that policy as flexibly as possible.

36/ 1975 Act (89 Stat. 824; P.L. 94-155).

37/ 1978 Act (92 Stat. 917; P.L. 95-417).

38/ 1981 Amendments (95 Stat. 1611; P.L. 97-116).

CHAPTER TWO

FEDERAL & FOREIGN PROCEDURES

Intercountry adoption is burdened with presumptions of illegality and of insurmountable legal complexity. This chapter counters many of those notions and establishes that the system has legal and ethical integrity. In doing so, the chapter offers something akin to a "how-to" guide.

Section One briefly outlines the character of notions about illegality from popular literature and from public documents. Section Two reviews intercountry adoption procedures of the Federal Government. and Section Three reviews procedures followed by a number of foreign governments, including: Brazil, Chile, Colombia, Costa Rica, El Salvador, Korea, Mexico and Eastern Europe, plus procedures that were followed by the Republic of Vietnam prior to its fall in April, 1975. Finally, Section Four outlines the principal methods, including their respective strengths and weaknesses, by which a family or individual can locate a foreign child who is eligible for adoption and bring the child to the United States.

The material is presented in a straightforward manner, but its purpose is important: it shows that intercountry adoption is well regulated by the national governments involved, including the United States. The chapter also cites State Department correspondence attesting to the legal integrity of practices in foreign countries and to the presence of extensive child care systems in many countries. The Chapter shows that an extensive Federal regulatory system is in place, with strengths that cannot be matched by other American jurisdictions or institutions, and that foreign countries regulate intercountry adoption extensively.

Section One:
Common Notions of Illegality

Intercountry adoption has long been burdened with firmly held beliefs that it involves a considerable illegal activity, particularly in foreign countries. Elizabeth Cole of the Child Welfare League of America states flatly that "There has always been controversy about the ethics of intercountry adoption." 39/ A number of public policies in the United States are built on the premise that they are required to counteract unethical and illegal activity. However, the available evidence does not support a presumption that this is a significant problem.

The popular literature is particularly fond of alluding to images of cloak-and-dagger dealings in foreign countries, with sensational references to baby selling and to Americans who are portrayed as callously shopping for children. The Wall Street Journal recently described intercountry adoption as "choosing a child like a commodity." 40/ Kathleen Benet's Politics of Adoption indicates that this popular perception began early in intercountry adoption. In her review of the history of intercountry adoption, Benet cites "a social worker" for evidence of truly grim practices, then adds her own comment to portray a still more grim situation.

> In occupied Germany, any soldier who was relatively sober could go into an orphanage and say "I'll take that one." Boys were sometimes used for homosexual purposes and they would take 12-year-old girls and use them as maids.

39/ Cole, Elizabeth; Adoption Problems and Strategies: 1976-1985; Office of Child Development, U.S. Dept. of Health, Education and Welfare (Washington; February 1, 1976) p. 91, para 215.

40/ Wall Street Journal; May 21, 1985; p. 50.

> Rich families looking for a child to adopt went to the countries that would not say no to a representative of the rich and powerful United States. Southern Italy and Greece were well known hunting grounds. 41/

Passages like this appear under ostensibly serious titles. Certainly "a social worker" does not qualify as a definitive source; other social workers may have had very different stories to tell. More importantly, allusions to "relatively sober," "homosexual purposes," and 12-year-old maids (the author apparently overlooked prostitution) are nothing short of ludicrous perceptions of adoption, whether domestic or intercountry. The added comments about "rich families" and "well known hunting grounds" in Southern Italy and Greece offer similarly unfounded assumptions and badly overstate the scale of intercountry adoption in those years.

In the post-war era of which Benet speaks, Congress authorized a total of 5,000 orphan visas for European children over 5 years. 42/ During that period. Italy and Greece placed monthly averages of just 10 and 21 children, respectively, with American families. 43/ Greece placed most of its children through Greek Social Services, an American-based social service agency of the Greek Orthodox Church. This fails to substantiate anything so onerous as a "hunting ground."

Note, too, that even the stereotyping gets a bit confused. "Relatively sober" soldiers and "rich families" suggest opposite ends of the social spectrum. In the era of which Benet speaks, intercountry adoption was dominated by

41/ Benet, Kathleen; Politics of Adoption, Free Press (New York, 1974) p. 130.

42/ 1948 Act.

43/ See Table 5; totals for Greece and Italy under 1948 Act, divided by 60 months.

American military families stationed abroad, whose problems with immigration quotas to congressional action in 1948. Military families, one hopes, hardly suffer from nearly universal alcoholism, as the quote invites one to assume, but neither should military families be mistaken for the very rich of American society.

This type of contradiction within stereotypical portrayals of intercountry adoption is not unusual, nor is it limited to characterizations of the American families involved. Such contradictions and confusion appear in numerous aspects of intercountry adoption, including the health of the children, motivation to adopt, etc., as shown in other sections and chapters of this dissertation. In any event, though Benet's portrayal of intercountry adoption is a bit more graphic than most, her message is not unique. 44/ In the extreme, Benet's portrayal alludes to imperialism at its worst. This message is not at all unlike criticisms about robbing a child of his or her cultural heritage.

In fact, the selection of foreign countries by Americans who adopt foreign children depends generally on two simple factors: (1) cultural and political toleration of adoption by foreigners; and (2) as Benet also suggests, "a pool of children whose families and countries cannot provide." 45/ Both factors must be present for adoption by foreigners to be significant. For example, adoption by foreigners is insignificant in the United State not because this country prohibits it (we do not), but because a large pool of adoptable children is absent for citizens and foreigners alike.

44/ E.g., see "Mail Order Babies", New Statesman; January 15, 1982; p. 4.

45/ Benet, p. 123.

Tony Kornheiser's Baby Chase is the most recent work enjoying widespread circulation to portray grim practices abroad. 46/ Baby Chase is an account of the author's efforts to adopt a child abroad and in the United States. As part of this account, Kornheiser speaks sincerely and at great length about unsuccessful attempts to adopt in El Salvador and Colombia. He now freely concedes that if he knew then what he knows now, he could have saved himself considerable confusion, time and grief in the process. Nevertheless, his account has generated a considerable amount of misinformation on intercountry adoption, particularly from Latin America.

The pervasive and mischevious effects of this type of popular writing are difficult to overstate. Kornheiser's book, for example, enjoyed the exposure of a lead feature article in the Washington Post's Sunday edition. 47/ In my own experience in "how-to" workshops, we seldom get through a session without questions from guests who have serious reservations about the legality of foreign practices; Baby Chase is the most frequently cited source of those misgivings.

The misgivings arise from the author's description of his attempt to undertake a "grey market" adoption in Latin America. Kornheiser mentions a total cost of $15,000 in 1975 and relates a sincere tale of emotional exhaustion before he and his wife backed out. The tragedy here is that the author never indicates that his was not the usual route in intercountry adoption, nor that intercountry adoption already was rather well established and routinized, particularly from Colombia, one of the two countries in which the author then was

46/ Baby Chase; Kornheiser, Tony; (Atheneum; New York, 1983).

47/ Washington Post; Sunday, December 11, 1983; "Outlook Section".

interested. For example, in 1975, Colombian courts granted legal guardianship to American parents for 379 Colombian children, who then entered the United States on the strength of their orphan visas. Those 379 children in 1975 were followed by 732 Colombian children in the next 15 months. (See Table 4.)

Though readers can sympathize with Kornheiser's emotional trauma, he seems to have assumed that utterly needless risk and sheer folly were the order of the day. Perhaps in an effort to dramatize the situation for his readers, the author exaggerates the negative aspects of his experience. In any case, the book indicates a failure to seek decent information. As a result, the author was not so much a victim of "the system," as the book repeatedly contends, but a victim of his own willingness to accept at face value a host of stereotypes about adoption practices in foreign countries. The estimated cost of $15,000 in 1975 could have covered all costs, including round-trip air fare, hotels, food, etc., for 6 or 7 perfectly legal and safe adoptions from Latin America at that time. 48/

Similarly, the author fails to mention the role that juvenile courts play in adoption in foreign countries, the role of foreign national governments in issuing passports and exit visas, and the role of the U.S. State Department and INS. Rather, the book implies that one deals only with cloak-and-dagger individuals who magically whisk a child onto a plane in a foreign country and then hustle the child through an American airport -- with no serious questions being asked.

In short, whenever a family determines that an intercountry adoption may be right for them, to consider anything but a perfectly legal adoption is unforgiveably foolish. Besides the intrinsic value of being legal, such an adoption will be well regulated, safe, and far less expensive than stories of the "grey

48/ Latin America Parents Association, Md. Region Chapter; Silver Spring, Md.

market" would suggest. To pursue an illegal adoption abroad also invites a nasty surprise at an airport in the foreign country or when one tries to disembark in the United States.

Portrayals such as Benet's and Kornheiser's are not restricted to popular literature. Hearings in the House of Representatives in June, 1977 indicate that such perceptions substantially influence public policymakers in the field. Following the testimony of officials from Friends of Children, Representative Millicent Fenwick introduced her questioning as follows.

> ... certainly, the investigation (of the family) must be made by an accredited and proper agency to get rid of the terrible danger that you suggest, a large house in which children just come and go in return for money, a racket in children, and nothing could be more terrible. 49/

Indeed, "nothing could be more terrible," but nothing of the sort had been suggested by Friends of Children's testimony. However, Representative Fenwick was not alone in assuming questionable practices in intercountry adoption. Subcommitte Chairman Eilberg questioned Saul Rosoff of the Office of Human Development, at the Department of Health, Education and Welfare.

> Eilberg: In view of the past concern of members of this subcommittee that an open-ended procedure for bringing in alien children may create serious abuses, ... have any abuses come to your attention in recent years with regard to the practices of adopting alien children?
>
> Mr. Rosoff: No, sir, they have not. ... The success of the adoption process witnessed by others in the neighborhood who would also like to adopt a child leads them to go through the same process themselves. 50/

49/ House Committee on the Judiciary, Document 118, 1977, p. 26.

50/ Ibid.

In the same hearings, State Department officials were questioned about practices in various foreign countries, but particularly about practices in Colombia, which had only recently emerged as a major country-of-origin.

> Mr. Eilberg: We also note that in 1974 and 1975 Colombia appears for the first time as a (major) source country for (I-600) adoptions.... We would be interested in knowing also if there is some special activity going on down there which might be possibly fraudulent or illegal. A suspicion has arisen that there may be some irregular activity taking place.
>
> State Dept., as submitted for the record by the U.S. Embassy in Bogota: We believe that the high rate of issuance of (I-600) visas in Colombia is primarily attributable to three factors: (1) relative ease, compared to long delays in the United States, with which the Colombian legal system permits adoption by foreigners; (2) extraordinary effectiveness of word-of-mouth advertising by previously successful adoptive parents; and (3) availability of small infants for adoption....
>
> We are very alert to the possibilities of fraud in all aspects of visa and passport applications, but find little evidence of any in adoption cases. The (Colombian) agencies are extremely thorough in the process of prescreening parents ... (and) the Colombian Government's Welfare Agency, Bienestar Familiar, does further screening after parents arrive in Bogota....(emph. added)
>
> Adoptive parents show off the new child to anyone and everyone upon returning to the United States. This inevitably leads to more inquiries from prospective parents and a gradually widening circle of knowledge about the possibilities of adoption in Colombia. Virtually every parent we see tells us that he learned of Colombia from someone who had previously adopted here and was satisfied with the result. 51/

Testimony on the legal and professional integrity of practices in other foreign countries is cited in Section Three, which outlines practices in selected countries. The point to be made here, however, is that no evidence exists to

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51/ Ibid.

support commonly held suspicions about illegal or grey practices abroad. Yet, the assumption continues to influence public policies. For example, in the comments already cited, Representative Fenwick noted that "certainly, the investigation must be made by an accredited agency." She went on to add that

> I think that if we are careful and if we make sure that this can be done only in States that have proper laws (restricting intercountry placements to American agencies), I think that would be a very proper restriction on the practice. 52/

The notion that illegal practices are involved is inseparable from the rationale for requiring State involvement and from subsequent efforts to limit, by legislation or administrative procedures, all intercountry adoptions to those made through American agencies. Just such a restriction was a major issue in the House hearing in 1977. Testimony from a number of agencies and from HEW supported the idea of such a restriction, including the testimony of Mr. Rosoff, despite his statement that no evidence of problems had emerged in Colombia, where American agencies have yet to establish themselves firmly.

Though the House of Representatives did not choose to act upon recommendations to restrict access to intercountry adoptions, assumptions about illegal practices abroad continue to influence policies in a number of States. For example, in February, 1980 the Children's Bureau (HEW) published a "Model State Adoption Act and Model State Adoption Procedures; Request for Comment" in the Federal Register in 1980. 53/ The Model Act had been developed under Congressional authority and was drafted by a committee that represented a

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52/ Ibid.

53/ Model State Adsoption Act; Federal Register; February 2, 1980.

consensus among adoption and child care professionals in HEW, the State governments and private adoption agencies.

In its section on intercountry adoption, the draft explained that the Model Act "should also serve to deter unscrupulous child placers in a foreign country from attempting to place children without the authority to do so." Yet, no evidence of any such problem is cited. 54/ As in the 1977 hearings, no such evidence was cited even in the testimony of those who advocated restricting access to intercountry adoptions. The notion is largely an article of faith in which the Model Act and many State governments believe that they are protecting American parents and foreign children from illegal practices abroad -- practices they really do not know to exist.

Assumptions about protecting families and children from illegal practices abroad are explored in more detail in Chapter Four, which examines constitutional implications in the application of American family law by the States to foreign environments. However, the principle point to be made here is that popular portrayals and many public policymakers simply assume that foreign practices are characterized by illegality; they are not.

54/ Ibid, p. 10660.

Section Two:
Federal Procedures

Section One outlined common perceptions about illegality in intercountry adoption. This section outlines procedures and regulations of the Federal Government in the field, including procedures that INS undertakes in the United States and procedures undertaken in the foreign country by the U.S. Consul. The purpose of the section is two-fold: (1) it shows that a family can deal with the system on its own, if it so chooses; and, more importantly, (2) that Federal procedures and regulatory capacities are so extensive that casual assumptions about illegal practices need to be re-examined. Section Three adds to this by examining procedures in foreign countries and showing that they function with integrity and within extensive regulatory systems that treat seriously the idea of foreigners adopting their young nationals.

Every immigrant must obtain a visa for permanent residence before entering the United States. The visa is obtained from the U.S. Consulate in the foreign country, following advance approval by the Attorney General. The Consulate awaits prior approval from the Attorney General, 55/ but can still deny a visa petition. The Consular Officer issues the visa on his own authority; his denial of a petition cannot be reviewed, nor can his revocation of a visa after it is issued, not even by the secretary of State. 56/

Both the INS and the State Department may reject, on their own authority, a petition for a visa. Therefore, the procedures of each agency, though

55/ See INS, Form I-174H.

56/ 8 U.S.C. 1104 and 1201.

closely interrelated, should be viewed as distinctly separate. For example, INS fulfills its requirements toward immigrant orphans with a single petition (the I-600). The same petition is used whether or not the family obtains a final order of adoption from a foreign court prior to the child's entry into the United States.

In contrast, visas issued by the State Department draw an important distinction between two groups of children under the I-600. IR-3 visas are issued to children whose adoptive families have obtained final adoption decrees from foreign courts. These families are exempt from any pre-entry role for the States. The children whose adoptive families have obtained temporary, interlocutory, or custody decrees from abroad, but not final adoption decrees, enter under IR-4 visas; their petitions are subject to a pre-emptive State role. The IR-4 visa now accounts for seven of every eight orphan visas.

As implied by the "IR" prefix in the IR-3 and IR-4 visas, all immigrant orphans enter the United States under the preference category of an immediate relative. As immediate relatives, the children are not counted under the statutory limitation of 20,000 immigrant visas from any single country. 57/ As with the petition for any immediate relative visa, the I-600 petition is filed by the American citizen who claims an immediate relationship with the alien.

I-600 Petition

The principal Federal procedure involved is the I-600, "Petition to Classify an Orphan as an Immediate Relative," which is filed with an INS District Office. (See Appendix.) If the identity of the child is not known in advance, the

57/ 8 U.S.C. 101 (b)(1)(F).

citizen files an I-600A, "Advance Processing of a Petition to Classify an Orphan as an Immediate Relative."

Note that the I-600 does not apply to an adopted child entering under an IR-2 visa (an adopted child who has resided with American parents abroad for a minimum of 2 years), who qualifies as a "child," under Section 101 (b)(1)(B) of the Immigration and Nationality Act. In those cases, the family files an I-130 petition with the U.S. embassy. If an American family resides abroad and adopts a child, but is unable to satisfy the two-year requirement, that family too would file an I-600 petition in order to have the child classified as an immediate relative.

The I-600 is designed exclusively for foreign orphans who are not yet members of existing American citizen families. The I-600 petition includes information on the prospective parents and on the child. The I-600A (advance processing) includes only the information on prospective parents. Filing the I-600A enables petitioners to cover most INS requirements prior to locating a child. This saves considerable time once a child is located and avoids significant expenses that otherwise could be required to support a child abroad while the family waits for its petition to be processed. The I-600A requires the following supporting documentation, which includes many of the same documents required by foreign agencies, foreign courts, foreign governmental agencies and many American States.

> proof of citizenship of an umarried petitioner or at least one partner of a married couple, e.g., an original birth certificate or an original naturalization certificate;
>
> original copies of a marriage certificate or, if appropriate, divorce decrees or death certificates relating to any prior marriages;

evidence of moral, financial and physical capacity to raise a child -- a home study conducted by an individual or social service agency licensed to conduct home studies in the United States, letters of reference, evidence of current employment, notarized bank statements showing account numbers and balances and a copy of the petitioner's most recent Federal income tax forms;

financial commitment to the child -- an Affidavit of Support (form I-134), which INS regards as obligating the petitioners for all costs required to support the child if the adoption breaks down (or "disrupts") in the United States;

fingerprints of each prospective parent on the appropriate INS form; the FBI uses the coded prints to conduct a fingerprint check to identify if a petitioner has a criminal record of a nature serious enough to indicate that INS should not approve the petition; the same check would also identify any petitioners who may have filed other I-600 petitions under another name (a local police station can take the finger prints, but they must be of a high quality, so the police should be advised of the purpose of the fingerprints); and

a fee of $50 -- the fee and the petition are good for one year, but are easily updated in the event that a child has not been located and/or that a visa has not yet been obtained. 58/

INS can and does reject I-600 petitions. Alice Krichefsky 59/ of the INS noted that in FY 1959 and FY 1960, INS rejected 7 percent of I-600 petitions. In Fiscal Years 1982 through 1984, INS rejected 4.1 percent of all I-600 petitons filed. 60/ Krichefsky noted questions about the petitioners' capacity to care for a child as the principal cause of rejection in 1960; that appears to remain the principal cause, though INS Inspectors note that some are rejected simply because they fail to complete the petition properly. 61/

58/ I-600.

59/ Krichefsky, 1963.

60/ INS, internal reporting form G-23.

61/ Ng Fun Yin v. Esperdy (187 F.Supp. 51, S.D.N.Y.) 1960.

Generally, the I-600 or the I-600A should be filed as soon as a family decides to pursue an intercountry adoption. If INS has more time to process a petition, the family is less likely to feel pressured near the end of the process to speed up the petition. The benefit of filing the I-600 or I-600A as soon as possible cannot be overstated.

If all goes well with the INS review of the I-600A, INS advises the U.S. Consul in the foreign country of the successful advance processing. Once a child is located, the family can then file the I-600, either with INS or with the Consul in the foreign country. The I-600 includes the previously unavailable information required on the child in order to to establish that the child is an eligible orphan under the Immigration and Nationality Act. 62/ The child must be under 16 years of age, be without parents due to death, disappearance or abandonment, or must have only one living parent who is unable to provide care and who has irrevocably released the child for adoption and emigration. To establish this, INS requires an official birth certificate or certificate of abandonment from a foreign court, and a copy of the biological parents' irrevocable release, if applicable. If INS is satisfied after it reviews these documents, the Consul in the foreign country is advised that the Attorney General has granted approval.

Consulate Requirements.

In addition to INS procedures, immigrant orphans, like all other immigrants, must be examined by a physician in the foreign country before a U.S. Consul may issue a visa. Under the 1891 Act, immigrants were examined before entering the United States. Since 1924, under the 1917 Act, all prospective

62/ Section 101 (b)(1)(F).

immigrants are examined in the foreign country before a visa is issued. In most cases, U.S. embassies rely on a small number of local physicians approved for the purpose of examining prospective immigrants.

This examination is not portrayed as a thorough physical, as its purpose is to identify communicable diseases and other conditions that would exclude an alien from qualifying under the Immigration and Nationality Act. However, the examination is sufficient to identify any obvious and/or serious physical, mental or emotional problems that a child may have. If any such problem is identified when the prospective parents are not present, the Consulate or INS, depending on the country, will inform the prospective parents in writing of the problem. The prospective parents then must acknowledge in writing that they have been so advised and that they still intend to go ahead with the adoption. Without this acknowledgement and clear statement of intent from the prospective parents, the Consulate is prohibited from issuing a visa for the child. 63/

This provides significant safeguards for prospective parents and precludes horrific, last-minute surprises when one might think it is "too late" to withdraw from an adoption. This safeguard is complemented by procedures of foreign agencies and their governments, and precludes the adoption of a child with serious and identifiable problems of which the prospective parents are unaware.

The Consul Officer also must view the child personally, regardless of the outcome of the physical examination, to determine that the child is generally in good health. If a child is to enter under an IR-3 visa, the adopting citizen parents must personally view the child before or during the foreign adoption procedure. A

63/ Immigration of Adopted and Prospective Adoptive Children; INS, (Washington, 1984); p 3, para 5 and p. 11, para C.

Consular Officer also must determine, independently of INS procedures, that a child is an eligible orphan under immigration law. 64/

The Consular Officer relies heavily on INS recommendations regarding the parents, under the rationale that the INS is best suited to investigate weaknesses or inconsistencies in the petition relating to the prospective parents. INS can request information in addition to that required by the I-600 if more information is deemed necessary. 65/

However, in the foreign country, the Consulate is in the best position to determine the merits of foreign documents and practices. Consequently, the Consular Officer is required to undertake an investigation and has full authority to reject a visa petition, regardless of any advance approval by the Attorney General. The Consular Officer can, and sometimes does, reject a petition simply because something does not seem quite right. Though denials can be appealed, the authority to deny is real.

The Consulate is in the best position to recognize any violation of local domestic law and procedures, or simply to recognize when something is wrong. The effectiveness of a Consulate investigation is greatly enhanced by the concentration of immigrant orphan visas among a handful of countries. For example, Table 8 lists the eleven countries from which 12 of every 13 orphan visas were issued by U.S. Consulates in 1984 and 1985. The table indicates an even greater concentration among the top five countries, which accounted for 83.2 percent of the children. As a result, U.S. Consulate officials in countries from

64/ Ibid.

65/ Hearings before the Judiciary Committee, U.S. House of Representatives, Document 118, 1974.

which most of the children come are routinely exposed to the system. Consulate officials in those countries know the individuals, agencies, courts and government officials involved.

The table indicates that in the five most significant countries, the average number of orphan visas processed monthly ranges from 28 to 457. In addition, issuance of the visa is not the first contact that a Consulate has with each petition. In short, these Consulates work with orphan petitions every day. The same point applies to a somewhat lesser extent to Consulates in the other six countries shown in Table 8: processing orphan petitions is an everyday event for Consulate officials, though on a more modest scale than in the top five countries. If problems were to exist with an adoption in a foreign country and if an official of any government or organization in the United States is going to recognize the problem, the Consulate is clearly the most likely to do so. When an institution or an individual is unknown, the Consulate is, again, in the best posiiton to undertake a more complete investigation.

Pre-Adoption Requirements of the States

If a petition is for an IR-4 visa (where the parents will not have a final order of adoption from a foreign court prior to the child's entry into the United States), Federal law requires prospective parents to meet the pre-adoption requirements of their State of residence. The State must then advise INS of its consent to the adoption before the Attorney General can give his advance approval of the visa petition. 66/

66/ 8 C.F.R., per Section 101(b)(1)(F).

In the past three years (1983-1985), about 87.5 percent of the children have entered the United States under IR-4 visas. Whether a citizen petitions for an IR-3 or an IR-4 visa depends almost exclusively on the law of the foreign country. That is, some countries will give foreigners legal custody, but will not issue a final order of adoption to a non-resident of the country. Other countries will do so, but only after an interlocutory (or temporary) order of custody that may extend for 6 to 12 months, as is the practice among courts in Colombia. Table 7 showed the rate at which children entered the United States under IR-3 and IR-4 visas from 22 countries in 1983 and 1984.

In Korea, which dominates intercountry adoption, parental authority is transferred to an agency, not to the prospective parents, in an intercountry adoption. Travel to Korea by prospective parents is discouraged and the opportunity for obtaining a final order of adoption prior to emigration is limited, as suggested by the modest 3 percent of Korean children who enter the United States under a final Korean decree (Table 7). An even smaller share of children from El Salvador emigrate with a final order of adoption, while the chance of securing a final order in Chile prior to emigration is shown to be virtually non-existent. Though final orders from Chilean courts normally are forthcoming within 12 months of emigration, just two of 758 children from Chile entered the United States with final orders of adoption from 1981 through 1985.

Other countries, however, are reluctant to release their children for emigration to a foreign country without a final order of adoption, e.g., Costa Rica, Honduras and in certain States in Mexico. In still other countries, practices are more mixed, e.g., Japan, the Philippines, Dominican Republic and Taiwan.

In any event, the IR-4 child is subject to the pre-adoption requirements of the future State of residence. In some States those requirements are the same as or less demanding than the requirements of INS and, therefore, may not be a significant hurdle in the process. Generally, minimum requirements will include a home study by a licensed agency (limited to "full-service" adoption agencies in some States) or by a licensed individual. 67/ A home study by a licensed individual is all that is necessary to meet INS requirements, but only three States license individual social workers for this purpose (Alaska, Iowa and New York). In addition, States generally require evidence that the child is legally available for adoption, plus evidence of the child's good health, etc., all of which duplicate Federal requirements. The basic concern will be to obtain some assurance that the child is adoptable, both in the foreign country and in the United States, and that the child will not become a public charge upon entering the State. These concerns also duplicate Federal concerns.

However, the 50 States do not interpret their requirements in a uniform manner in intercountry adoption. Different States will require different levels of evidence that the child is an orphan. The States also will interpret American law differently as it applies to an intercountry adoption, as in a foreign government's determination that a child is an orphan and/or that the rights of the birth parents (particularly the father) have been properly terminated.

In addition, some States require that a State official independently review all documents relating to the adoption before advising INS of their consent. Further, even in States in which pre-adoption requirements are fully

67/ Section 101(b)(1)F) and Immigration of Adopted and Prospective Adoptive Children; INS.

satisfied by INS requirements, prospective parents may be subject to the Interstate Compact on the Placement of Children. 68/ The Compact is designed to facilitate interstate placements of children, but can easily become a bureaucratic nightmare. Forty-seven States have signed the Compact, which applies to any adoption that involves more than one State, including cases in which an out-of-State agency provides services in an intra-state adoption. This means that petitioning citizens must satisfy two States and, conceivably, three States. The Compact does not mention intercountry adoption, but is frequently applied by State officials whenever services involve an out-of-State agency.

Depending upon the State in which a prospective parent resides, pre-adoption requirements of the State may or may not constitute an additional barrier. Where pre-adoption requirements are an extra hurdle, the degree to which they constitue a problem also will vary according to the State in which the prospective parents reside.

Some popular portrayals of intercountry adoption indicate that the system is insurmountably complex and mysterious. The Wall Street Journal recently noted that "the red tape in South America is so nightmarish that it can leave couples with a lingering paranoia about losing their babies." 69/ Kornheiser notes that a family undertaking an intercountry adoption needs "a lawyer who knows adoption law inside and out." 70/ Similarly, Wishard and Wishard advise that intercountry adoptions "require the services of an attorney in the foreign

68/ Interstate Compact on the Placement of Children (ICPC); American Public Welfare Association; Washington, D.C.

69/ Wall Street Journal; May 21, 1985; p. 30.

70/ Washington Post, December 11, 1983; "Outlook Section".

country and in the United States." 71/ This simply is not the case, at least not on the American end, neither before nor after the child enters the United States. The visa process is bureaucratic, but it is hardly mysterious. A family does not need an attorney to deal with INS. Further, when a family later petitions to adopt the child under State laws, the process will be equally lacking in mystery.

When the adoptive parents seek a State adoption decree, many parents will find that their States use a pre-printed form, in which the family simply fills in the blanks and attaches specified documents. In States that do not use pre-printed forms, so-called forms books are available in any county law library. These forms books offer examples of petitions that have been successfully filed in the State and include references to all documents that the courts require. In addition, most of the larger parent-support groups have standard packages for guiding a family through the State adoption petition. In sum, a family may choose, for many good reasons, to obtain the services of an attorney to handle State adoption procedures for their child, however an attorney is not required.

Even in the foreign country, an independently secured attorney is not necessary if a family works with a foreign orphanage or public agency. Those organizations will have their own attorneys who routinely handle placements. Only with an independent intercountry adoption will a family require the services of an independently secured attorney to ensure that the matter is handled properly in the foreign courts. In the vast majority of cases, retaining an attorney in the United States offers the family nothing it could not do for itself. As this chapter will show, the required procedures are manageable and straightforward.

71/ Wishard, Laurie and William; Adoption: The Crafted Tree; Cragmont Publications (San Francisco), 1979.

In short, the complexity of the system is seriously overstated. The Wishards offer still another example:

> You will need to adopt your child at least once, maybe twice. Some countries require that children be adopted before they leave the country. This can be accomplished by one or both parents actually being present during the adoption proceedings, or, in many countries, by proxy adoption. ... Children adopted by proxy must be adopted again in the United States. ... It may even be necessary to begin adoption proceedings here before the child eneters the country. This may help the child secure a preferential visa. 72/

This passage is so full of half-facts and misleading suggestions that one has difficulty choosing where to begin. First, whether a foreign country grants a final adoption decree or not, the country will have a formal procedure by which custody is granted to the adopting parents. Similarly, proxy adoptions, which are most common in Korea, have not been recognized by INS for nearly 25 years as of this writing. 73/ In any event, the Wishards were speaking of the distinction between the IR-3 and the IR-4 visas, knowingly or not.

Secondly, the suggestion that "it may be necessary to begin adoption proceedings here" presumably alludes to the Federal requirement that State pre-adoption requirements be met before a visa can be issued. With some 87 percent of the children now entering under IR-4 visas, for most families it is "necessary to begin here...." To suggest that "this may help secure a preferential visa" adds a needless sense of mystery to the process. All the children of intercountry adoption enter the United States under preferential visas, be they IR-3 or IR-4

72/ 33/ Ibid.

73/ P.L. 87-301; 75 Stat. 654.

visas. Commentators need not suggest that by some administrative magic, for which the technical skills of an attorney are presumably necessary, adopting parents can hope to secure the very same visa that must be secured in any event.

The popular literature is not alone in commenting about nearly insurmountable complexity. The Child Welfare League of America (CWLA) makes the following comments on the complexity of the process and on the diversity of laws and practices among the various countries.

> Intercountry adoptions are difficult to do. The procedures are complicated. Parents must meet the requirements of the other country which frequently change, and often are not clearly explained. Visa petitions must be completed. This in itself is a formidable and anxiety-provoking task for most.
>
> Laws are different from country to country. Eligibility requirements for parents vary and termination of parental rights occur in a variety of processes. It is difficult to determine what certain legal documents are and what rights they convey or don't.
>
> Not being able to find out much about the other country's agency or institution is often a greater problem than diversity. Often an individual or agency here knows nothing about the organization providing the child. Are they legitimate? Have they come by the child lawfully? Has the child been cared for? What is he or she like? What is the state of its health? Is there an adequate medical or social history? 74/

First, laws change here, too, and that State requirements are not always clearly explained. In addition, variations among the States do not help. CWLA proposes to resolve some of the uncertainties and complexities cited above by organizing "the national adoption leadership (to) collect and disseminate precis of the laws of the countries involved." 75/

74/ Cole, para. 221.

75/ Ibid., para. 222-223.

This is a remarkable set of comments. CWLA inadvertently has offered a strong case for the central position of this dissertation: "let the Feds do it." CWLA is correct when it notes that agencies and individuals in the United States typically have little knowledge about the significance and meaning of various foreign legal documents and rights. However, the State Department and INS can answer these questions definitively. As the following sections of this chapter show, the Federal Government is the only organization, public or private, in the United States that is in a position to answer most of the questions raised here. The U.S. Consul will not need a "precis" of foreign laws to identify foreign legal documents, foreign legal rights, or which rights are and are not protected or terminated by particular documents.

In short, the process outlined above is fully capable of handling the misgivings noted by CWLA. Further, the process is not mysterious and full of administrative magic. Though it can be cumbersome, it is fairly straightforward.

Summary .

This section has shown that the Federal Government has a substantial system already in place for regulating intercountry adoption. INS requires a full set of documents on the prospective parents, including a home study, evidence of financial means, affidavit of support, fingerprints, etc. The INS can investigate any issue that arises and has the benefit of an FBI fingerprint check.

Federal regulation of intercountry adoption in foreign countries is especially important. The U.S. Consul, who is responsible for issuing a visa to a child, benefits from familiarity with the laws and regulations, courts, institutions and government officials in the host country. The State Department provides an

administrative capacity in foreign countries that other institutions and jurisdictions in the United States cannot hope to match. This administrative capacity, along with a medical examination, the personal viewing of the child by the Consul, the required communication regarding any identified problems and the simple fact of on-site location in every country of origin attests to a Federal system that is extensive and highly routinized.

Finally, a major caveat is in order. Neither INS nor the State Department should be mistaken for an international adoption agency for Americans. These agencies are far from that and have no interest in being mistaken as such. Rather, each fulfills statutory and regulatory responsibilities in immigration. The central concerns of INS are that the child satisfies the statutory definition of "orphan," is otherwise qualified for immigration (e.g., health), will have proper care and will not become a public charge. The State Department shares these concerns, but also is responsibile to its host government; no Consulate wants infant nationals of its host country stuck in an international limbo. However, as INS and the State Department execute their respective responsibilities in immigration and/or toward the host national government, they provide an effective Federal system of oversight that other American jurisdictions and institutions cannot equal in intercountry adoption.

Section Three:
Practice & Procedure in Foreign Countries

Section Three reviews practices and procedures in selected foreign countries that, together, account for 83 percent of orphan immigrants. The basic message of this section is simple: the countries from which the children come have their own extensive systems of regulating intercountry adoption. Adoption is not treated casually in these countries. Rather, the regulatory systems are real and are effective. A second purpose of Section Three is to provide some sense of understanding of the cultural differences that exist among the various countries-of-origin, and even within certain countries, particularly those with federal systems of government.

The section emphasizes Korea and Colombia, the largest countries-of-origin in their respective regions. Their practices differ somewhat from neighboring countries, but each can provide a broad appreciation of regional approaches to child welfare and to intercountry adoption. South Vietnam also is examined at some length to place the so-called Babylift in context. Four other countries plus Eastern Europe also are reviewed, but in less detail.

Korea

Korea has been the most prominant country-of-origin for immigrant orphans since the mid-1950's and, for that reason, is reviewed first. Since 1972, Korea has accounted for at least half of all children each year. In the past three years (1983-1985) 15,476 Korean orphans entered the United States. 76/

76/ Immigration and Naturalization Service, Statistics Division; Washington, D.C.

Korea also provides an excellent example of a cultural approach to adoption that differs markedly from that of North America. To understand Korean adoption, we must appreciate the significance of the extended family, "parental authority," and the system of Family Registration (a counterpart to birth certificates) in Korea. Family Registration indicates the special place that the biological family holds in Korea. 77/ The process is governed by national law and is implemented by local government. When a child is born to a married couple, the child is registered in the father's Family Registry, which is located in the home area of the father's family. The child assumes the father's surname, which relates to the family's place of origin.

Under Article 781 of the Korean Civil Code, an illegitimate child may be registered with the father's family if the father acknowledges the child. However, as will be discussed in a later chapter in some detail, pressure from the family seldom permits such a registration. If the father does not register the child, the mother may register the child in her Family Registry, but this is almost never done, as it requires the entire family, in effect, to acknowledge an illegitimate birth, which carries a tremendous social stigma in Korea. If neither family registers the child, Article 781 authorizes the Family Court to establish a new register in which the infant is the only member. The Court assigns the child a surname different from that of either parent (if their identities are known) and a different place of origin.

77/ For an excellent summary of pertinent Korean law, see Chin Kim and Timothy Carrol, "Intercountry Adoption of South Korean Orphans: A Lawyer's Guide"; Journal of Family Law (Vol. 14) 1975.

The Korean code also defines "parental authority" as belonging to the father. 78/ The Code defines parental authority to include protecting, educating, housing and disciplining the child, and managing any estate that the child may have or acquire. 79/ Only if the child has no resident father can the mother exercise parental authority. 80/ In the case of an illegitimate child who is not acknowledged by the father, the mother exercises parental authority. 81/

Abandonment and adoption in Korea also are governed by national law. Article 781 addresses abandonment, while "The Special Law on the Adoption of Orphans," now Article 703 of the Code, addresses adoption. In addition, Article 731 addresses adoption of Korean children by foreigners. Each of these sections builds on the position of parental authority and Family Registration in Korean law and culture.

Under 781, Korean law requires that an abandoned child be reported to the local police, who must investigate the identity of the parents. During the investigation, the police must place the child with a nearby child care agency. After the police investigation, the county government issues a "Request for Adoption of an Abandoned Child," which constitutes a formal government request for the child care agency to seek an adoptive family for the abandoned child.

With the formal request in hand, the child care agency has authority to apply to the Family Court for a new Family Registry for the child. The agency submits a statement of the child's discovery and a copy of the local police

78/ Korean Civil Code, Article 909(1).

79/ Korean Civil Code, Articles 909-917.

80/ Korean Civil Code, Article 909(2).

81/ Korean Civil Code, Articles 909(3) and 928.

department's report on its investigation. After a review by a 3-judge panel, the Family Court may establish a new Family Registry, again with the child being the only member and with a court-assigned surname and place of origin.

If the child is in a public child care institution, the institution's chief officer exercises parental authority. 82/ If the child is in a private care institution, the Regional Governor or the Municipal Mayor appoints a guardian, who has full parental authority. 83/

Before the child can be placed for adoption, public notice is given (15-day period for comment), with further judicial review and permission required for actual placement. Further, under Special Law 703, all adoptions must be processed through adoption agencies that are licensed by the Korean Ministry of Health and Social Affairs. 84/ Agencies must meet guidelines that are prescribed by statute (e.g., so much open space per child, health professionals on the staff, a minimum of one licensed social worker per 30 children in the institution, etc.). In addition, children who are placed with foreign families must be followed by the agency so that it may notify the Ministry of Justice of the child's assumption of foreign citizenship, whereupon the child is de-naturalized in Korea.

Special Law 731, which addresses intercountry adoption, identifies its purpose to be the faciltation of adoption by foreigners in order to help relieve Korea of a serious social problem. The same law requires that prospective foreign parents qualify as adoptive parents under the laws and regulations of the

82/ Special Law 703 (2.1).

83/ Special Law 703 (2.2).

84/ Special Law 703 (3.1).

jurisdiction in which they live. 85/ In addition, prospective parents must be deemed financially and morally capable, must have no incurable disease, and must guarantee the child freedom of education and religion comparable to that which is generally available in the prospective parents' home community. 86/

The Family Court also requires written consent to the adoption from the person exercising parental authority over the child, i,.e., the guardian. If the Court approves the placement with the proposed family, the court transfers parental authority to an international agency licensed by the Ministry of Health and Social Affairs to place children with foreign families. The Ministry limits the number of licensed agencies in order to exercise close control of intercountry placements. Therefore, American families usually work only with American adoption agencies licensed by the Korean Government or that provide support services under contract to an agency licensed in Korea. Travel by the prospective parents is not prohibited, but Korean procedures discourage it.

In sum, "parental authority" cannot be severed in Korean law; someone always has full parental authority over each child. Further, the processes of abandonment and Family Registration conclusively certify that all Korean pre-requisites for abandonment and for adoption have been met under Korean law.

South Vietnam

Vietnam is no longer a significant country of origin for immigrant orphans. However, the procedures that were followed by the Republic of Vietnam prior to its fall in April 1975 are outlined here for two reasons. First, South

85/ Special Law 731 (3.1)

86/ Special Law 731 (3) and (4).

Vietnam once was a major actor in intercountry adoption. From fiscal years 1973 through 1977, a total of 2,634 immigrant orphans entered the United States from South Vietnam. 87/ The second and more significant reason for examining Vietnamese procedures is to relate those procedures to the Babylift in 1975, which took place as the Saigon government was falling. The Babylift has received more than a little attention and is easily misunderstood as being representative of Vietnamese-American adoption; it was not.

The Civil Code of the Republic of Vietnam attached an importance to the family that equalled or even surpassed that of Korea. 88/ For example, Article 17 of the Constitution of South Vietnam acknowledged the family as the central unit in society and held that the family's power could not be superseded in any matter of family concern. In effect, the Constitution acknowledged that Vietnam's social structure was based on the extended family and South Vietnam's adoption laws explicitly recognized this. Granted, this type of constitutional assurance may not be meaningful in many countries, but, in South Vietnam, it was a recognition of an existing and pervasive fact.

One or both birth parents had to approve adoptive placement of a child, not just consent to adoption in general. In the absence of both parents, Vietnamese law established a hierarchical order of consent: (1) paternal grandparents; (2) maternal grandparents; and, in their absence (3) the family

87/ INS, Table 12.

88/ For summaries of pertinent laws under the Republic of Vietnam, see Charles Eddleman, "Immigration and Adoption of Operation Baby Lift Orphans: Tough Decisions in Family Law"; Orange County Bar Journal (Vol. 4:2, p. 164), 1977; and Doris M. Besikof, "U.S. Adoption of Vietnamese Children: Vital Considerations for the Courts"; Denver Law Journal (Vol. 52, p. 771) 1975.

council. 89/ Article 267 of the Civil Code held that if the father could not exercise paternal power, as was frequently the case with the social upheaval caused by an extended civil war, paternal power would be transferred to the mother. In her absence, children commonly were raised by the paternal grandparents and, in their absence, by the maternal grandparents, or, finally, by the family at large.

Under Article 250, the courts assumed paternal authority over an abandoned child or a child recognized as illegitimate. That authority then commonly was transferred by a court to a recognized child care agency. Vietnam also had procedures by which parents could transfer their authority to a court or orphanage, but this was almost never done. 90/ In the event of formal parental abandonment, the courts appointed a guardian and required that documents be signed before a notary in the place of parent's or guardian's residence.

Due to the status of the extended family and the progression of paternal authority, Vietnam recognized no need for a formal public notice comparable to that practiced in the United States. By definition, if a child was abandoned and a village or municipal government could identify no family connected to the child in a society in which few people travelled more than a few miles in a lifetime, the child was deemed in fact to be without a family.

This could be a source of confusion in a number of cases in the United States. Our notion of due process requires, among other things, that public notice be given in order to protect the rights of birth parents. Vietnam also recognized

89/ Civil Code of the Republic of Vietnam, Articles 249, 250, 251 252 and 254.

90/ Besikof, p. 777.

the rights of birth parents, as well as the rights of the extended family, but Vietnam's legal system treated those rights within the context of its own society. A case can be made that the statutory progression of paternal authority provides a system of notice that in fact is considerably more complete than anything practiced in American law. 91/

Family Registration in Vietnam was a second source of confusion in American proceedings related to Vietnamese orphans. Births were not routinely registered in Vietnam. As Besikof notes, many parents did register their children at birth, but most did not because, in a semi-literate society, parents seldom saw the point of doing so. Rather, most children were registered only later in life in order to establish some status under public laws or regulations, e.g., as students or recipients of government benefits.

Even where births were registered, customs varied widely. Registration forms might show when a child entered school, when a child was conceived, when a family celebrated the first anniversary of a child's birth, or, indeed, when a child was born. In short, even if a child had a Vietnamese birth certificate, it did not necessarily tell an American family, agency or court anything certain about a child's age. Further confusing American notions of proper documentation, the birth certificate commonly identified the parents, only to have the director of an orphanage sign the consent to an adoption -- with no accounting for the time elapsed between issuance of the birth certificate and the release for adoption.

This was acceptable in Vietnam and, again, was a result of its social structure and the disruption associated with an extended civil war. That is, orphanages cared both for orphans and for other children who had been placed for

91/ See Besikof and Eddelman.

extended but nevertheless temporary care by parents who could not provide care under the circumstances they faced. Article 14 of the Civil Code required orphanges to keep records of which children were without parents and which had been entrusted only for temporary care by parents who intended to return for their children in the future. Again, in a society in which most people travelled no more than a few miles in a lifetime, orphanage directors were expected by everyone, government and individuals alike, to know the local situation. Directors were known by local residents and directors were expected to know which children were parentless, which were not, and which children had lost their parents while entrusted to temporary care.

Consequently, even prior to the Babylift and the fall of Saigon, the differences in cultural attitudes toward formal documentation versus reliance upon a de facto social system of extended family supervision and thorough familiarity among local residents could lead to considerable confusion in a court or administrative proceeding in the United States.

Prior to the Babylift, the Vietnamese government closely controlled intercountry placements. Authority to place children with foreign families was restricted to a handful of agencies licensed by the national government (Art 14.5). Paternal authority would be transferred only to agencies that were under contract with the Vietnamese government.

If a child had been abandoned, courts transferred paternal authority to a local child care agency. That agency could be an international agency licensed to place children, or a local agency that could later transfer its parental authority to an international agency, of which Vietnam licensed only seven. The agency was then required to conduct its own investigation to determine that the child was

parentless, abandoned or irrevocably released and, if released, that the release was signed by a person who had authority to do so. Articles 249-252 authorized paternal authority to be vested in a child care institution.

When Saigon's fall became imminent, Phan Quang San, who was Deputy Prime Minister and Minister of Social Welfare, gave international agencies permission to remove from the country all orphans who had cleared Vietnam's legal requirements. 92/ Nearly 2,600 children were removed in the midst of utter chaos. INS later determined that 263 (10 percent) in fact were not orphans.

INS defines a child who is unconditionally released to an orphanage to be "parentless". 93/ However, mere placement of a child in an orphanage does not qualify the child as "parentless" under INS regulations, largely in recognition of variations in foreign practices. INS requires that a clear and irrevocable release be clearly established.

The real source of confusion in the Babylift, within the general chaos and panic, was whether "those adults who released Babylift children had the authority to do so," and whether the individuals placing children in orphanages "do so with the intent to reunite later with their children in the United States?" 94/ Under the circumstances, some parents had placed their children in orphanages in the hope of getting their children out of the country before the complete disintegration of the government, and some of those parents later followed their children to the United States, under considerable hardship, in order to reunite.

92/ Eddelman, p. 167 and p. 177n.

93/ 8 C.F.R. 204 (2) d (1).

94/ Eddelman, p. 166.

Nevertheless, the agencies involved in the Babylift performed incredibly weli under the most severe conditions. That 10 percent of 2,600 children were not orphans should not be seen as a sign of failure; rather, the fact that 90 percent were orphans might well be a measure of incredible success under extraordinary conditions. To the extent possible, the emigration of the children was carried out under the requirements of Vietnamese law. The real problem arose after evidence revealed that some of the children had not been released with the understanding that they might be adopted by an American family. Some agencies in the United States, particularly in Michigan, went ahead with placements despite the uncertainty surrounding the question at the time. 95/ Still, INS cleared up this uncertainty within months, and 90 percent of the Babylift children were deemed to be orphans and were permanently placed with American families.

Prior to the fall of Saigon, Vietnamese procedures were different from those in the United States, but their intent and effect were much the same: to determine that a child indeed was orphaned and to provide full notice to all family members. Prior to the Babylift, Vietnam limited international placements to just seven agencies, which the government closely controlled; no other agency could secure an exit visa for a child. In short, despite some confusion about Vietnamese birth certificates, a lack of formal public notice, and use of the social system to help identify the de facto status of an orphan, Vietnam's system was effective.

Howard Altstein comments on the adoption policies of South Vietnam and on the notion, outlined early in this chapter, that some countries may be reluctant to say "no" to representatives of "the rich and powerful United States." Altstein notes that even in the midst of its collapse, the government of South

95/ See Eddelman and Besikof.

Vietnam did not increase the number of orphans who could leave the country. Only orphans whose foreign adoptions had completed all Vietnamese requirements were allowed to leave. Altstein notes that prior to Saigon's fall, South Vietnam discouraged foreign adoptions by lengthy procedures for a child's exit visa, tough adoptive requirements (years married, age, income, etc.), and by requiring all placements to be made through one of only seven licensed agencies, which made close regulation more feasible, but also restricted access. In short, South Vietnam had reservations about foreigners adopting its nationals. Even the imminent collapse of its system of government did not substantially change its willingness to say "no." Cultural pride and nationalism are not so easily discarded. 96/

Nevertheless, the utter chaos surrounding the Babylift did indeed create problems; 263 non-orphans cannot be casually dismissed, nor can one justify the continued placement of those children despite awareness of a significant problem. However, the Babylift is hardly representative of intercountry adoption in Vietnam or anywhere else. Governmental systems do not disintegrate every day. In fact, the Lift should be seen as a significant accomplishment under the circumstances and, in less chaotic times, Vietnamese-American placements should be perceived as having the integrity that they in fact enjoyed.

More importantly, problems that did exist during the chaos of the Babylift were not relieved by State regulation of adoption, particularly in certain States. Those problems were rightfully a Federal burden. Whether the Federal Government could have done a better job on its own in that chaotic period is doubtful, but the burden belonged with the Federal Government; it should not have been passed on to 50 different States, some of which were not up to the task.

96/ Altstein, p. 29.

Colombia

About 600 children join American families from Colombia each year, and about 4 times that many join Canadian and European families. Colombia increased as a country-of-origin very rapidly in the mid-1970's. Just 13 orphan immigrants entered the United States from Colombia in 1970; in 1976 that number surpassed 550 and, in 1981, 650. Since then, the number of children from Colombia has levelled off at about 600 per year.

In testimony before the U.S. House of Representatives in 1977, the State Department attributed the increase in American-Colombian adoptions to three factors: (1) Colombia's willingness to allow foreigners to adopt; (2) the sheer numbers of children available for adoption; and (3) the "extraordinary effectiveness of word-of-mouth 'advertizing'" by American families who had completed successful adoptions in Colombia. 97/ Also, the State Department had noted at the time that Colombian adoptions soon would level off, since Colombia appeared to be approaching its administrative capacity to process children for emmigration with adoptive families. That projection appears to have been accurate; hereafter, Colombian-American adoptions should remain fairly stable.

The State Department also has noted that the increase in American-Colombian adoptions was closely related to increases in Colombian expenditures for child welfare in the early 1970's, when Colombia vested adoption authority in the Instituto Colombiano de Bienestar Familiar (the Colombian Family Welfare Agency). Headquartered in Bogota, Bienestar has operations throughout the country. Bienestar licenses orphanages and public agencies to place children for

97/ House Judiciary Committee Document 118, 1977.

adoption and reviews all adoption applications and petitions in the country; independent adoptions are no longer permitted. Bienestar has moved steadily toward centralizing all adoption activity in Colombia.

Colombia now has a well established and respected child welfare system. Before the cited increase in government spending, La Casa de la Madre y el Nino had been the only orphanage officially licensed to place children for adoption. La Casa remains a relatively small and first class operation. Since then, Bienestar has licensed a number of adoption agencies that the State Department's House testimony characterized as "reputable." In 1972, Bienestar licensed the Fundacion para la Adopcion de la Ninez Abandonada (FANA). In 1975, Fundacion los Pisingos ("The Ducklings") was licensed primarily to provide adoptive services and long-term care for older children. Bienestar also has licensed Cenetro de Adopcion Chicquitines in Cali and the Unwed Mothers' Home in Bogota.

FANA began operations with a close relationship with the Florence Crittendon League in Boston. FANA has maintained its ties in Boston and now places children through American agencies in other U.S. cities, such as the Barker Foundation in Washington. FANA remains the only significant agency in Latin American agency that places children abroad only through foreign agencies. Except for FANA, Colombian agencies prefer to work directly with the families who seek to adopt their children. This is generally the practice throughout Latin America, and is a major difference from practices in Korea and most other Asian countries. The State Department has characterized Colombian agencies as applying a demanding scrutiny to applications. 98/

98/ Embassy memo to Washington as briefing for OAS Conference; Bogota, 1983.

The typical procedure for prospective American parents in Colombia (and elsewhere in Latin America) is to write a detailed (positive but honest) introductory letter to an agency to request application. The application must be returned with a number of documents that INS also requires, such as a marriage certificate, a home study, evidence of financial ability, etc. An agency then sends a report to the prospective adoptive parents proposing a particular child, with information on the child's health and whatever else is known about his or her background (which, except for some older children, is usually very little).

After a child is assigned to adoptive parents and preliminary procedures have been completed, the agency directs the parents to appear at the agency on a given date (usually on short notice), whereupon the petition to adopt is presented to a juvenile court. Bienestar already will have reviewed the application and documents and will submit its recommendations to the Court. Bienestar and the orphanages it has licensed have established a solid reputation with Colombian courts. As a result, following judicial review of the petition, the courts almost always confirm a positive recommendation from Bienestar. 99/

In all but a few cases, the parents receive an interlocutory order, with which they can obtain an exit visa for the child. Six to nine months later, a final decree is granted. Parents usually must travel to Colombia; Colombian courts, as well as Colombian agencies, have a general aversion to granting custody to unseen parents. La Casa, for example, makes no final decision on a placement until the parents present themselves at the orphanage for a face-to-face interview.

99/ Ibid.

The problem for American parents, however, is that this system can take time. In the case of La Casa, the policy of waiting until the parents arrive before making a final decision and, therefore, before submitting a petition to the court, often means that at least one parent must remain in Colombia for three to six weeks. Though some parent-support groups recommend a network of private homes that offer relatively inexpensive lodgings and food, costs can add up. However, the conclusion here is straightforward and important: Colombia has an extensive regulatory system that treats intercountry adoption with care and integrity.

Brazil

In 1985, 240 Brazilian children joined adoptive American families, compared to just 15 in 1978 and 25 in 1979. 100/ Brazil has long had a strong middle class and most of its orphaned children had been adopted locally. However, intercountry adoption increased with the severe recession beginning in the late-1970s. Yet, this is rather modest for a country of 120 million.

Like the United States, Brazil has a federal system in which its 24 states basically control adoption. Therefore, to speak of "Brazilian" procedure is a misnomer, though most of the children come from just two areas: Recife in the northeast, Brazil's poorest region, and Sao Paolo in the south.

Generally, adoptions can be undertaken through Brazilian agencies, American agencies or independently. Brazilian courts conduct their own review of a petition and most Brazilian states require review and approval from their

100/ INS, Table 12 and U.S. State Dept., Visa Office.

child welfare departments. Foreign parents almost always must appear personally in court. Lengths of stay vary, depending upon the state and/or the agency (U.S. or Brazilian) with which one is working.

Brazilian states have become less willing to grant final orders of adoption to foreigners. From 1976 through 1979, final orders of adoption were obtained for 73 percent of the orphan visas. By 1981, that figure had decreased to 39 percent and in 1984 to just 5 percent. Most of the children now leave Brazil under interlocutory orders, with final decrees following 12 months later. 101/

Chile.

Over 150 Chilean children entered the United States under orphan visas in 1983 and again in 1984. 102/ Like Colombia, Chile has a well established system of public and private care for children. La Casa Nacional del Nino (National Home for Children), Nuestra Senora de la Paz (Our Lady of Peace), the Institute Chileno de Colonia y Campanentos (Chilean . Agency for Municipal Districts) and Padre are among the larger organizations licensed in Chile to place children for adoption.

Non-residents cannot obtain final orders of adoption in Chile, but receive permanent guardianship and "custody to adopt overseas." In addition, Chilean courts have become more demanding in their review of petitions, as has the Chilean Government in reviewing applications for passports for the children. 103/

101/ Ibid.

102/ Ibid.

103/ Memorandum, U.S. Embassy in Santiago to Washington; Jan., 1984.

The procedure is as follows: a petition for guardianship is filed with the Court of Minors of the municipality in which the child resides. The petition may be filed by a Chilean attorney or a Chilean agency or orphanage on the adoptive parents' behalf. The Municipal Courts then investigate all petitions for guardianship. If the Court is satisfied that the child is an orphan and that the family can provide and care for the child, an order of guardianship may be obtained. With a court order in hand, a guardian can apply to the Chilean national government for an exit visa for the child, whereupon the national government independently reviews all documents.

American agencies, particularly around Washington, D.C., have become more active in Chile, but most American-Chilean adoptions are handled directly by Chilean agenices or by independent sources. In those cases, at least one parent must appear in Court in Chile. With American agencies, an escort for a child can sometimes be arranged, but even in the case of most American agency adoptions, the parents must travel to Chile. Either way, the length of stay in Chile usually is brief (3 to 5 business days). This helps reduce overall costs, but the expense of travel to Chile places Chilean adoptions among the most costly, averaging about $8,500 in 1984. 104/

As with Korea and Colombia, one can only conclude that the Chilean system of regulating intercountry adoption is extensive and reliable. The U.S. Embassy in Santiago has advised the State Department that investigations by the municipal courts, the Chilean national government and the U.S. Consulate in

104/ LAPA, Maryland Region.

(in executing its visa responsibilities) have consistently established the legal integrity of intercountry adoption in Chile. 105/

Costa Rica

From 1980 through 1985, 469 children entered the United States from Costa Rica under I-600 procedures. 106/ Because Costa Rica, much like Brazil, has a strong middle class, most orphans are adopted by Costa Rican nationals. Most of the children adopted by foreigners are four years old or older, except for members of sibling groups. Unlike many other countries, most of the children leave under a final order of adoption. Costa Rica typically does not allow its minors to leave the country in the custody of a foreigner without such a decree.

Costa Rica also has a well established system of child care and supervision. As in Colombia, a centralized agency of the national government reviews all adoptions. The Patronado Nacional de la Infancia (National Child Welfare Board) receives a copy of any adoption petition filed with a civil court, along with copies of all supporting documentation. Patronado is also free to request additional documentation not required by the court.

Patronado then formally advises the court of its approval or its objection to the petition. The courts routinely add their own review of the petition. An approval from Patronado is no guarantee, but the courts always defer to a request for further study and investigation if Patronado files an objection. Finally, if a petition is approved by Patronado and is granted by a civil court, Costa Rica's

105/ Memorandum, U.S. Embassy in Santiago to Washington, January, 1984.

106/ INS, Table 12, and U.S. State Dept., Visa Office.

Supreme Court then reviews the petition and supporting documents. 107/ Though this review is usually routine, it can sometimes result in denials.

Patronado has a reputation of being particularly sensitive to the circumstances in which a child becomes available for adoption. If Patronado has the slightest misgiving about the child's status as an orphan, it will file an objection with the civil court. 108/ In addition, Patronado and the civil courts are reluctant to work through foreign agencies; they insist on maintaining control over the placement and petition. In short, Patronado's message has long been that of "no independent adoptions and no foreign agencies, please." 109/ Still, independent adoptions are legal in Costa Rica. Given Patronado's relationship with the civil courts, its broad discretion in requesting further investigation and its strong preference that adoptive parents apply directly to Patronado, if a family undertakes an independent adoption in Costa Rica (as indeed some do) and emerges with a final order of adoption, the United States Government and the American States can be assured that the adoption was fully legal in Costa Rica.

El Salvador

American adoptions of Salvadorean children increased from just 48 in 1974 to 367 in 1984 and 309 in 1985, with similar numbers adopted by Europeans and Canadians each year. In a country roughly the size of Massachusetts, this is a very high level of foreign adoption, though only half the per-capita rate of Korea.

107/ Embassy briefing for OAS Conference; San Jose; March, 1984.

108/ Ibid.

109/ Ibid.

Much of the sustained increase in intercountry adoption in El Salvador must be associated with the political violence that has steadily accelerated since the aborted presidential election of 1972. Nevertheless, the U.S. Embassy in San Salvador has advised that fewer Salvadorean children may be available for adoption than one might assume. The U.S. Embassy noted in March 1984 that:

> the Government of El Salvador takes great pains to verify that the children have indeed been abandoned or have lost their parents and are not simply temporarily separated from their families as a result of the hostilities. 110/

Less than 2 percent of the children leave El Salvador under a final order of adoption. 111/ Most leave under legal guardianship, with a formal classification of "custody to adopt overseas."

The Ministry of Justice reviews all petitions for guardianship as part of its responsibilities for operating public orphanages. The Ministry will work with individuals or agencies, but much prefers working directly with the prospective parents. Though independent adoptions are more common than are placements through the Ministry of Justice, the Ministry has long preferred that prospective parents apply directly through its own orphanages. 112/

Petitions are filed with the Court of Minors, which investigates the child's adoptive status and requests review from the Ministry of Justice if the placement does not originate from that government agency. Biological parents

110/ Embassy Briefing for OAS Conference; San Salvador; March, 1984.

111/ See Table 8.

112/ Write to Seccion de Adopcion, Procuraduria General de Pobres, Centro de Gobierno, San Salvador. (Embassy briefing, March, 1984.)

must be shown to have irrevocably terminated their custodial rights or the child must be found to have been abandoned.

In their efforts to establish that the children indeed are orphans, and not just temporarily separated from their parents, the courts benefit from a well established system of birth records. Next only to the United States and Canada, El Salvador may have the most complete national system of recorded births in the Western Hemisphere. 113/ This remains true even in the midst of a civil war.

Though Salvadoran law does not require it, the courts almost always insist that at least one parent appear before the court to be interviewed. Petitioners can expect to travel to El Salvador and complete all formal business in 3 to 5 workdays. This short stay and relatively inexpensive travel help to make El Salvador affordable to adoptive parents.

Mexico

Its 32 states and the Federal District (Mexico City) give Mexico, like the United States, 33 different sets of practices in adoption. With 320 orphans entering the United States in 1984 and 1985, Mexico is not a dominant country in intercountry adoption, but is still significant. 114/

The reason that the numbers are not higher, despite Mexico's proximity to the United States, is that many of the states simply and effectively discourage adoption by foreigners. Other states do permit adoption by foreigners but will delay an adoption indefinitely if they have any misgivings. Still other states allow

113/ Embassy Briefing for OAS Conference; San Salvador; March, 1984.

114/ INS, Statistics Division, Washington, D.C.

foreigners to adopt, but may require multiple court appearances. This increases travel costs and, at some point, disrupts jobs, family life, etc., so severely as to restrict adoption by foreigners. The majority of the I-600 children entering the United States from Mexico come from just two jurisdictions: the state of Baja California and the Federal District.

Eastern Europe

Eastern Europe accounts for less than 0.5 percent of intercountry adoptions in the United States, with three-fourths of those children coming from Poland. Despite the modest numbers involved and the obvious political difficulties, a review of Eastern Europe helps make the point that intercountry adoption operates within a varied universe and that the children indeed come from everywhere. From 1980 through 1985, the latest five years for which data is available, American families adopted 157 children from Poland, 29 from Jugoslavia. 6 from Romania, 5 from Hungary, and 3 from the Soviet Union. 115/

Eastern Europe also combines certain Western and Oriental traditions in adoption. That is, the "blood tie" in one sense or another remains important, as does the Western tradition of "strangers adopting strangers." The sense of "blood tie" is expressed in different ways. Poland requires evidence that the grandparents of one adopting parent were born in Poland. 116/ Jugoslavia, in practice, restricts intercountry adoption to expatriate natives and to Jugoslavs living as

115/ Ibid.

116/ Letter from U.S. Embassy, Poland; March. 1982.

guest workers in other countries. 117/ Hungary and Czechoslovakia require that all acceptable applications from resident citizens be filled first and then restrict foreign adoptions to prospective parents who can show that they have active family ties with the country. 118/ The required "blood connection," therefore, is much in the Germanic tradition of suggesting a kindred link to the land or to the whole people. Only Romania 119/ goes so far as to restrict foreign adoptions to relatives of the child; just 10 Romanian children entered the United States under I-600 procedures from Romania from 1976 through 1985. 120/

Adopting in Jugoslavia is further complicated by a federal system. Courts and municipalities must approve an adoption petition, which then is reviewed by a central agency at the Republic level. Then the federal government independently determines whether or not to issue an exit visa for the child. 121/

Other countries in the region also have significant interjurisdictional procedures. In Romania, the local People's Council must grant permission for the prospective parents to visit the child. If the prospective parents decide that they wish to adopt the child, the People's Council requires documents much like those reqiured in most countries. If, following that visit, the People's Council approves, the petition goes to the Romanian Council of State for an independent review and

117/ Letter from US Embassy, Poland, March, 1982.

118/ Letter from US Embassy, Jugoslavia, March, 1982.

119/ Letter from US Embassies, Hungary and Czechoslovakia, March, 1982.

120/ Letter from US Embassy, Romania, March, 1982.

121/ INS, Table 12.

investigation, which takes about 9 months. The adoptive parents then may return to Romania to obtain the child's exit visa, which usually takes about a week. 122/

In Poland, where the Roman Catholic Church operates a large part of the child care system, an intercountry adoption must balance Church and state. Both religious and civil authorities expect prospective parents to demonstrate an acceptable level of appreciation for Polish tradition and culture. In addition to requiring evidence of grandparents born in Poland, both the state and Church prefer families that most likely could raise a child in a manner that encourages a sense of Polish identity. The Church also requires evidence of active membership in a religion, but not necessarily Catholicism, though families must promise to raise the children Catholic if they already have been baptized. 123/

Summary of Section Three

Section Three outlined procedures in different countries to show that those countries meet their respective needs and concerns in significantly different ways. However, the section has shown that the major countries involved share certain basic concerns that children be adopted by families who will provide properly for them, that their orphan status be clearly established, and, generally, that intercountry adoption is extensively regulated in those countries. The countries reviewed here accounted for three-fourths of all immigrant orphans in 1985, with Korea alone accounting for nearly 60 percent. Colombia, El Salvador and Brazil account for another 13 percent.

122/ Embassy letter, Romania.

123/ Embassy letter, Poland.

Section Four:
Locating a Child

The most basic question in intercountry adoption is how a family in the United States locates an adoptable child in a foreign country. This section outlines four basic ways in which an American family can pursue an intercountry adoption. The central purpose here is to make the point that the system is manageable for any family who should choose to get through the process on its own. The system is cumbersome and sometimes frustrating, but it is not shrouded in baroque legalisms for which expert assistance is required. A family has four alternatives: (1) work through an American or international agency that places foreign children in the United States; (2) contact and work directly with a foreign orphanage or agency that is licensed by its government to place children for adoption; (3) locate a child independently; and (4) work through an American "facilitator" (an intermediary).

American Agencies

A number of American agencies have working relationships with foreign agencies or international programs of their own. For our purposes, an "agency placement" denotes those instances in which an American adoption agency exercises guardianship over the child and, therefore, functions much as it would in an adoption within the United States. This definition excludes those cases in which American agencies in effect act as third parties, which is often the case in Latin America, where American agencies normally do not have extensive working relationships with foreign agencies and seldom receive legal custody of a child.

Where an American agency receives legal custody of a child, the agency exercises its best judgment on behalf of a child for whom the agency is responsible. This is the case in all Korean-American adoptions, since parental authority (as defined by the Korean Civil Code) is transferred to an American or international agency. This also was the case in South Vietnam prior to April 1975.

In these cases, the agency retains custody during a temporary period. As in domestic adoption, the agency thereby retains the option of removing a child from a home prior to a final adoption decree if the best interests of the child so dictate. This very rarely happens, but the point is that the American agency is the placing agent and the agency's procedures and concerns will be much the same as in a domestic placement. Similar procedures may apply to intercountry adoptions from other regions of the world, but to a far more modest degree. Generally, in Latin America, if an American agency is involved, it serves only as a consultant to the family. In most cases the foreign agency and/or foreign court will retain temporary custody.

Whether an agency functions as a custodial agent or only as a consultant, an American or international agency can have two major attractions to a family seeking to adopt abroad. First and foremost, the agency may have access to children through an established and routinized relationship. Secondly, an agency will provide advice on and, in some cases, actually perform required procedures, though in most cases the family will have to accomplish most of the procedural steps for itself.

In the case of Korean-American placements, agencies have still other attractions. The first and most basic advantage is that they are the only option: if one wishes to adopt in Korea, one must work though an American or

international agency. Secondly, Korean-American placements have a history of more than 30 years. The system is well established and is highly reputable and routinized. Common practice includes escorted transportation of the children to the United States. Normally, one adult will accompany three children. As a result, a family absorbs the cost of just one-third of one round-trip ticket to Korea and avoids the cost of two full round-trip tickets and hotels, as would be required if the adopting parents had to travel to Korea. This makes Korean placements the least costly of the major countries active in intercountry adoption.

Direct Placements

In direct placements, an American family works directly with a foreign agency or orphanage that is authorized under its domestic law to place children for adoption. All communication is with the foreign agency or orphanage, which makes all decisions in selecting families and placing the children in its care.

Foreign agencies that will work with Americans can be identified in a number of ways. The most common method is to contact a parent-support group. Three such groups are: Families Adopting Children Everywhere (FACE), which is most active on the East Coast; Latin America Parents Association (LAPA), which also is most active on the East Coast, but also has chapters in Chicago, Los Angeles and Albuquerque; and OURS, with chapters mainly in the Midwest, particularly Minnesota. These are only the three largest of dozens of such groups.

The other major ways of identifying a foreign agency or orphanage are rather straightforward: word-of-mouth from someone who has completed a

foreign adoption; personal or family contacts in foreign countries; and through a foreign country's embassy or its national child welfare agency. Even if a family obtains information from a foreign country's embassy or personal contacts, the family usually will be well served if it contacts a parent-support group that can provide assistance with procedures and/or contacts with other families who have adopted through a particular source.

In direct adoption, the family typically writes to the foreign agency or orphanage (in the local language) to express its interest in adoption. The letter normally would include basic information on the family, such as the ages of the prospective parents, marital status and/or years married, number of children, their ages, family income, formal education, occupation, religious practices, etc. However, the letter should also include any items the family feels could eliminate it from consideration, such as a previous divorce, serious medical conditions, etc. The purpose of including any potentially exclusionary factors is simply to avoid wasting time and effort: if an agency will not work with a family, it is best to learn this early.

As a rule, if an agency responds with an application and a request for documentation, the family is nearly assured of eventual success with that agency. This is the common practice among adoption agencies in Latin America. If a Latin American agency sends an application, that generally means the agency liked what it saw in the introductory letter and, if the letter can be substantiated with documentation, the agency will place a child with the family.

The most common advice is that a family should contact as many agencies as possible, <u>but</u> actively pursue just one. That is, a family should file an application and supporting documents with just one agency <u>and</u> then take the

necessary time to write to all other agencies that sent applications to inform them that the family has decided not to pursue an adoption through them at this time. This not only spares the agencies unneccsary work, but keeps the family's options open for the future.

Considerable time and effort can be saved by obtaining information on as many foreign agencies as possible. To the degree possible, a family should identify in advance those agencies whose requirements may disqualify them as applicants, e.g., based on age, religion (seldom a factor in direct foreign adoption), number of children, years married, etc. This type of information gcnerally is available through parent support groups and can save everyone (families and foreign agencies) considerable time and effort.

Independent

In an independent foreign placement, the family works through a third party who is not licensed as an adoption agency in the foreign country. Most commonly, the independent source is an attorney, but frequently may be a physician or a member of the clergy. Independent placements are legal and common in many foreign countries (as they are in the United States). However, a simple but important caution is that a family should know or find out exactly who the third party is. This can be accomplished much in the same way as with direct placements: through parent-support groups or personal contacts in foreign countries. Personal contacts are probably the most common link in independent foreign placements.

The role of an independent third party is easily misrepresented and requires some discussion. The most obvious and most critical caveat is that the

family must know, or know the reputation of, the independent party with whom it is working. If the party is not known personally by the family or by a trusted friend, then the family must find out! Again, parent-support groups frequently can help here. To go into a third-party arrangement with an unknown quantity at the other end is foolish, as well as risky. The risk that the party may be inexperienced or incompetent is greater than the risk of illegality, though that too can be a factor.

However, third-parties can become as much of a local institution as any formal organization. In some cases, e.g., Costa Rica and Honduras, experienced third parties frequently arrange adoptions before children enter the more restrictive public systems. In other cases, the third party may be an institution in his or her own right. A Peruvian priest, known only as Father Ken, now deceased, offers a classic example. In Latin America, particularly in rural areas, a birth parent who wishes to find care for a child or to arrange an adoption may approach a priest for help. Father Ken often functioned like an agency. Based on correspondence with an adopting family, a home study and on his own extensive contacts in the United States, Father Ken made all the decisions in placing three to five children per year in the United States.

The point here is simple but important. Independent sources in foreign countries should not be presumed to warrant suspicion, any more than is the case with an independent adoption in the United States. Nevertheless, the critical caveat remains: one must know, or learn, about the third party with whom one proposes to work. Again, experience and competence are greater concerns than any issue of integrity.

American Facilitators

A so-called "facilitator" is the American counterpart to the foreign third party. The facilitator does not act as an agency but, more accurately, as a consultant to the family. The facilitator may advise on requirements in the United States and may be especially familiar with a particular foreign country or a particular foreign source. The facilitator also may work sometimes, in effect, as a consultant to an established foreign source, but the facilitator will not have control over the placement of a child, nor will the facilitator have any legal standing in the adoption.

Working through a facilitator requires the very same caveats outlined above with foreign third parties. That is, know or learn about the facilitator beforehand. However, the role of a facilitator can be confusing and may require additional caveats. Confusion arises because many American adoption agencies in fact function only as third-party consultants, or facilitators, in a given country, even though the same agencies may perform full adoption services in the placement of children from other countries. The "facilitator-agency" is most common in Latin America, where American agencies have yet to establish a strong base. A number of American agencies place children in the United States through Latin American sources. In these cases, the agency almost always functions, in fact, as a third-party facilitator, rather than a full-service adoption agency. One useful test is to determine whether the agency has custody of the child from the foreign court.

The principal attraction of a facilitator is access to a routinized source, but facilitators do not always have access to such sources. The second attraction is the expectation of experience with the system and, therefore, of useful advice.

However, the principal caution is that the facilitator seldom offers services that the family could not perform for itself, even including access to an established source. The second caution is to learn of the facilitator's experience with the particular country and particular source under consideration. A facilitator (individual or agency) may have an excellent reputation, but may not have much experience in the country under consideration. As with the foreign third party, experience and competence cannot be assumed.

These caveats notwithstanding, families can be well served by a facilitator. Many will have routinized relationships with one or more foreign sources or, at least, considerable experience in a particular country. Secondly, the family may be spared some scurrying about to obtain translations, authentication of American documents, etc. Finally, a family may simply feel more secure with a facilitator providing a degree of assistance. The principal point here, therefore, is that facilitators indeed have services to offer that a family may choose to purchase. Families merely need to understand the role of the facilitator and the nature of the services that are being purchased.

General Precaution

Whether a family adopts a foreign child through an American agency, a foreign agency, independently or with the assistance of a facilitator, the family should always determine exactly what is included and not included in quoted fees. If a quoted fee sounds too good to be true, it probably is too good to be true. The family needs to estimate its "bottom line" costs. A family should determine if quoted fees include translations, preparation of documents for foreign courts, phone calls, transportation, fees in the other country, post-placement services

(e.g., a follow-up study of the home that a foreign agency, foreign government, American agency or an American State may require), etc.

Chapter Summary

This chapter outlined the procedures of the Federal Government and of foreign governments in intercountry adoption. The Federal regulatory system has been shown to be extensive, with an on-site administrative capacity in foreign countries that cannot be matched by other American jurisdictions or institutions. The concentration of orphan visas in certain countries (see Table 8) indicates that U.S. Consular Officers work with appropriate institutions, courts, governments, regulations and laws in those countries on a daily basis. The U.S. Consul is the best situated American official to identify problems or to take appropriate action. Though the system is not fool-proof, Section One showed that the Federal system of regulating intercountry adoption very nearly eliminates the chance of last-minute, horrific surprises for adoptive American families.

Section Two outlined foreign governmental practices and showed that they, too, are extensive. In fact, from the perspective of an American family that is anxiously awaiting an adoptive placement, foreign requirements often seem too rigorous and demanding. Foreign governments, juvenile courts, orphanages, and public child welfare agencies do not treat lightly the notion of foreigners adopting their young nationals. Certain foreign countries also were shown to have well established child care systems and institutions.

Together, Sections One and Two are evidence of a well regulated system, both here and abroad. Though certain foreign customs and procedures may cause some confusion in the United States, such as the Vietnamese system of registering births, the foreign and Federal systems are shown to be serious, and to have legal integrity.

Section Three then outlined how an American family might undertake the process. Four approaches were identified, none of which was presented as "best;" each has its strengths and weaknesses. Major caveats were: (1) know or learn of all parties with whom one is working; (2) do not simply assume that someone has extensive experience appropriate for every case; (3) find out exactly what services one is buying; and (4) obtain an estimate of "bottom-line" costs.

PART TWO

CONSTITUTIONAL VALUES

Part Two consists of three chapters that examine, at some length, the constitutional values in intercountry adoption. The term "constitutional values" is carefully chosen here and is important to this dissertation. "Constitutional value" is not a synonym for constitutional law, per se. Rather, the term means something akin to what John Rohr and others call "regime values," a term which appears with some frequency in the Public Administration literature. 124/

This refers to a limited number of fundamental "beliefs, passions and principles that have been held for several generations by the overwhelming majority of the American people." 125/ These are the fundamental values by which a people conducts its business of governing and which government is expected to ensure and protect. Such values are distinguished by their universality and staying power; they are not the temporary passions of a particular faction, but are fundamental and lasting. In a very real way, regime values function as a secular religion.

Despite, or because of, our pluralism, Americans indeed have developed some values that qualify as "regime values." Rohr suggests freedom, equality and property as three such values. 126/ We could add some of the values identified as

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124/ Rohr, John; Ethics for Bureaucrats; Marcel Dekker, Inc. (New York, 1978); Hart, David; "The Virtuous Citizen, the Honorable Bureaucrat, and 'Public' Administration", Public Administration Review, March, 1984, pp 111-119; and Rosenbloom, David H.; Public Administration and Law, Marcel Dekker (NY, 1983).

125/ Rohr, p. 59.

126/ Ibid, p. 67.

early as de Tocqueville, such as our national faith in the courts as the arbiter of nearly any dispute. We might also add the values of federalism and separation of powers. All these values are important in Part Two of the dissertation.

As with freedom, equality and property, we may -- do -- lack a single, detailed definition of these values, but, as a people, we share some vague but important meanings, symbols and notions when we speak of these values. Such values offer a source of moral authority in our pluralistic, non-sectarian society.

The serious question for this dissertation is not whether Americans have a set of regime values, however vaguely defined. Rather, the question is the basis on which we identify those elements in our national enterprise of governing that are consistent with or that conflict with those values. Rohr argues that we should look to the Supreme Court for guidance in such matters.

Because we do not have a single, definitive meaning of our various regime values, we turn to the highest moral source of civil authority, the Constitution, for meaningful statements about the nature and content of those values. Here the Court serves an important teaching function. 127/ With its varied opinions, the Court offers the best source for a disciplined effort to treat these values over time. 128/ As Ralph Lerner has put it, the Supreme Court functions much like a "Republican schoolmaster." 129/

The concept of regime values will be used here as a tool for developing a critique of our public policies in the field of intercountry adoption. These values

127/ Ibid, p. 68.

128/ Ibid; Forward by Herbert J. Storing.

129/ Supreme Court Review; Chicago University Press (1967), pp 127-180).

are used as a standard by which to judge whether our public policies and public behavior are consistent with the standards we have established for ourselves as a nation. This goes beyond the question of whether something is "legal." Rather, it asks whether it is "right," by which I mean whether it is in harmony with the normative standards of our consitutional values. For example, the Supreme Court's ruling of "separate but equal" was legal, but it was never exempt from severe moral criticism. However, this dissertation goes a step further than the teaching tool for which Rohr recommends regime values. Rather, the dissertation uses regime values as a tool of policy analysis. This is more consistent with David Hart's use of the term than with Rohr's.

> "When the moral truth is found, understood and believed, then action necessarily follows. The regime values, by their nature, require embodiment in action." 130/

Using constitutional or regime values as a standard by which to judge law or public policy is hardly new. It is an American expression of the Western tradition of "Higher Law," which holds that the law of man is subject to moral law. This idea has been expressed by writers as diverse and revered as Plato, Aristotle, Seneca, Augustine, Aquinas and the authors of the Federalist Papers. Gregory Foster offers a good contemporary expression of the same concept.

> Is law open to moral criticism? Does the admission that a rule is a valid legal rule preclude moral criticism or condemnation of it by reference to moral standards or principles? ... Justice is not a rule or set of rules, it is a moral principle by which we mean a mode of choosing (that) which is universal. 131/

130/ Hart, p. 115.

131/ Foster, Gregory D.; "Law, Morality and the Public Servant", Public Administration Review, January-February, 1981, p. 29.

Certainly, not all the material discussed in Part Two reaches the level of moral philosophy implied in the literature on regime values. This dissertation seeks to amend a particular clause of a particular statute. Generally, the more specific we get, the more difficult it is to sustain the broad agreement required of a regime value. Nevertheless, regime values provide the normative foundation for the discussion that follows and for the basic weaknesses found in existing policies affecting intercountry adoption.

In Part Two, Chapter Three reviews Federal case law to establish that the power of the Congress over immigration is plenary. Therefore. if the Congress were to eliminate the States from intercountry adoption, it would be on solid constitutional grounds, because the States enjoy only those powers in immigration that they have been explicitly granted by the Congress. The States possess no inherent constitutional powers of their own in matters of immigration. The chapter goes on to show that the current Congressional policy of inviting the 50 States to approve or veto an immigration petition to the Federal Government conflicts with a number of constitutional principles that have remained firmly established for over 100 years.

Chapter Four examines selected areas of family law to establish a number of critical points. First, "fundamental" values, i.e., regime values, are often at issue in family law and such issues commonly involve the Fourteenth Amendment and, thereby, come under Federal jurisdiction. Secondly, examining the substance and/or existence of family relationships is not foreign to INS nor to the Federal judiciary, nor are issues such as the "best interests of the child" foreign to the INS and Federal judiciary. Finally, full-faith-and-credit among the States, i.e., the vehicle by which one State is assumed to extend full legal

recognition to the actions of other States, is rather pourous in family law and does not offer the legal protection suggested by arguments favoring a State role in intercountry adoption. For example, the exercise of police power by the States does not always preclude Federal jurisdiction; a State claim to absolute jurisdiction over all adoption and the delegation by Congress of its plenary authority in the immigration of alien orphans are not as strong as the constitutional principle of plenary Federal jurisdiction in immigration.

As a result, the central recommendation of this paper, that the Federal Government should act alone in intercountry adoption, is not a far-fetched notion. In fact, unilateral Federal action already is the case with two of the three classes of foreign adoptees recognized by Federal immigration law, including about 15 percent of all I-600 orphans.

Chapter Five most directly addresses questions of regime values and whether the current system is inconsistent with the fundamental rights of citizens who petition the Federal Government to classify an alien orphan as an immediate relative for the purposes of immigration under an IR-4 visa. Of equal importance, the chapter asks if citizens have a right to seek adoption and whether that right is protected by the United States Consitution.

This question does not presuppose that government lacks a compelling interest in regulating adoption for the best interests of the child, nor, therefore, that all citizens have an unqualified right to adopt. However, it does ask whether citizens at least have the right to pursue adoption. In addition, because Federal immigration law says that all citizens are entitled to petition the Federal Government to classify an alien as an immediate relative, the chapter asks

whether a citizen who pursues adoption through Federal regulation of adoption has the right to equal protection and uniform treatment of the immigration petition.

The chapter does not definitively answer the questions posed because the courts have never directly addressed them. However, the chapter suggests that citizens may indeed be denied due process and/or equal protection by being exposed to substantial variations in State pre-adoption requirements and, thereby, to 50 different immigration systems.

The current system also may infringe upon other rights that the chapter establishes as fundamental and protected by the Constitution. They include the right to a sacred relationship in marriage and the right "to have offspring" by which the Nation "fosters a way of life, ... a harmony." 132/ The chapter also shows that individuals have a constitutionally protected right to obtain information about and to practice birth control 133/ and to an abortion. 134/ Even a minor is shown to have a constitutionally protected right to an abortion without parental consent if she can show that she is mature enough to make her own decision, or if a court determines an abortion to be in the best interests of the minor. 135/

All these individual rights are shown to be protected by the Constitution. The chapter then explores whether one's desire to adopt, and thereby "to have offspring" and to "foster a way of life, ... a harmony," merits a degree of

132/ Griswold v. Connecticut (85 S.Ct. 1678) 1965.

133/ Ibid.

134/ Roe v. Wade (93 S.Ct. 705) 1973; City of Akron v. Akron Center for Reproductive Health, Inc. (103 S.Ct. 2481) 1983.

135/ Bellotti v. Beard (99 S.Ct. 3035) 1979; H L v. Matheson (101 S.Ct. 1164) 1981.

constitutional protection comparable to that extended to protect individual rights and the sanctity of the family in the areas of birth control and abortion. The chapter argues that the vehicle by which thousands of citizens seek to fulfill their desire to adopt, the I-600 petition to the Federal Government to classify an orphan as an immediate relative for the purpose of immigration, should at least be guaranteed uniform treatment by the Federal Government. The delegation by Congress of its plenary authority in intercountry adoption, as a matter of immigration, to 50 different jurisdictions should be subject to the test of compelling governmental interest. Similarly, under this delegation, State actions that add to Federal requirements in any way should be subject to the test of a compelling governmental interest. At a minimum, the success or failure, or the length of time and expense, of such a Federal petition should not depend substantially on the accident of where a citizen's home is located in the United States.

Public law, procedure and general behavior should be consistent with constitutional values, which define the standards by which we as a people expect to govern ourselves. David Hart makes the central point: "regime values, by their nature, require embodiment in action." 136/

Part Two concludes that, by delegating to the States a pre-emptive role in the Federal Government's exercise of its plenary authority in the immigration of orphans, the current system is inconsistent with a host of constitutional values. Conversely, Part Two concludes that the central psition of this dissertation, that Section 101(b)(1)(F) of the Immigration and Nationality Act should be amended to delete the State clause, is perfectly consistent with those norms.

136/ Hart, p. 115.

CHAPTER THREE

CONSTITUTIONAL VALUES IN INTERCOUNTRY ADOPTION: IMMIGRATION AND FEDERAL-STATE JURISDICTION

> The authority of the Congress over the general matter of admission of aliens into the country is plenary.... Thus, ... the formulation of the policies regarding the rights of aliens to enter the country and remain here is entrusted exclusively to the Congress. 137/

Plenary powers suggest that Congress' jurisdiction over a given matter is so complete that the matter is treated as though the United States were a unitary country, rather than a federal system of 50 sovereign States. Congress may or may not choose to act on the matter at hand, but the power to do so belongs only to the Congress. This chapter establishes that the plenary Congressional power is the consititutional norm for all immigration law and policy in the United states, including the treatment of immigrant orphans. As such, this principle goes beyond questions of whether something is "legal" or "illegal". Rather, much in the spirit of regime values, it provides important guidance on whether we are conducting our public business in a proper manner. The basic value at issue, as the chapter shows, is that the authority over immigration is singular; our constitutional values do not allow for immigration standards to be set by 50 different jurisdictions.

The plenary authority of the Federal Government over the matter of immigration has not been under serious challenge in this country for well over 100 years. Based on national sovereignty, the regulation of foreign commerce and international relations, and Congressional power to make uniform rules for

137/ American Jurisprudence, 2nd Supplement, p. 901.

naturalization, the United States Supreme Court established long ago that the Federal Government, and only the Federal Government, may prescribe, add to or take from the conditions under which an immigrant is admitted to the United States, is allowed to remain, and becomes eligible for naturalization.

Yet, this clearly stated principle of plenary Federal control of immigration becomes a bit blurred in intercountry adoption with the immigration of IR-4 children, i.e., those immigrant orphans for whom a final order of adoption has not yet been obtained from a foreign court. These intercountry adoptees, now at 8,300 annually, are the only immigrants whose visa petitions for permanent residence in the United States are subject to a State veto. Federal statute requires adopting American parents to meet the pre-adoption requirements of their particular State of residence before INS will approve the petition to classify an alien orphan as an immediate relative. Consequently, delegation of the "plenary" power that has been "entrusted exclusively to the Congress" creates 50 different immigration systems for this class of immigrant.

The principal constitutional arguments in support of a strong State role in the immigration of orphans are: (1) the adoption element in this class of immigration justifies the exercise of State police powers; and (2) only States have authority to grant legal status to an adoptive relationship; the Federal Government is said to be precluded from acting in family law. Since, only the States have the authority to grant an American order of adoption, their interests in public health and welfare must be protected from the outset.

This chapter reviews the constitutional values at issue in the congressional delegation of pre-emptive authority to the States in visa petitions for immigrant orphans. The chapter argues that the weight of our constitutional

values strongly supports the central recommendation of this dissertation, i.e., that Section 101(b)(1)(F) of the Immigration and Nationality Act should be amended to eliminate the pre-emptive State role. The premise of the argument is that immigrant orphans are, in the first instance, immigrants. Hence, the Federal Government should exercise it plenary power over immigrant orphans instead of delegating its power to the 50 States. Our consitutional values indicate that procedural requirements, elapsed time, expenses incurred and, ultimately, the question of success or failure of a visa petition to the Federal Government should not depend to any degree on where one's home is located within the United States.

The chapter shows that a strong role for the States has no convincing constitutional basis in the area of immigration. A constitutional basis for a State role prior to the Federal decision to admit or exclude an immigrant is absent. Therefore, the recommendation to eliminate the States from Section 101(b)(1)(F) is on solid constitutional grounds.

Section One:
Exclusive Federal Authority in Immigration

Congressional delegation of authority over the immigration of orphans has its roots in the traditional ambiguity and tension between the Federal commerce power and the police powers of the States. The central issues are whether and, if so, under what circumstances and to what degree do the police powers of the States operate concurrently or as co-equal with the Federal commerce power.

Section One shows that, while some ambiguity may exist in domestic interstate commerce, no such ambiguity exists in matters of immigration. The

ambiguity originates in the wording of the commerce clause. Among other things, Article I, Section 8 of the Constitution gives Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; (and) To establish a uniform Rule of Naturalization ... throughout the United States." The ambiguity arises from the use of the word "among". Was the term intended to extend Federal jurisdiction to all commerce that occurs in and among the various States, or only to that commerce that occurs "between" two or "among" more than two States? Kelly, Harrison and Belz note that

> One of the chief objectives of the framers of the Constitution had been to replace the confused condition of foreign and interstate commercial relations prevailing in 1787 with an orderly and uniform system. Consequently, the Constitution authorized the Congress "To regulate Commerce ...." 138/

Following 1787, the States lowered many barriers that had restricted interstate commerce under the Articles of Confederation and reduced the practice of State-granted monopolies. For a generation thereafter, interstate commerce increased, along with international trade, and the question of the extent of Federal authority over commerce faded. However, after Robert Fulton and Robert Livingston stunned the country by moving a steamboat upstream at the Louisville Rapids on the Ohio River, the practice of State-granted monopolies reasserted itself.

The State of New York granted Fulton and Livingston a monopoly on steamboat traffic on New York waters and one Aaron Ogden acquired the

138/ The American Constitution: Its Origins and Development; Kelly, Alfred, Winfred Harrison and Herman Belz; W.W. Norton Inc. (N.Y., 1955) 6th Ed., p. 201.

monopoly on cross-Hudson traffic. However, Thomas Gibbons continued to operate competitive services in the cross-Hudson traffic with a Federal license that had been granted under the Coastal Act of 1793. Ogden sought and received a restraining order from the New York courts against Gibbons.

Ogden v. Gibbons 139/ reached the Supreme Court in 1824. Chief Justice Marshall established a broadly based Federal commerce power but also recognized a concurrent State police power. First, Marshall found that "commerce is something more (than traffic), it is intercourse." The term "commerce" was to be as complete among the States as it was with trade between foreign nations. That is, the commerce power of Congress could reach all types of commercial activities. Conversely, Marshall also found that commerce which occurred strictly within a State's borders and effected only that State was beyond the Federal commerce power. States could enforce general health and safety laws that had only an incidental effect on interstate commerce, as matters of health and safety were said to be the sole reserve of the States.

That is, the States had police powers that could be concurrent with the Federal commerce powers, provided the exercise of those powers did not contradict Federal action in the field, or did so only incidentally. The Federal statute was found to be constitutionally valid and the New York restraining order was found invalid not for violating the Constitution, but for being in conflict with the valid action taken by the Federal Government.

Gibbons had argued that Federal authority was exclusive and, even without Federal action, that States could not enter the field of interstate

139/ Ogden v. Gibbons (9 Wheat. 1) 1824.

commerce. The Court ultimately gave Gibbons the decision he wanted, but for a different reason. Chief Justice Marshall found New York's action conflicted with the Federal Coastal Act and, therefore, could not exclude Gibbons from competing for the cross-Hudson traffic. That is, because the Federal Government had taken action in the matter, States could not take conflicting action.

Three years later, in Brown v. Maryland, 140/ the Court decided a case in which Maryland had required a special license for wholesalers who imported goods. The question at issue was whether the State license was a valid function of State taxing powers or whether it infringed upon the Federal commerce power. Chief Justice Marshall found that States could not tax goods until they had become "mixed up with the mass of property in the country." Short of integration into the "mass of property," that is, goods still in their "original package," were deemed to be imports. As such, the goods constituted international trade and were the exclusive domain of the Federal Government; Maryland's tax was voided.

Yet, two years later, in Black Bird Creek Marsh Co., Marshall found that the State of Delaware could dam a creek, though it was used periodically in interstate commerce. 141/ The Court found that Delaware had an interest in its internal waterways and, because the Federal Government had not acted on a pertinent matter, Delaware's action was a valid exercise of its police power. The Federal power in commerce, therefore, was not perceived as plenary; if the Federal Government had not acted on a matter pertinent to interstate commerce,

140/ Brown v. Maryland (12 Wheaton 419) 1827.

141/ Willson v. Blackbird Creek Marsh Company (2 Peters 245) 1829.

such as regulating a waterway, the States could take action on their own authority. This is not the case in immigration.

The ambiguity increased with New York v. Miln 142/ in 1837. After Marshall's death, a more conservative Court upheld a New York statute that required ships' masters to provide the city with lists of names, ages, occupations, places of birth and places of most recent legal residence on all passengers. Justice Babour, for a majority of 5 (with two concurring opinions), argued that

> (S)ince the State's internal welfare was the obvious purpose of the statute, ... unlike Ogden v. Gibbons, it did not conflict with any act of Congress. ... The purpose ... is to prevent New York from being burdened by an influx of persons ... either from foreign countries or from other States. 143/

This would have been consistent enough with the earlier findings of "incidental effect" had it stopped there. However, Justice Barbour added that a State's police power over persons and things within its borders, unless restricted by the Constitution, was as complete as the power of a foreign nation over persons and things within its borders. The authority of the States to exercise the police power was "complete, unqualified and exclusive." 144/ In short, State police power was, in all ways, a co-equal to the Federal commerce power, and neither power, each of which was valid, could preclude the exercise of the other.

Justice Barbour also added that "commerce" was confined to goods; persons were not elements of commerce. This was aimed at the issue of slavery,

142/ New York v. Miln (11 Peters 102) 1837.

143/ Ibid.

144/ Ibid.

not immigration. However, Barbour's opinion had explicitly mentioned "persons ... either from foreign countries or from other States." That opinion would have recognized State authority in immigration as co-equal, provided it did not violate the Constitution's charge that Congress could establish a uniform system of immigration. At a minimum, Barbour's position would have granted States extensive authority to regulate the actions and movements of aliens after their entry into the United States.

In 1847, the License Cases 145/ involved the taxation and regulation of alcohol by three States. The Court failed to provide a definitive ruling, with nine opinions being handed down. A majority of five Justices avoided the question of concurrence by finding that the regulation and taxation involved were only coincidentally related to interstate commerce and, therefore, could be tolerated by the Federal Government. Three Justices, however, went further and argued that the State police power operated concurrently with Federal authority in interstate commerce. The remaining Justice, Chief Justice Taney, argued that a State's authority over its territory was co-equal with Federal sovereignty. As such, Federal authority could not preclude State authority.

Concurrent Powers and Immigration

The Court began to address the same issues in immigration more explicitly in 1849, 26 years before the first "real" Federal regulation of immigration. In the Passenger Cases 146/, the Court spoke directly to the issue

145/ License Cases (5 How. 504) 1847.

146/ Passenger Cases (7 How. 283) 1847.

of concurrent authority. The first cases involved a head tax of $2.00 levied by the States of Massachusetts and New York on each alien entering a port in the State. This was no mean fee in 1849 (roughly the equivalent of $200 in the mid-1980's.) The two States argued that their actions were taken to protect their people from paupers and disease, not all that unlike New York's successful argument in Miln.

While ambiguity prevailed with the Federal commerce power and the State police power in domestic commerce, the Court, albeit with an initial majority of only five Justices, quickly established that a State tax levied on aliens arriving in port was unconstitutional. In Smith v. Turner, the Court found that:

> (the) act of the legislature of ... Massachusetts entitled 'An Act Related to Alien Passengers,' ... that no alien passenger shall be landed until the sum of $2 is paid ... is repugnant to the Constitution and laws of the United States and (is) therefore void. 147/

In 1849, consistent with Brown v Maryland from 22 years earlier, a majority of five Justices in Smith v. Turner found that by restricting the movement of international passengers into the United States, the acts constituted direct regulation by the States of foreign commerce, over which the Congress had exclusive power. Even in the absence of Federal action, as was the case in 1849, the majority found that the States could not exercise their police powers to regulate or tax immigration. Congressional power had been found to be plenary. Though Congress had not yet acted to regulate immigration, the plenary nature of Congressional power in the field precluded action by the States.

147/ Smith v. Turner (48 U.S. 283) 1849.

In the minority, Chief Justice Taney reiterated his position in the License Cases and argued that the acts of Massachusetts and New York were legitimate exercises of the police power. Further, the Chief Justice argued that the States could regulate immigration even if the Federal Government had taken an active step to admit an immigrant.

Note that in 1849 the question of whether or not the Federal Government had taken any action in immigration was strictly hypothetical. "Real" Federal regulation of immigration would not begin for another 26 years, with the 1875 statute that denied entry to prostitutes, "idiots," et. al. Prior to 1875, the immigration policy of the United States, in effect, had been that of an open door, as the Federal Government had taken only the most marginal regulatory action up to that time (the 1819 statute that established standards on transport ships). Nevertheless, in 1849, the majority in Smith v. Turner held that, even in the absence of Federal action in the field, States were precluded from regulating commerce with foreign nations.

Much like the License Cases, eight opinions were handed down in Smith v. Turner and no firm rule emerged. Still, the Court had, for the first time, directly addressed concurrent State police power in matters of immigration and found that the States were pre-empted by the plenary Federal authority to regulate immigration.

Two years later, in 1851, Cooley v. Penn. 148/ added to the clarification. Like the Passenger Cases, Cooley did not address immigration per se. but, rather interstate commerce. The Court upheld a Pennsylvania statute regulating the

148/ Cooley v. Pennsylvania Board of Wardens (12 How. 299) 1851.

operation of ships in the port of Philadelphia as a legitimate exercise of State police power for public safety. However, the Court added that where State actions touch on Federal powers over commerce, those Federal powers (unspecified) operated to the exclusion of the State police power.

Ambiguity in domestic questions continued, but whatever ambiguity that may have existed relative to immigration was definitively clarified by the Supreme Court after explicit Federal regulation of immigration began in 1875. In that year, the Court ruled on similar statutes from California and New York that levied a head tax on each alien entering a port. The Court was more definitive in these cases than it had been in 1849 in Smith v. Turner. In both 1875 cases, the Court found unequivocably that the exercise of the State police power was excluded by the Federal power over foreign commerce and naturalization. 149/

In Chy Lung v. Freeman, the Court heard California's argument that the State had taken a valid police action to protect itself from disease, paupery and criminals that might otherwise have been visited upon the State through an influx of aliens. This was very much in keeping with Brown v. Maryland. However, in a strongly worded opinion, the Court rejected California's argument.

> The California statute regulating the arrival of passengers from a foreign court is palpably unconstitutional and void. Its purpose is to extort money from a large class of passengers, or prevent their immigration. It operates directly on the passenger, for unless the owner of the vessel gives an onerous bond for the future protection of the State against the support of the passengers, ... he is not permitted to land from the vessel. It

149/ Chy Lung v. Freeman (92 U.S. 275, 1875) and Henderson v. Mayor of New York (92 U.S. 259).

> extends far beyond the right, if it exists, of protecting the State from the diseased, the poor and the criminal classes, and invades the right of Congress to regulate commerce with foreign nations. (Emphasis added.) 150/

In Henderson, 151/ New York made much the same argument as California had made in Chy Lung., i.e., that the State action was a valid exercise of State police power in order to protect the State from an influx of criminals, the diseased, orphans and other public charges. The Court reaffirmed Chy Lung and added that the argument pursued by New York was almost irrelevant because, regardless "of the class of legislative powers" to which a State action might be said to belong, "it is prohibited to the States if granted exclusively to the Congress" by the Constitution. Further, because the questions at issue "are not only national, but of international concern, (they are) best regulated by one uniform rule, applicable alike to all ... of the United States." The Court added that regardless of the language that a statute may use, "its purpose and its constitutional validity must be determined by its natural and reasonable effect." 152/ In this case, the "natural and reasonable effect" was State regulation of immigration and foreign commerce.

New York, however, was not easily discouraged. The State legislature responded to Henderson by enacting an "inspection law," with a fee of one dollar per alien passenger in order to cover the administrative costs of the inspection. The stated purpose of the new statute was to "inspect" passengers for "their being

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150/ Chy Lung v. Freeman.

151/ Henderson v. Mayor of New York.

152/ Ibid.

criminals, paupers, lunatics, orphans or infirm persons, liable to become a public charge." 153/ Using the Henderson and Chy Lung reasoning, the Court found this statute also was an unconstitutional regulation of foreign commerce by a State.

The Court noted that "the tax is not relieved from ... Constitutional objection by saying ... that it is in aid of an inspection law." The Court held inspection to imply goods and imports, not free persons. Further, the Court noted that factors such as poverty, lunacy, orphanage and criminal guilt "are not to be ascertained by inspection alone." 154/

Therefore, by 1883, just eight years into specific Federal regulation of immigration, the Court had firmly established the exclusivity of Federal authority to regulate immigration. Unlike the commerce clause in domestic questions, ambiguity or "dual federalism," had been averted. The Federal Government, and only the Federal Government, could regulate and/or tax immigrants upon their arrival. 155/ Even if no Federal action had been taken, as was the case in 1849, the States could not take action. 156/ Further, State police powers could not empower the States to act against the admission of alien paupers, orphans, etc. 157/ As will be shown in Section Two, the notion of protecting a State against the migration or immigration of public charges infringes upon the fundamental right to freedom of travel.

153/ People v. Compagne Generale Transatlantique (2 S.Ct. 87) 1883.

154/ Ibid.

155/ Chy Lung; Henderson; and People v. Compagne Generale Transatlantique.

156/ Ibid.

157/ People v. Compagne Generale Transatlantique .

The exclusive nature of Federal authority in immigration was reaffirmed in 1884 when the Court upheld a Federal head tax that was virtually identical to the State head taxes that had been voided in Chy Lung and Henderson. The Congress had enacted a head tax of 50 cents on ships' captains for every alien who disembarked. Unlike the State head taxes, the Federal head tax was found to be a "valid exercise of the power to regulate commerce with foreign nations." 158/

The landmark case was handed down in 1893 in Ekiu. 159/ Besides addressing the constitutionality of discretionary power, the Court clearly stated that the Federal power to regulate the admission of aliens was indeed plenary.

> It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, ... to forbid the entrance of foreigners ... or to admit them only ... under such conditions as it may see fit to prescribe. 160/

The Court reiterated this reasoning in 1895 when it upheld Federal authority to expel aliens after having admitted them. In Fong Yue Ting, the Court held that "the right to expel or deport foreigners ... rests upon the same grounds and is as absolute and unqualified as the right to ... prevent their entrance." 161/

In 1898, the Court also upheld Federal authority to exclude whole classes of immigrants from admission to the United States. 162/ The Court held that

158/ Edye v. Robertson (5 S.Ct. 297) 1887.

159/ Ekiu v. U.S. (12 S.Ct. 336) 1893.

160/ Ibid.

161/ Fong Yue Ting v. U.S. (13 S.Ct. 1016) 1895.

162/ Chae Chan Ping v. U.S. (9 S.Ct. 623) 1898.

Congress has the authority to "exclude aliens from, or prevent their return to, the United States for any reason it may deem sufficient.

In each of these cases in the 1890's and in the case involving the Federal head tax, 163/ the Court addressed Federal power. per se, not the Federal-State relationship. Nevertheless, they added to the rationale for exclusivity, based on national sovereignty and Federal powers in foreign commerce, foreign relations and naturalization. The question, by now, presumably is settled. Nevertheless, the Court continues to have reason to address the nature of the Federal power in immigration. As recently as 1982, in Toll v. Moreno, the Court found that

> Federal authority to regulate the status of aliens derives, inter alia, from the Federal Government's constitutional powers to establish a uniform rule of naturalization and to regulate commerce with foreign nations and from its broad authority over foreign affairs. (Emphasis added.) 164/

These cases apply directly to intercountry adoption. First, Federal authority in immigration is exclusive. It is irrelevant whether the purpose of a State role in the immigration of alien orphans is to regulate immigration or, under the State police power, to regulate adoption. The "natural and reasonable effect" is the issue, 165/ and that effect is the regulation of immigration by the States. States cannot exercise their police powers to prohibit the admission of alien paupers and orphans. 166/

163/ Edye v. Robertson.

164/ Toll v. Moreno (102 S.Ct. 2977) 1982.

165/ Henderson v. Mayor of New York.

166/ Chy Lung v. Freeman; Henderson; and People v. Compagne Generale.

Third, the use of the State pre-adoption requirements contradicts the Federal power to establish "a uniform rule". 167/ Rather, the petition from a citizen family to classify an alien as an immediate relative for the purpose of immigration and the Federal decision on that petition are subject to 50 different sets of rules. Finally, international adoption also touches on international relations. In the end, immigration is "best regulated by one uniform rule, applicable to all alike ... in the United States." 168/

Section Two:
State Authority After Admission

If no compelling constitutional values justify the delegation of Congressional power to the States in the immigration of orphans, the subsequent issue is the extent to which States may exercise authority over immigrants following their admission to the country by the Federal Government. The central issue is the degree to which the States can treat aliens differently from citizens based on their classification as aliens after their admission into the United States.

The Federal courts have upheld certain actions by the States to restrict the activities of aliens. However, Federal courts have subjected any such restrictions to a demanding test: a State must show them to be necessary to protect a compelling interest of the State or of its people. In practice, Federal courts have restricted such powers to State regulation of the franchise, the right to hold office, and, in certain cases, the right to inherit and own real property.

167/ Henderson v. Mayor; Toll v. Moreno.

168/ Henderson.

The most definitive authority of the States is in the area of restricting aliens from the right to vote and to hold public office. Many States once extended the franchise immediately to immigrants as a means to compete for immigrants in order to relieve chronic labor shortages, but this practice was abandoned during the 1840's. Since then, the Supreme Court has found repeatedly that the rights to vote and to hold certain public offices are so "bound up with the operation of the State as a political entity" as to justify the exclusion of aliens. Aliens are entitled to full and equal protection of the laws, but they are not entitled to the right to govern. 169/

The inherently political nature of the franchise "permit(s) the exclusion ... of all persons who have not become part of the process of self-government." 170/ Economic regulation of aliens' activities "is subject to heightened judicial scrutiny, but such scrutiny is out of place when a restriction primarily serves a political function." Aliens have a right to education and public welfare, a right to earn a living and "to participate in the professions, (but) the right to govern is restricted to citizens." 171/ Though any classification to treat aliens differently from citizens is normally suspect, the right to vote "is fundamental to the definition and government of a State." 172/

The authority of the States to restrict aliens' rights to real property is much more limited than their authority to restrict aliens' participation in

169/ Ambach v. Norwich (99 S.Ct. 1589, 1979); Foley v. Connelie (98 S.Ct. 1067, 1978); and Cabell v. Chavez-Salido (102 S.Ct. 735, 1982).

170/ Cabell v. Chavez-Salido.

171/ Foley v. Connelie.

172/ Ambach v. Norwich.

governing the State, though the power of the States to restrict the transfer and distribution of property is well recognized. This was particularly significant to the question of aliens following the American Revolution, when many British subjects and British loyalists laid claim to inheritances in the United States. 173/

The Supreme Court first addressed the question in 1813 in Fairfax's Devisee. 174/ A British subject sought to inherit a relative's estate in Virginia. The Court found that, since the American Revolution, a British subject "cannot ... take lands by descent in the United States." As a result, the Court upheld Virginia's action to deny the inheritance.

The basic finding in Fairfax's Devisee has been reaffirmed on numerous occasions by the Court. In 1819, the Court found that an alien child is not deemed "issue" before the law and, therefore, cannot inherit land by descent. 175/ Since the alien child has "no inheritable blood," the land descends to the next of kin who has inheritable blood. Similarly, even if one is a citizen, and therefore has "inheritable blood," one's otherwise valid assertion of inheritance is disrupted and terminated if any connection to the inheritance, is disrupted by alienage. That is, a citizen may be denied the right to inherit property from his citizen grandfather if one's father is an alien, because the alien father cannot transmit inheritable blood to his child, even if the child is a citizen. 176/

173/ Fairfax's Devisee v. Hunters Lessee (11 U.S. 603, 1813); Spratt v. Spratt (29 U.S. 393, 1830); Mager v. Grima (49 U.S. 490. 1850); Hauenstein v. Lynham (100 U.S. 483, 1879); and Sullivan v. Barnett (105 US 334, 1881).

174/ Fairfax's Devisee v. Hunter's Lessee.

175/ Orr v. Hodgson (4 Wheat. 453) 1819.

176/ Levee's Lessee v. McCartee (6 Pet. 102) 1832.

The notion that an alien cannot have inheritable blood originates in our heritage from English common law. 177/ However, the same common law tradition, consistent with our notion of due process, also holds that a State cannot deny an alien's claim to land "until office found." That is, until "the fact of alienage is authoritatively established by a public office on an inquest at the instance of the government." Further, the State and only the State may take action against an alien's claim. 178/

In addition, the Supreme Court has made clear on a number of occasions that the power to determine the devolution of land in the United States rests properly with the States. 179/ For example, only Alabama may determine the devolution of land within the State of Alabama. 180/ By the same token, a State has the power to grant aliens all the privileges of ownership or may grant those privileges with any conditions attached that the State determines to be appropriate. 181/

However, States are not unlimited in their treatment of aliens' property rights and privileges. At a minimum, an alien who becomes a naturalized citizen is, of course, no longer an alien. That individual then "holds lands as a citizen and

177/ Phillips v. Moore (100 US 208, 1879); Hauenstein; Sullivan v. Burnett 105 US 334, 1881); Webb v. O'Brien (44 S Ct 112, 1923).

178/ Hauenstein v. Lynham; Doe ex. dem, Goveneur's Heirs v. Robertson (11 Wheat. 332, 1826); Craig v. Leslie (3 Wheat 563, 1818); Craig v. De Valle (1 Wall. 5, 1863); Union National Bank v. Matthews (98 US 621, 1878); Phillips v. Moore; Manuel v. Wulff (14 S. Ct. 651, 1894); and McKinley Creek Mining Co v. Alaska Mining Co (22 S. Ct. 84, 1902).

179/ Hauenstein.

180/ Webb v. O'Brien.

181/ Beard v. Rowan (9 Pet. 301) 1835; Mager v. Grima.

not by (operation of the) law." 182/ A naturalized citizen, under the Constitution, "stands on equal footing with the native citizen in all respects, save that of eligibility to the presidency." 183/

The authority to treat aliens' property rights differently from those of citizens is also restricted by the Federal treaty power. That is, a State may not take actions against an alien's property rights in contradiction to a Federal treaty with the alien's country of citizenship, as State powers are superseded by Federal powers in foreign relations. 184/

Even in the era following the Revolution, when the States were generally upheld in their efforts to restrict the ability of British subjects and loyalists to inherit and own property, the Court established firmly and early that conflict with a Federal treaty would pre-empt State authority to regulate the distribution of land. French citizens who were being subjected to the same treatment as British subjects following the Revolution were found to be protected by a Federal treaty with France that explicitly guaranteed the reciprocal protection of property rights. 185/ Again, Federal regulation of international relations is exclusive; State police powers do not operate concurrently with that Federal power. 186/

182/ Spratt's Lessee v. Spratt (1 Pet. 343) 1828.

183/ Baumgartner v. U.S. (64 S.Ct. 1240) 1944.

184/ Terrace v. Thompson (44 S. Ct. 15, 1923); Webb v. O'Brien (44 S Ct 112, 1923); Frick v. Webb (44 S.Ct. 115, 1923; Mahler v. Eby (44 S Ct 283, 1924); Jordan v. Tashiro (49 S Ct 47, 1928).

185/ Chirac v. Chirac's Lessee, 15 U.S. 259, 1817; Delassus v. U.S., 34 U.S. 117, 1835); Missouri v. Holland (40 S.Ct. 382, 1919); Webb v. O'Brien (44 S.Ct. 112, 1923); Frick v. Webb; Jordan v. Tashiro; and Morrison v. California (54 S.Ct. 281, 1934).

186/ De Geofroy v. Riggs (10 S.Ct. 295) 1890.

In sum, States continue to have extensive authority over the devolution of land within their borders. However, their actions are limited by Federal treaty and, since long before the 14th Amendment, by the common law notion of "office found" which is consistent with contemporary ideas of due process. Similarly, only the State can take action against an alien's ownership; the alien's claim is defendable against all others.

The principle here is significant to intercountry adoption because the children, of course, are aliens. Therefore, should any of the children be orphaned again prior to naturalization, they presumably could be denied the right to inherit property in the various States. However, the United States has entered treaties with members of the Organization of American States, Korea, India, the Philippines and the countries of Western Europe to extend reciprocal property rights to aliens. As noted in Chapter Two, the children of intercountry adoption come primarily from just those countries. In short, though it is significant, State authority over the devolution of land is precluded by Federal treaties from affecting the vast majority of intercountry adoptees. Moreover, once the children are naturalized, they would take lands as citizens, not as aliens.

Fourteeth Amendment and State Authority Over Aliens

The most basic restrictions on State power to treat aliens differently from citizens stem from the Fourteenth Amendment, which speaks of "persons," not "citizens." Except for restricting the right to participate in government and the right to hold property (provided the restriction does not conflict with a Federal treaty), the capacity of the States to treat aliens differently from citizens is very limited. At a minimum, "aliens are entitled in their persons and

effects to the protection of our laws." 187/ The Court has also found that a resident alien who has taken steps or made known the intent to take steps toward naturalization, is not easily denied most rights extended to citizens.

> Mere lawful presence in the country by an alien creates an implied assurance of safe conduct and gives him certain rights, and such rights become more extensive and secure when he makes preliminary declaration of his intention to become a citizen, and they expand to full citizenship upon naturalization. 188/

> Once an alien gains admission to the United States and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly. 189/

These passages are of direct interest in intercountry adoption. First, the children already have been declared "immediate relatives" by the Federal Government as the basis of their immigration and admission to the United States. Secondly, the citizen parents have declared in the visa petition their intent to adopt the children and have them naturalized. Hence, a declaration has been made on their behalf to obtain citizenship. Further, by virtue of the family relationship, the children "begin to develop the ties that go with permanent residence." The children of intercountry adoption are not at risk of being denied constitutional rights and protections. These principles, plus the effects of bi-lateral treaties, would ensure the children's rights of inheritance in the United States should their citizen parents die before the children become naturalized.

187/ Carlon v. Landon; Butterfield v. Zydok (72 S.Ct. 525) 1952.

188/ Johnson v. Eisentrager (70 S.Ct. 936) 1950.

189/ Landson v. Plasencia (103 S.Ct. 331) 1983).

Similarly, States cannot regulate a resident alien's access to employment opportunity due only to his alien status. This principle was first established in Yick Wo v. Hopkins in 1886. 190/ At issue was a San Francisco ordinance that prohibited the operation of a laundry in a wooden structure without the approval of the Board of Supervisors. The Board gave such approval to all non-Oriental applicants, but denied approval to all Oriental residents. The Supreme Court found that the 14th Amendment protected aliens from such arbitrary and capricious actions taken under State authority. The Court found that "the rights of petitioners ... are not less because they are aliens...." The Court added that Federal policies that restricted certain groups from citizenship or from admittance to the United States gave the States no license to restrict arbitrarily the activities of aliens already admitted by the Federal Government.

Yick Wo turned on a blatantly discriminatory application of an otherwise valid exercise of the police power. Truax turned on Arizona's direct invasion of the plenary Federal power to regulate immigration. However, Truax also included the question of a special State interest. That is, the Court found that the State could not establish any "special public interest with respect to any particular business ... that could possibly be deemed to support" Arizona's law. 191/

The issue of State restrictions on alien employment reapppeared in a California statute passed during World War II. First enacted in 1943, the statute prohibited "alien Japanese" from fishing within California's three-mile zone, thereby excluding all Japanese-American residents, who, at that time, were excluded by Federal law from becoming American citizens. Hence, even third- and fourth-generation Japanese-Americans were "aliens."

190/ Yick Wo v. Hopkins (6 S.Ct. 1064).

191/ Truax v. Raich.

In Takahashi v. Fish and Game Commission, a lawful Japanese resident brought action against California. 192/ Takahashi had been a fisherman and had obtained a fishing license annually from 1915 through 1942. Thereafter, he was denied a license and, thereby, was denied the opportunity to continue his occupation. California defended its statute on the grounds that the United States was at war with Japan and that alien Japanese were subjects of the Emperor of Japan. The State also argued that its statute met the test of a special State interest that Truax had failed. That is, California had enacted a responsible conservation measure to preserve its resources for its citizens in wartime.

The Court rejected both arguments. First, the Court repeated an earlier finding from Holland v. Missouri that "to put the claim of the State upon title is to lean on a slender reed." That is, California could not claim to "own" off-shore fish that traversed its coastal zone. Such a claim could not justify the exclusion by the State of "any or all aliens who are lawful residents of the State from making a living."

The second issue addressed the matter of a State restricting activities of lawfully resident aliens. In retrospect, one or two generations later, the immigration and naturalization policies that excluded Orientals seem obvious contradictions of the first sentence of the Fourteenth Amendment: all persons born or naturalized in the United States are citizens of the United States and of the State in which they reside. However, the Fourteenth Amendment did not add new Federal rights, but only extended or "incorporated" existing Federal rights into State actions. However, the Court found that one such right was the fundamental right of equal protection for all residents.

192/ Takahashi v. Game Commission (68 S.Ct. 1186) 1948.

Further, the Court had stated repeatedly that, as a function of national sovereignty, only Congress could determine which aliens could enter or remain in the United States. This power could not be abridged by State action. The Court thus rejected California's argument that because the Federal Government used a racial test for immigration and citizenship, the State had acted reasonably in applying the same test to the preservation of its resources in wartime.

> (That) all persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts, to sue, be parties, give evidence and to full and equal benefits of all laws, extends to aliens as well as citizens.
>
> The federal government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they remain, the regulation of their conduct before naturalization and the terms and conditions of their naturalization.... Under the Constitution, the States have no such powers; they can neither add nor take away from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several States. (sic) 193/

The Court reaffirmed Takahashi in De Canas in 1975. 194/ The Court found State regulation of aliens cannot "be in excess of anything contemplated by the Congress" and that restricting an alien's opportunity to find employment was a regulation of immigration which "is unquestionably exclusively a Federal power." In Takahasi, the Court spoke to fundamental rights under the Fourteenth Amendment; in De Canas, the Court spoke directly to State authority to regulate or restrict employment of aliens after admission by the Federal Government. In De Canas, the State had gone beyond anything contemplated by Congress.

The congressional delegation in intercountry adoption appears to conflict with the spirit of De Canas, if not its letter. States may amend their adoption laws at any time, and some changes can affect immigration in ways never

193/ Ibid.

194/ De Canas v. Bica (96 S.Ct. 933) 1975.

contemplated by Congress -- nor by the States on most occasions. The same spirit that finds State regulation of employment to be an unacceptable regulation of immigration might ask whether a State should pass on the "exclusively Federal" decision of whether or not to admit a particular alien orphan.

The Court reached a finding similar to Takahashi as early as 1915 in Truax v. Raich. 195/ There the Court voided an Arizona law restricting the number of aliens that one could employ. The State had required employers of five or more persons to reserve at least 85 percent of positions for "qualified electors or native-born citizens of the United States." The Court found that aliens admitted by the Federal Government have "a federal privelege to enter and to abide in any State in the Union." The Court added that the Arizona statute

> would be tantamount to the right to deny (aliens) entrance, for in ordinary cases, (aliens) cannot live where they cannot work. ... The authority to control immigration - to admit or exclude aliens - is vested soley in the Federal Government.

Truax was reaffirmed in 1923, when the city of Seattle restricted pawnbrokers' licenses to citizens. The Court again found that "aliens have a constitutional right to earn a livelihood by following the ordinary occupations of life." 196/ Yet in intercountry adoption, a petition for immigration that otherwise meets all Federal requirements may fail if it originates in Illinois, Pennsylvania or Virginia, while the same petition could succeed if it originates in Iowa or Maryland. This violates the spirit of uniformity suggested in Henderson: because the issues "are not only national, but of international concern, (they are)

195/ Truax v. Raich (36 S.Ct. 7) 1915.

196/ Terrace v. Thompson (44 S.Ct. 15) 1923.

best regulated by one uniform rule, applicable alike to all ... of the United States." 197/ Instead of uniformity, 50 States have "tantamount" authority to exclude aliens. Much like the issue of employment in Truax, alien orphans cannot live where they cannot reside with their adoptive families.

In Foley v. Connelie 198/ (1978), while reaffirming State authority to restrict the franchise, the Court reiterated that the Constitution limited the degree to which an alien may be treated differently merely because of his alien status. The Court concluded that the right to govern indeed is restricted to citizens, but that "aliens are extended the right to education, and public welfare along with the right to earn a livelihood and engage in licensed professions." Four years later, while reaffirming the same restriction on the franchise, the Court noted that "restrictions on lawfully resident aliens that primarily effect economic interests (are) subject to heightened judicial scrutiny." 199/

The Court also ruled on an employment case in 1976 that bears directly on intercountry adoption. In Examining Board of Engineers, the Court heard Puerto Rico's argument for restricting aliens from licenses to practice engineering or architecture. 200/ The Court found that "once an alien is lawfully admitted, a State may not justify restriction of an alien's liberty on the ground that it wishes to control the impact or effect of federal immigration laws."

197/ Henderson v. New York (92 U.S. 259); Chy Lung (92 U.S. 275, 1875)

198/ Foley v. Connelie.

199/ Cabell v. Chavez-Salido.

200/ Examining Board of Engineers, Architects and Surveyors v. Flores de Otero (96 S.Ct. 2264) 1976.

Puerto Rico had justified its action, in effect, as a function of the police power, but the Court rejected that argument. Much as in Henderson, the Court found that States cannot regulate immigration to protect against public charges, nor, as in Truax, to reserve jobs for citizens.

> Neither the alleged desire to prevent 'uncontrolled' influx of Spanish-speaking aliens into the field of civil engineering in Puerto Rico, nor the desire to raise the prevailing standard of living ... nor the desire to give clients of civil enginners assurance of financial accountability ... constitute sufficient justification....
>
> States, territories local governments or the federal government may be permitted some discretion in determining the circumstances under which it will employ aliens or whether ... aliens may partake of public resources on the same basis as citizens; in each case, the governmental interest ... is to be carefully examined in order to determine whether that interest is legitimate and substantial and ... whether the means ... are necessary and precisely drawn. 201/

Puerto Rico argued that, since it is not a State, the Fourteenth Amendment did not extend the same protections to aliens in Puerto Rico that might be extended in a State. However, the Court found that the Fifth Amendment, in and of itself, would be sufficient cause to find the provision unconstitutional. The Court noted that the violation was "so egregious as to violate due process." In short, consistent with Bolling v. Sharpe, 202/ the Fifth Amendment also implies an equal protection element when the violation of due process is egregious.

201/ Ibid.

202/ Bolling v. Sharpe (347 U.S. 497).

Two cases from the field of education add to the point that States are restricted in their treatment of aliens after their admission by the Federal Government. In Nyquist v. Mauclet 203/ (1976) the Court prohibited New York from limiting education loans to citizens and those resident aliens who had applied for citizenship or who had declared to New York their intent to do so. In 1982, Plyer v. Doe 204/ found unconstitutional a Texas statute that withheld State fiscal assistance to school districts that enrolled illegal alien children. Texas argued that the illegal status of the children created a legitimate State interest in preserving its limited resources for citizens and lawful residents. The Court rejected this position, and prohibited States from taking action on the rationale of protecting themselves against public charges in order to preserve the public purse.

> Although it is a routine and normally legitimate part of the business of the federal government to classify on the basis of alien status and to take into account the character of the relationship between an alien and this country, only rarely are such matters relevant to legislation by a state. 205/

These principles are of direct interest in intercountry adoption. "States can neither add to nor take from ..."; yet States can do precisely this under Section 101 (b)(1)(F). With 50 States, one State or another is always changing its adoption laws, regulations or policies. State policies may extend American family case law to foreign jurisdictions, where it creates confusion and simply does not fit, or add other restrictions that increase costs to petitioners. Secondly, changes

203/ Nyquist v. Mauclet (97 S.Ct. 2120) 1976.

204/ Plyer v. Doe (102 S.Ct. 2382) 1982.

205/ Ibid.

in State pre-adoption requirements, be they statutory, regulatory, or changes in the exercise of discretion, can add to the conditions for entry and may well go beyond anything contemplated by the Congress.

For example, Section 101 (b)(1)(E) of the Immigration and Nationality Act requires only that a home study be performed by a licensed individual. The record fails to show whether Congress contemplated that all but three States would require home studies by licensed agencies. Because precious few public agencies have the staff to perform home studies for their public at large, in practice this requires home studies by private agencies and, thereby, means an extra cost of $500 to $1,000 for families not lucky enough to live in one of the three States that licenses individuals to conduct home studies. Similarly, Congress may not have contemplated other State actions that restrict access to IR-4 visas, such as requirements in 7 States that petitioners work only and entirely through adoption agencies, which can add still another $1,500 to a family's cost.

Finally, in a market in which the supply of agency services is restricted by regulation, Congress probably has not contemplated actions like those by Virginia, Missouri and others, which restrict adoption services to agencies licensed in that State, thus excluding agencies licensed in other States.

State actions like these are directed at the regulation of adoption in general, not at restricting access by citizens to IR-4 visas. However, the effect of such State action is indeed to restrict the access that American citizens enjoy to immediate relative visas. Congress has never addrssed such a consideration; the burden to do so lies with the Congress, not with the States.

In sum, the States have limited authority to treat resident aliens differently from citizens. States are excluded from arbitrarily restricting aliens from employment opportunities, educational opportunities, and the opportunity to inherit real property. Lawfully admitted aliens are entitled to certain Federal protections, and even illegal aliens are sometimes beyond State authority.

Summary

This chapter has shown that the plenary Congressional power is the consititutional norm for all immigration law and policy in the United states, including the treatment of immigrant orphans. Based on national sovereignty, the regulation of foreign commerce and international relations, and Congressional power to make uniform rules for naturalization, the Federal Government, and only the Federal Government, may prescribe, add to or take from the conditions under which an immigrant is admitted to the United States, is allowed to remain, and becomes eligible for naturalization. The basic value at issue is that the authority over immigration is singular; our constitutional values do not allow for immigration standards to be set by 50 different jurisdictions.

Immigrant orphans are, in the first instance, immigrants. As such, the Federal Government should exercise its plenary power over immigrant orphans instead of delegating its power to the 50 States. Our consitutional values indicate that procedural requirements, elapsed time, expenses incurred and, ultimately, the question of success or failure of a visa petition to the Federal Government should not depend to any degree on an accident of geography.

Conversely, no convincing constitutional basis exists for a strong State role in any class of immigration petitions. Though some intergovernmental ambiguity, or dual federalism, may exist in domestic interstate commerce, no such ambiguity exists in matters of immigration. In Henderson, the Supreme Court determined that because the questions at issue "are not only national, but of international concern, (they are) best regulated by one uniform rule, applicable alike to all... of the United States."

The chapter has shown the Supreme Court to have found repeatedly that State police powers do not empower the States to act against the admission of alien paupers, orphans, etc. The argument that the State role is that of regulating adoption and not that of regulating immigration does not withstand constitutional scrutiny. The "natural and reasonable effect" of Section 101(b)(1)(F) of the Immigration and Nationality Act is State regulation of immigration and, thereby, foreign relations and foreign commerce. In short, a strong State role in the immigration of alien orphans rests only on the decision of the Congress to delegate that authority to the States; the State role has no convincing constitutional basis independent of this delegation.

Similarly, once admitted by the Federal Government, alien orphans, like other aliens, enjoy substantial Federal protection, under the Fourteenth Amendment, against various State actions that treat them differently from citizens. In addition, the children of intercountry adoption appear to be protected against any notions that a State might deny them an inheritance based on a lack of inheritable blood prior to their being naturalized. The children will have been declared "immediate relatives" by the Federal Government as the basis of their immigration and, secondly, the citizen parents will have declared in the visa

petition their intent to adopt the children and have them naturalized. Hence, they "begin to develop the ties that go with permanent residence." These principles, plus bi-lateral treaties, ensure the children's rights of inheritance should their citizen parents die before the children become naturalized.

In sum, the Court has found that State regulation of aliens' activities cannot "be in excess of anything contemplated by the Congress." Yet, States may amend their adoption laws at any time, and those changes frequently affect the immigration of alien orphans in ways that go well beyond anything contemplated by Congress. With 50 States, one State or another is always changing adoption laws, regulations and policies.

In intercountry adoption, a petition for immigration that otherwise meets all Federal requirements may fail if the citizen petitioners reside in the wrong State. This violates the spirit of uniformity from Henderson: if issues "are not only national, but of international concern, (they are) best regulated by one uniform rule, applicable alike to all...." Instead of uniformity, 50 States have "tantamount" authority to exclude aliens. Much like the issue of employment, alien orphans cannot live where they cannot reside with their adoptive families.

In short, the strong State role in the immigration of alien orphans rests only on the decision of the Congress to delegate that authority to the States; the State role has no convincing constitutional basis independent of this delegation. In contrast, the weight of our constitutional values supports the recommendation that Section 101(b)(1)(F) of the Immigration and Nationality Act should be amended to eliminate the State authority to pass on an immigration petition to the federal Government on behalf of an alien orphan.

CHAPTER FOUR

A FEDERAL ROLE IN FAMILY RELATIONS

The States regulate adoption as a function of their police powers, i.e., the power to regulate for the health, welfare and morals of their people. The most common argument for the powerful State role in the immigration of an alien orphan is that only the States, under their regulation of adoption, can determine whether the children can be adopted in the United States. Further, the States must make that determination before the Federal Government admits the children for the presumed purpose of adoption. Even if a child already has been adopted abroad (IR-3 visa), the argument holds that a State might not recognize a foreign judicial order, though that order will be sufficient to gain entry for a child into the country. Consequently, the argument goes, each immigrant orphan should be assured that adoption is feasible in the United States. Once adopted under a State order, the child is said to be assured that all other States will fully recognize the order as a matter of full-faith-and-credit among the 50 States.

The chapter shows these premises to be less than convincing; the States' claim on family law is not utterly exclusive. The chapter also shows that current Federal policies invariably lead to an application of American family case law by the States to foreign environments in which: (1) it is simply out of place; (2) it contradicts Federal precedent: and (3) it could logically lead to State actions that void the basis on which the federal Government has admitted an alien orphan.

The chapter also shows that INS in fact has considerable experience in defining adoptive relationships and in appraising the propriety of proposed

adoptions. The chapter concludes by arguing that Congress in fact establishes a legal adoptive status for intercountry adoptees by virtue of recognizing foreign adoption or custody orders as the basis for classifying an alien orphan as an "immediate relative" for immigration purposes. Therefore, to relieve the ambiguity and/or duplication involved, the Congress can and should explicitly establish a legal adoptive status for I-600 children upon their entry into the United States.

Given the level of intercountry adoption over recent years, INS in fact has far more experience in reviewing adoption petitions than does any State. As a result, the Federal Government has the authority and the practical experience to implement a statutory recognition of that which now exists in fact under Federal regulation of immigration.

Section One
The Federal Judiciary & Family Law

Article Four of the Constitution provides that "Full Faith and Credit shall be given in each State to the Acts, Records and judicial Proceedings of every other State." Nevertheless, the States commonly do not extend full-faith-and-credit to each other in the field of family law. The reason is straightforward: because family circumstances change frequently and rapidly, the States frequently amend their own judicial orders in family law. Since, for example, Florida and New York may change their own judicial orders, neither State will hesitate to amend judicial orders from the other State.

Partly due to this source of uncertainty in the way that States treat each others' judicial orders in family law, Federal courts have played an active role in

family law. The active role of Federal courts in the field normally is based on the Fourteenth Amendment and common law, through which the Federal courts have sought to safeguard constitutional or personal rights before the States. However, in doing so, the Federal courts routinely go beyond the constitutional issues to examine the nature of family relationships at issue.

This section reviews Federal case law in four areas of family law. The section has two objectives. First, by reviewing areas in which Federal courts independently evaluate the substance of family relationships in cases that arise under the 14th Amendement, the section casts doubt on the standard argument that family law is the sole reserve of the States. The section shows that once the 14th Amendment triggers Federal jurisdiction in a case, Federal courts must independently review the substantive merits of a case, regardless of the issue at hand. This was clearly stated in 1947 in Oyama v. California.

> In reviewing a case in which federal constitutional rights are asserted, (the) United States Supreme Court must inquire not merely whether those rights have been denied in express terms but also whether they have been denied in substance and effect, and must review independently both legal issues and those factual issues with which they are comingled. 206/

This section also establishes that full-faith-and-credit, which is commonly cited as the principal safeguard that a State role in intercountry adoption can offer the family and the child, simply does not exist in family law. The four areas from which cases are reviewed to establish these objectives are: illegitimacy; divorce and child custody; termination of parental rights; and the rights of the unwed father.

206/ Oyama v. California (68 S.Ct. 268) 1947.

Illegitimacy.

Illegitimacy cases illustrate the willingness of Federal courts to address the substance of family relations. Under their police powers, many States traditionally discriminated by statute against illegitimate children in order to regulate public morals and welfare. However, the United States Supreme Court and lower Federal courts, especially since the late 1960's, have restricted the power of the States to treat illegitimate children differently from other children.

In Levy v. Louisiana 207/ a Louisiana statute prohibited five illegitimate children from recovering damages in the wrongful death of their mother. In 1968. the U.S. Supreme Court held that the children were clearly dependent upon their mother and that the children, per Justice Douglas, were "clearly 'persons' within the equal protection clause of the 14th Amendment." Therefore, the Court found the children to be entitled to full recovery, based on equal protection and based on their substantive family relationship with their mother.

A similar Louisiana statute identified the rights of "natural children" (defined to include adopted children) to be superior to the rights of illegitimate children in estate matters. In Labine v. Vincent 208/ (1971) the State was upheld on the merits of the case. In Labine, no substantive family relationship was determined to exist between the illegitimate child and the deceased father whose estate was at issue. The Court noted that the father had an ample number of years to establish a father-child relationship, but that he had chosen not to do so. Consequently, the Court upheld Louisiana's argument that the State had a special

207/ Levy v. Louisiana (391 U.S. 68) 1968.

208/ Labine v. Vincent (401 U.S. 532) 1971.

interest in the orderly transfer of real property, but only after the Court had examined the nature of the family relationship and found it to be absent.

The following year, in Weber v. Aetna Casualty, 209/ a comparable case resulted in a different finding. Weber also originated in Louisiana and involved the State workman's compensation law, under which an illegitimate child could receive compensation only from those benefits that remained, if any, after "natural children" had recovered full benefits.

In contrast to Labine, the father in Weber had died before his illegitimate child was born. In Weber, the death of the father had precluded his opportunity to exercise any intention to establish a parent-child relationship. Hence, the Court found that no significant issues were present regarding the State's claim to regulating the orderly transfer of property. Rather, the Court found that such statutory classification required "stricter scrutiny" and found that the statute violated the equal protection clause.

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liasons beyond the bonds of marriage. But visiting this condemnation upon the head of an infant is illogical and unjust (and) is contrary to the basic concept of our system that legal burdens should bear some rela tionship to individual responsibility or wrong-doing.... Penalizing the illegitimate child is an ... unjust way of deterring the parent.... (I)n this case, the classification is justified by no legitimate State interest, compelling or otherwise. 210/

Again, the Court had independently evaluated the substance of family relations in a case arising under the 14th Amendment. In order to determine

209/ Weber v. Aetna Casualty & Security Company 4/ (406 U.S. 164) 1972.

210/ Ibid.

whether a constitutional right had been violated and merited protection under the 14th Amendment, the Court did not hesitate to undertake an independent review of the arena said to be the sole reserve of the States. In Levy and in Weber, the Supreme Court rejected arguments by Louisiana that discrimination against illegitimate children protected legitimate family relations and, as such, that it was a reasonable exercise of the police power. In each case the Court determined for itself what was and what was not a "legitimate" family relationship.

In 1973, the Court also applied an independent review of the nature of the family relationship to cases involving an illegitimate child's right to financial support in Gomez v. Perez 211/ and on equal rights to welfare benefits in New Jersey Welfare Rights v. Cahill. 212/ In those cases, the Court also rejected State arguments of protecting legitimate family relations. The Court established that discriminatory treatment of illegitimate children by the States is a Federal issue, based on 14th Amendment protections. Within this context, the Court went on to address and make its own determination on the question of protecting family relations, which is said to be the sole reserve of the States.

In the following year, 1974, the Court addressed Federal treatment of illegitimate children. In a case involving social security benefits, the Court found unconstitutional a Federal regulation that denied benefits to illegitimate children whose dependency had not been established before a father's disability. 213/ In effect, the regulation had barred illegitimate children born to disabled fathers

211/ Gomez v. Perez (409 U.S. 535) 1973.

212/ New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619) 1973.

213/ Jimenez v. Weinberger (417, U.S. 268) 1974.

from receiving benefits if they were born following disability. Two years later, the Court upheld a social security regulation that made dependency, at any time, the primary requirement for an illegitimate child to qualify under survivor benefits. 214/ In both cases, as in New Jersey Welfare Rights, the Court applied actual dependency and substantive family relationships as the critical test.

In sum, the United States Supreme Court has denied the right of either the Federal Government or a State, under its police powers, to discriminate against illegitimate children based only on birth status. However, where the Court finds that no substantive family relationship existed, the Court tolerates such discrimination. Therefore, the Court's determination of whether or not the 14th Amendment protects an individual in illegitmacy cases depends on the outcome of the Court's review of the very questions that the States would argue to be their sole reserve: "legitimate" or substantive family relationships.

State Termination of Parental Rights

The question of just how and why a State may intervene to terminate parents' custodial rights over their children has directly involved the issue of Federal jurisdiction over matters of family law. In parental termination cases, a commonly contested issue concerns the jurisdiction of Federal writs of habeas corpus. That is, can a Federal court assert jurisdiction and, ultimately, provide relief to a parent who claims to have been injured by State action. The basic argument was whether Federal writs could address State determinations of a parent's fitness (or unfitness) and, thereby, a child's best interests.

214/ Mathews v. Lucas (472 U.S. 495) 1976.

At first, Federal courts split on the constitutional question of whether Federal writs can apply to this realm of State action, but Federal courts have consistently entertained the very substantive question that the States argued to be their reserve: the best interests of the child. In 1978, in Sylvander v. New England Home for Little Wanderers, the First Circuit Court of Appeals determined that child custody was the sole reserve of the States and that a Federal writ, therefore, could not extend to a case in which a State had intervened to terminate a parent's custodial rights. 215/

However, the court based its finding on its own assessment of the child's best interests as much as it based its finding on constitutional grounds. The court explicitly determined that a Federal writ would operate against the best interests of the child because it would prolong litigation and, therefore, extend the period in which the child was denied stability. The best interests of the child, said the court, demanded quick resolution, not extended litigation and legal limbo. Hence, the Court chose not to assert jurisdiction.

In the end, the Court agreed with the State, but only at the bottom line. The Federal court reached that line partly by weighing the merits of the very question that the State had argued to be its sole reserve. The same substantive determination by the court, i.e., that a child's interests would be ill-served by prolonged delay and uncertainty, has an important application in intercountry adoption. If the best interests of the child dictate quick resolution, the co-mingling of State regulation over adoption with the exclusive reserve of the Federal Government in immigration operates against the best interests of the

215/ Sylvander v. New England Home for Little Wanderers (584 F.2d 1103) Ist Cir., 1978

child, and those of the citizen parents, and operates against the value of family unification outlined by the courts, the Congress and INS.

Three years after Sylvander, the Third Federal Circuit Court of Appeals addressed the same issues of exclusive State jurisdiction and of substantive child welfare policy. In Lehman v. Lycoming County 216/ in 1981, the Court found the Federal interest in protecting personal liberty and family autonomy to mandate that jurisdiction of a Federal writ "be exercised unless there are compelling reasons to the contrary." (Emph added.)

This finding is especially significant to intercountry adoption. In Sylvander, the First Circuit Court of Appeals weighed the child's best interests almost in spite of itself. That is, Sylvander found that Federal courts could not assert jurisdiction over child welfare issues, but did so only after making an independent assessment of that very interest and its effects on the child at issue. In Lehman, the Third Circuit Court had no such ambiguous feelings. There, the Court found that Federal habeas corpus did apply, unless States could establish compelling reasons why it should not be applied.

In Lehman, the court went even further by asserting a Federal interest in family autonomy, an interest that is consistent with the historical Congressional concern for family unity in immigration policy. Congress first established its concern for family unity and autonomy in immigration policy with the War Brides Act of 1945 and the Fiancees Act of 1946. The War Brides Act protected family relationships already established abroad, while the Fiancees Act protected the

216/ Lehman v. Lycoming County Children's Services (68 F.2d 1103) 1978.

right to establish a family relationship. The Displaced Persons Act of 1948 went a step further by providing special visas for children adopted abroad.

The 1952 codification of the Immigration and Nationality Act further established a Congressional interest in family autonomy and unity by authorizing unlimited non-quota visas for immediate relatives of citizens. The Act entitled all citizens to petition the federal Government for immediate relative visas and later included stepchildren as "immediate relatives" in order to protect existing family relationships. Sections Two and Three of this chapter show in detail how family unity and autonomy remain critical in decisions by INS on visa applications.

In Lehman, the Court found a comparable Federal interest in the unity and autonomy of families throughout the United States. The Court added the powerful statement that the Federal Government not only has an interest and a responsibility in family relations, but that this interest must be respected and asserted unless compelling reasons to the contrary can be established.

Also in 1981, the Third Circuit Court of Appeals addressed the right to counsel of an indigent parent in termination proceedings. In Davis v. Page, the court found that such a parent is entitled to counsel. 217/ The case was remanded to the State court, which later confirmed its decision to terminate the parent's custodial rights. The case again reached the Federal Circuit Court in 1982, in Davis en Banc. This time the Federal Circuit Court explicitly added that Federal habeas corpus was an appropriate vehicle for raising Federal constitutional issues that touch on such basic, personal rights as custody of one's child.

217/ Davis v. Page (640 F.2d 599) 1981.

In sum, the three cases cited here considered whether Federal writs of habeas corpus extend to State termination of parents' custodial rights over their children as an exercise of the State's defense of the child's best interest. After independently examining the child's best interests, Sylvander answered "no." Lehman answered "yes," based on an independent assessment of the child's best interests' being served by protecting family autonomy. Finally, Davis avoided the question of Federal habeas in 1981, then, in Davis en banc, provided a strongly worded "yes" on the question of whether Federal habeas corpus extends to State termination proceedings.

Finally, in 1983, the United States Supreme Court entered the arena of termination cases by addressing the evidentiary standard, or the "why" in a State's decision to terminate an individual's parental rights. In Santosky v. Kramer the Court rejected the commonly used standard of a preponderance of the evidence as the basis for terminating a parent's rights. 218/ The Court insisted on a more demanding standard of "clear and convincing evidence."

As a result, to be acceptable, a State's termination of parents' custodial rights must be shown to be nothing short of self-evidently required to protect the child's best interests. Not only did Santosky extend the Federal writ of habeas corpus to termination without seriously questioning its jurisdiction, but the Court, in effect, mandated that Federal courts weigh the substantive issues involved in family relations. Only then, the court indicated, can a Federal court determine whether the preponderance-of-the-evidence standard has been exceeded. This is consistent with the Court's finding in Oyama in 1947, i.e., that the Court must

218/ Santosky v. Kramer (102 S.Ct. 1338) 1983.

"review independently both legal issues and those factual matters with which they are comingled" whenever the Court reviews a case in which Federal constitutional rights are asserted.

According to the Court in Santosky, termination of parental rights so severely and so irrevocably affects private rights that a review of the merits and a demanding evidentiary standard are absolutely required. Therefore, in appropriate cases, Federal habeas corpus can extend to family relations.

In sum, consistent with the finding in Lehman v. Lycoming County, Santosky established that parents' custodial rights are fundamental. Santosky then added that a State not only must show that it has a compelling interest at issue before terminating parental rights, but that the State must establish its interest with something more substantial than a preponderence of the evidence; the State's evidence must be "clear and convincing."

Rights of the Unwed Father

In cases involving illegitimacy and termination of parental rights, Federal courts have pursued the preservation of family units. In doing so, the best interests of the child have been found to be within the reach of Federal courts. However, illegitimacy and termination cases shrink in their cumulative effect on adoption and family law when compared to the issue of the unwed father's rights. The giant among Federal cases in the field is Stanley v. Illinois, 219/ which built on the landmark precedent of Armstrong v. Manzo. 220/

219/ Stanley v. Illinois (405 U.S. 645) 1972.

220/ Armstrong v. Manzo (380, U.S. 545) 1965.

Prior to Armstrong (1965), many States authorized their courts to give consent on behalf of non-custodial parents and unwed fathers to the adoption of their children. In Armstrong, the Supreme Court found that such statutes violated the rights of non-custodial legitimate parents. The Court found that a non-custodial legitimate parent had to be notified before a State could assume the authority to consent on that parent's behalf in the adoption of the parent's child.

Similarly, prior to 1972 most States assumed unwed fathers to have no interest in the welfare of their children. Stanley abruptly changed that, based on equal protection, due process and a substantive examination of the family relationships in the case. Stanley involved the rights of an unwed father who had lived with the mother of their 5 children periodically for 18 years, but who never married the mother. Upon the her death, the Illinois Department of Children and Family Services took custody of the children, though the father was living with the children at the time. The State based its action soley on the father's classification as an unwed father.

The Supreme Court found that Stanley had functioned as a parent and that his parental rights could not be terminated without a substantive hearing to establish that he was unfit as a parent. In short, married or not, Stanley was in fact a parent and, based on a review of questions presumed to be the sole reserve of the States, the Court emphatically found him entitled to be treated as a parent by the State of Illinois. The Court held that Stanley had an interest "in the children he had sired and raised" (emphasis added), and the assumption that he was unfit soley by virtue of classification "needlessly risks running roughshod over the important interest of both parent and child."

At a minimum, non-custodial parents and unwed fathers must receive notice of a pending adoption. If those parents refuse to consent, they are entitled to substantive hearings in which they must be established as unfit parents by the State, or as de facto non-parents. Classification alone is not sufficient reason for terminating a father's rights.

Armstrong and Stanley created a fair degree of turmoil in American adoption, and to overstate their pervasive effects would be difficult. They frequently are cited as fundamental causes of the sharp decline in American adoption that occurred in the early 1970's. Stanley is particularly cited as a cause for great care among adoption agencies in their placement practices. The idea is that parental releases, findings of abandonment or terminated parental rights must be air-tight, lest the adoptive placement of a child becomes a nightmare of litigation.

National adoption trends provide some support for the argument that these cases have inhibited adoption. (See Table 1.) From 1971 to 1972, non-relative adoptions fell by 19 percent in a single year. Though the decline in adoption had begun one to two years prior to Stanley, the sharp decline in 1972 remains the largest decrease in any single year. The question remains whether and/or to what degree Stanley was directly related to this decline or whether, as Chapter Six explores, the sharp decline was related to external trends, which judicial or adoptive policies could not significantly influence.

The Supreme Court has curtailed some of the chaos that Stanley created in domestic adoptions in the United States. In 1978 in Quilloin v. Wallcott, a Georgia statute required the consent of both parents in the adoption of a legitimate child but the consent only of the mother in the adoption of an

illegitimate child. 221/ The Court noted the discriminatory nature of the statutory classification, which assumed that, based soley on sex, an unwed father had no interest in his child. However, unlike the finding in Stanley, the Court rejected the argument that the father in Quilloin had been denied due process. As in Stanley and as in termination cases, the Court based its finding on its independent examination of the family involved. The Court found that Quilloin had had 13 years in which to establish a father-child relationship, but that he never did so. Therefore, he failed to establish himself as a parent. Had Quilloin established such a relationship in fact, his interest would have been protected by the Fourteenth Amendment.

The Court once again decided in favor of protecting a de facto family unit. In Quilloin, the adoption petition was filed by the mother's spouse of 9 years. The mother, husband and child had been a family unit in fact for 9 years, during which time Quilloin failed to establish himself in a father-child relationship. Based on its own determination of the best interests of the child, the Court upheld the State. Nevertheless, the Court found that the State's statute was unconstitutional as it rested on sex alone. In 1979, the Court ruled unconstitutional a comparable New York statute and applied the same test of a de facto parent-child relationship. In Caban v. Mohammed, the Court sustained the unwed father's right to veto the adoption of his illegitimate child. 222/

The standard, then, by which one determines the rights of the unwed father is that of a de facto father-child relationship. If the unwed father

221/ Quilloin v. Wallcott (434 U.S. 246) 1978.

222/ Caban v. Mohammed (99 S.Ct. 1760) 1979.

conducts himself like a father and establishes a parent-child relationship, then his parental interest is entitled to due process and equal protection of the laws. However, the question of exactly which unwed fathers deserve protection by the courts, and on what evidence, remains a case-by-case problem to be resolved by Federal courts. Consequently, though some of the confusion has been alleviated since Armstrong and Stanley, much of it remains.

Every State now requires notification to unwed fathers and non-custodial legitimate parents whenever a petition for adoption is received by a court. If the parent's identity and/or whereabouts are unknown, public notice must be given. This raises still another uncertainty: just how much effort is required in the attempt to locate that parent? Further, all these cases have involved older children. Exactly how or even if an unwed father can establish a de facto parent-child relationship with an infant remains unclear.

Armstrong, Stanley, Quilloin and Caban established that de facto family relationships are entitled to protection by Federal courts. Despite the effectiveness of this protection in cases like Stanley and Caban, and its effectiveness in establishing the de facto parent-child relationship of the petitioning spouse in Quilloin, the general effect of these cases has been to restrict adoption in the United States. Many children find themselves in the very legal limbo that the First Circuit Court of Appeals feared in Sylvander. That limbo frequently becomes prolonged and often denies the child any chance of entering a permanent family. Public and private adoption agencies are understandably very reluctant to place a child for adoption unless they are certain that all legal requirements have been fully met and that no chance exists that the agency later will have to pull the child from his or her new family environment.

Consequently, the child who must be freed for adoption against parental objections, i.e., through an adversarial court proceeding, "becomes older during the process, more damaged emotionally and harder to place than would usually be the case if (the child) had been freed voluntarily." 223/ A related effect has been to make utterly meaningless any estimate of the number of children "waiting" to be adopted. The case-by-case nature of the judicial questions, as well as the near void of any useful State data on any aspect of adoption, let alone solid information on a case-by-case basis, make it impossible to offer anything more credible than a seat-of-the-pants estimate of the number of children who are waiting for and who are legally available for adoption in the United States.

Michael Ward, in the Stanford Law Review 224/ (April, 1976) argues that the restrictive effects of Stanley and Armstrong will not change unless and until States can establish statutes and practices that: (1) can withstand constitutional scrutiny; and (2) will provide for termination proceedings prior to and completely separate from adoption petitions. This is an attractive notion, as it suggests that such statutes and procedures would make "final" the determination of the existence or absence of a particular parent's right to veto an adoption. However, to wait for the definitive approach that will "finally" clarify any uncertainty created by the need to protect constitutional rights, common law rights, de facto family relations, etc., and the interests of children truly waiting to be adopted may be a nostaligic longing for the "good 'ol days."

223/ Joe, Barbara; Public Policies Toward Adoption; Urban Institute (Washington, D.C., 1979), p. 10.

224/ Ward, Michael; Stanford Law Review (April, 1976)

Further, Barbara Joe 225/ notes that even in the twenty-plus States that have laws for the termination of parental rights prior to adoption proceedings, those laws typically are applied only to a very small percentage of those children who are in the foster care of public agencies. Courts in fact are very reluctant to terminate parental rights, as the issue involves something a bit more substantial than "procedures." The Court's comment in Stanley about "running roughshod" was not made loosely; a number of States had been doing just that.

In sum, a tension exists between two very important sets of considerations, and that tension and the associated uncertainty can be expected to continue. On the one hand, facilitating the adoption of children who are in need of stable and caring homes is presumably a public good with which few would argue. Conversely, extreme caution is required, as public policy has no interest in "running roughshod" over parental rights. Terminating parental rights is not a casual undertaking. In short, Federal courts are into family law to stay.

Divorce,. Child Custody and Full-Faith-&-Credit

Full-faith-and-credit among the States is frequently cited as a major reason for a State role in intercountry adoption. The rationale is that, through full-faith-and-credit, once a family has obtained an adoption decree from an American State court, the family is guranteed that all States will treat the decree as a final order and will, therefore, extend full and equal protections to the adopted child and the adoptive family. In short, full-faith-and-credit is assumed

225/ Joe, Barbara; "In Defense of Intercountry Adoption"; Social Service Review; University of Chicago (March, 1980) and Public Policies Toward Adoption; Urban Institue (Washington, D.C.; 1979).

to offer "true finality." This section examines cases involving divorce and subsequent disputes over child custody: (1) to reinforce the point made above that Federal courts frequently address questions such as the best interest of a child; and (2) to illustrate that neither Federal nor State courts feel terribly restricted by any sense of reverence for full-faith-and-credit.

In 1980, the U.S. Department of Health and Human Services (HHS) published its draft Model State Adoption Act in the Federal Register for public comment. 226/ The Model Act was intended to provide a model by which State adoption statutes could be amended to implement standardized practices that the professional adoption community recommended. The panel that drafted the act was composed principally of officials from HHS, State agencies and private adoption agencies. As such, the Model Act represents a general consensus among adoption professionals in the United States. Section 106 of the published draft spoke to full-faith-and-credit and its assumed effect in intercountry adoption.

> ... the family (should) readopt in the United States. Readopting assures that the decree is valid -- through full-faith-and-credit -- in every jurisdiction of the United States, thus providing maximum legal protection for the child and the family and securing the child's right to inheritance. ... The Model Act specifically provides that full-faith-and-credit be given to the records and judicial proceedings of ... States and jurisdictions of the United States. 227/

226/ Model State Adoption Act, Federal Register, February 15, 1980; Department of Health, Education and Welfare, Washington, D.C.

227/ Ibid, p. 10626.

This passage indicates both a problem and a remedy that may not exist. The implied problem is that foreign adoption orders (in IR-3 cases) would not be given any credibility in an American court and that a child may, therefore, be denied an inheritance for, as we have seen, a person without "inheritable blood" may not claim property by descent. However, we also have seen that Federal courts assess de facto family relationships. In most cases today, a resident alien child who has been reared by a family under the authority of a foreign adoption decree and prior Federal immigration proceedings is highly unlikely to be deemed anything but a bona fide member of the family by a Federal court. In addition, we also have seen that Federal treaties which provide for reciprocal property and/or inheritance rights preclude the operation of State laws on the subject. In short, a non-problem is being cited as a major concern.

Equally significant, a porous remedy is cited as an air-tight solution. Particularly in family law, full-faith-and-credit is unable to provide the degree of finality that is often assumed. Cases involving divorce and disputed child custody offer the clearest example of the pourous nature of the proposed remedy. In general, whenever a multi-State dispute is at issue, Federal and State courts give preference to the order of the State that is in a position to enforce its order. State custody decrees have not been found to have extraterritorial validity.

In Halvey v. Halvey 228/ (1947) New York had modified a Florida custody decree on the grounds that, because Florida could and did modify its own custody decrees, New York was under no obligation to extend to a Florida decree any

228/ Halvey v. Halvey (330 U.S. 610) 1947.

more finality than did Florida. The United States Supreme Court agreed and explicitly denied that full-faith-and-credit demanded anything of New York.

Six years later, in 1953, the Supreme Court delivered its most definitive rejection of full-faith-and-credit in custody cases in May v. Anderson. 229/ The father in the case had obtained an ex parte custody order in Wisconsin, as his wife had left the State before the court proceeding began. The mother later refused to return her children to Wisconsin following their visit with her in Ohio. The Ohio courts recognized the Wisconsin decree, under full-faith-and-credit, and ordered the mother to return the children to Wisconsin. However, the United States Supreme Court found that the Wisconsin decree was not entitled to full-faith-and-credit, as "a custody decree rendered without personal jurisdiction over an absent parent" could not be enforced in another State. A parent's custodial rights are personal and fundamental and cannot be abridged by a State that has no jurisdiction over the parent.

The practical effect of May has been to encourage parents who anticipate unfavorable custody orders to leave the State in advance of a proceeding. Halvey and May frequently are cited as the root causes of parental child-snatching in the United States. Be that as it may, the pertinent finding for our purpose is that, even when two States fully agree on the extension of full-faith-and-credit, the concept may carry little credit before the Supreme Court.

In 1958, the Supreme Court went even further to limit full-faith-and-credit. In Kovacs v. Kovacs, 230/ grandparents in North Carolina had custody of a

229/ May v. Anderson (345 U.S. 528) 1953.

230/ Kovacs v. Brewer (356 U.S. 304) 1958.

chiid for three years under a New York order when the mother petitioned the New York court for an amended order. The grandparents fully participated in the New York proceeding and never challenged that State's jurisdiction. However, when New York granted the mother's petition, the grandparents returned to North Carolina and did not return the child to the mother in New York.

The mother then petitioned in North Carolina, where the State court determined that the child's interests would be best served by staying with his grandparents. Again, the United States Supreme Court found that no State was required by full-faith-and-credit to attribute more finality to another State's order than that State would attribute to its own order, despite the apparent acceptance of New York's jurisdiction by the grandparents.

These cases illustrate that Federal courts and State courts have not felt bound by full-faith-and-credit. Yet, the Model Adoption Act speaks of protecting intercountry decrees from attack in other States. The premise is that, because "an adoption may not be subject to attack in the State which granted it" (p 10655), full-faith-and-credit will extend the same protection from attack in all 50 States for an intercountry decree. However, an adoption order, or any other judicial order arising under family law, indeed may be attacked in the State which granted it. Finality is an elusive goal, whether we speak of intercountry adoption, domestic adoption, or divorce and custody.

Summary, Section One

In the above cases, Federal courts sought to guarantee due process, equal protection and fundamental rights. However, to determine whether such rights have been violated, Federal courts have consistently applied practical tests to

establish the nature of the family relationship, in which the courts have addressed the substantive issues of the child's best interests. Federal courts have shown little reluctance to address the substantive questions in family law that the States feel to be their exclusive preserve.

This has been true in cases involving termination of parental rights, divorce and child custody, legitimacy and rights of the unwed father. The consistency of these themes makes it difficult to argue that Federal courts do not enter the substantive arena of family relations and family law. Further, the Supreme Court has consistently rejected State arguments based soley on full-faith-and-credit, even when the States involved fully agree on the question.

The argument for a State role in intercountry adoption prior to a Federal decision on the admission of the immigrant orphan generally rest upon these arguments of exclusive preserve and full-faith-and-credit. The latter factor is often used in a manner that simply assumes an orderly and clearly defined finality of State judicial orders. In fact, that finality is neither so orderly nor so clear.

Section Two

When American Case Law Differs from Foreign Conditions & Practices

The effects of cases like Stanley and Armstrong also extend to intercountry adoption. depending upon the State. This section notes the difficulties that can develop when American judicial and constitutional values, such as those outlined in the section above, are applied to a foreign adoption proceeding.

The least troublesome effect is a requirement by courts in most States that public notice be given whenever a petition is filed for the adoption of an immigrant orphan. Notice in the local newspaper usually suffices. The intent seems to be that of avoiding any obvious shortcomings in procedures that could invite needless challenges; certainly the intent cannot be a serious effort to notify someone in, say, Korea through a notice on page 38 of the Fairfax Jounal, with all due respect to the Journal.

More difficult problems arise when the rights of the unwed father, as defined by American constitutional principles, are applied to foreign cultural and legal environments. INS has taken the position that domestic law in the foreign country determines who has standing as a parent. For example, in 1980, an INS District Office denied an I-600 petition on behalf of a child from Peru, based on a finding consistent with the principles in Stanley, i.e., that termination of the unwed father's rights had not been consistent with American case law. However, the Board of Immigration Appeals (BIA) within the INS reversed the denial. 231/

The parents lived together, but were never married. After the child's birth, the mother signed a "certificate of consent" before a judge and a representative of the Interior Secretary of Peru to release the child for for emigration and adoption. The mother then was interviewed by a "social assistant" assigned by the First Court of Minors of Lima in a routine procedure to ensure that the mother understood fully the meaning of her action and that she had undertaken her action freely. The First Court of Minors of Lima and the INS both concluded that the mother knowingly and "irrevocably releas(ed) her daughter ...

231/ Matter of Rodriguez (18 IN 9) November 7, 1980.

for emigration and adoption." 232/ However, the release became confused when the adopting American couple felt obligated to secure the father's release.

Though the father fully agreed to the release, the INS field office determined that, since the mother and father were living together, the child had two parents. As such, the child could not qualify as an "orphan" under the Immigration and Nationality Act and, therefore, the visa petition was denied. This was fully consistent with the previously cited cases in which American courts had sought to determine whether a de facto paternal relationship existed between the unwed father and the child.

However, despite the father's acknowledgement of the daughter and his living with the mother, BIA reversed the denial of the petition because an unwed father in Peru cannot establish any legal standing. He neither has authority to consent nor object to an adoption. Speaking to the father's acknowledgement of his daughter and of his living with the child's mother, the BIA found that

> This act alone is insufficient to accomplish legitimation under the laws of Peru. ... By Article 314 of the Peruvian Civil Code, legitimation of children born out of wedlock takes place only by subsequent marriage of the parents or by judicial declarartion in certain narrowly defined circumstances. (Because) the parents have not married, (the child's) status was not converted to a legitimate child by the acknowledgement of paternity.
>
> (Therefore, the child has) only one parent. This is true even though such an act of acknowledgement would cause an illegitimate child to be ... legitimated in some other countries.
>
> An illegitimate child has only one parent, (his) natural mother, for purposes of the Immigration and Nationality Act. 233/

232/ Ibid.

233/ Ibid.

Despite this ruling by INS, many States continue to apply Stanley to intercountry adoptions. The Model State Adoption Act outlines how adoption professionals perceive the rights of the unwed father in intercountry adoption.

> State officials must ascertain that the evidence of the termination of parental rights according to the laws of the child's country of origin is sufficient for the adoption to be completed once the child arrives. Termination standards vary from country to country, but in general there may be (the following) types of evidence to substantiate termination of parental rights: (1) parental surrender or a certified copy of the parent's consent to the adoption; (2) a certified copy of a court order terminating parental rights and including the grounds for termination; (and) (3) a consent from an authorized representative from an orphanage, agency, governmental body or individual having custody of an abandoned child and having the right to consent to adoption 234/

Such a perception among the professional adoption community is enforced by a number of States, though not by all States. Where it is enforced, it is a serious extension of cultural blinders and creates a problem where one otherwise does not exist. Further, it exposes American adoptive parents to significant variations in the standards under which citizens' petitions to the Federal Government to classify an alien as an immediate relative for the purpose of immigration is approved, denied or, at least, delayed.

The above quote from the Model State Adoption Act also conflicts with the Federal practice of relying on foreign law to establish personal status and adoptability for purposes of immigration. Reference is made to the laws of the child's country of origin, but then the paragraph speaks of testing practices under

234/ Model State Adoption Act (Federal Register), p. 10660.

those laws according to State laws "once the child arrives." Yet, every type of evidence mentioned above will already have been reviewed by INS, the Consul and various agencies of the foreign government. If any American official is likely to distinguish proper from improper evidence under the laws of the child's country of origin, it will first be the U.S. Consul, who is located on site and who is exposed to such issues daily within the local legal and institutional environment, and, secondly, it will be INS, which reviews such evidence hundreds of times annually from each of the major countries involved.

At a minimum, the quoted position assumes that State adoption officials who review intercountry placements have far more administrative capacity than they enjoy in fact. Typically, those officials will also be responsible for all interstate placements and must fulfill all their duties with very limited, if any, professional staff support. Typing support is commonly the limit of staff support. In short, the State official is being asked to perform a rather large task, i.e., to recognize when a local law or administrative regulation in, say, El Salvador has not been fully followed -- and to be the first official in the chain to recognize the problem, though foreign officials, the on-site U.S. Consul and the INS will have reviewed the very same documents before they have been sent to a State official.

The Model Act goes on to outline the nature of parental terminations that should be acceptable. 235/ For example, a State should be assured that the birth mother has received written alternatives to adoption, plus legal counsel and a minimal time to reconsider her decision. This type of standard clearly would be out of place in most other countries.

235/ Ibid. p. 10661.

First, "alternatives" to adoption in the countries-of-origin of nearly all the children consist of a single option: raise the child in stark poverty and, perhaps, inflict still more severe poverty and rejection on the mother in many cases (particularly in the Orient) than she might otherwise face. These mothers do not have the option of public assistance nor the option of aborting in their rather strictly moral societies.

What, then, is the practical objective of encouraging the States to apply an American mentality and legal standard to a foreign proceeding? The Model Act suggests two purposes. First, it is said to ensure that the proceeding accords with Amercian adoption practices; as indicated above, this is less than profound reasoning. Secondly, the Model Act contends that such State actions "should also serve to deter unscrupulous child placers in a foreign country from attempting to place children without the authority to do so." 236/ This assumes a severe problem that simply does not exist, then presumes, rather naively, that if such a severe problem were to exist, an official in a State capitol back home might ever be the first to recognize it.

Illinois takes this presumption a step further. Illinois' Department of Children and Family Services (DCFS) requires various documents as evidence that the child is free for adoption under the laws of the foreign country, including the "citation of the specific law or regulation sections thereof that such action is in relation to." 237/ Illinois thereby asserts that it can recognize citations of foreign statutes, regulations, etc., and determine whether or not such laws and

236/ Ibid, p. 10661.

237/ Illinois Department of Children and Family Services, Information Sheet Number 18, circa. 1978.

regulations have been followed properly, although, again, the very same questions have been reviewed by the U.S. Consul on site, by INS and by various agenices and jurisdictions of the foreign country. This is absurd, unless DCFS has a substantial legal staff that specializes in foreign family law. The presumption is even weaker if applied to foreign federal systems, such as Brazil, India and Mexico; presumably DCFS recognizes citations from Brazil's 24 States, India's 26 States and 9 Federal Districts and Mexico's 32 States, plus citations from Bolivia, Chile, Peru, etc.

The most germane point, though, is that the principles associated with Quilloin and Stanley are simply out of place in the legal and cultural environments of most foreign countries. When these values are applied in full by the States to intercountry adoption, the situation can become badly confused. For example, as in Peru, the unwed father essentially is a non-person before the courts in most countries and unwed fathers have no legal standing whatsoever. 238/ Not only do most other countries not require consent of the unwed father, but most countries would not recognize the consent of the unwed father and may become suspicious of the adoption if it were offered.

A recent case in Honduras is a perfect example. 239/ An American couple in 1984 had its adoption of an Honduran child delayed by Honduran courts not because the parents failed to obtain the unwed father's consent, but because they did obtain it. The child's parents had never married. The mother died shortly after the child's birth, whereupon the father undertook to raise the child. He kept the child for over a year before he determined that he could not afford to

238/ Matter of Rodriguez.

239/ Confidential source; story related by the family involved.

continue. When he sought to have the child placed for adoption, the adopting American couple acknowledged in their documents the circumstances faced by the child and the father. Consequently, the State of Connecticut, upon its review of the documents, requested a release signed by the father.

However, the unwed father in Honduras can neither object nor consent to an adoption. Under American case law, this unwed father would have been fully recognized as the father of the child. He would have satisfied the test of a de facto parent. No such concept exists in most other countries. The result was that the Honduran court became suspicious of the petition. Essentially, the Honduran court wanted to know whether the child's mother was ever married or not. If not, who is this man and why does he assert parental rights in this case?

These cases are not the norm; such confusion is indeed the exception. However, neither are these cases terribly rare. Other authors have cited comparably confused applications of American family case law to intercountry adoption. For example, Elizabeth Cole cites a similar case in which a Wisconsin Court insisted on an additional statement from a birth father in El Salvador to attest that his paternal rights, not recognized under Salvadorean law, had been "properly" terminated. 240/ The notion that an unwed father's rights could be properly or improperly terminated makes no sense in El Salvador's legal context.

The Vietnam Babylift offers an example of a rather large-scale problem caused when the States apply American judicial and constitutional values to intercountry adoption petitions. As outlined in Chapter Two, Vietnamese customs result in what we Americans find to be rather puzzling birth certificates.

240/ Cole, Elizabeth; "Prospects for Adoptions: 1976-1985"; Dept. Health, Education and Welfare and Child Welfare League of America (Washington, D.C., 1975.)

Eddleman 241/ alludes to dozens of cases in which State courts found, for example, a child standing before it who was clearly some 7 to 10 years old, while a Vietnamese birth certificate said he or she was but three years old. A number of courts applied American assumptions and cultural values and required additional investigation before granting adoption petitions. The source of the confusion was that, under Vietnamese custom, a family registry may show any number of things, only one of which might be a date of birth.

In sum, Stanley and the related constitutional principles, which are proper within an American legal and constitutional context, are not the controlling principles in intercountry adoption. This, of course, is a convenient finding for this dissertation because it adds weight to the case against a State role prior to the entry of an immigrant orphan. However, the finding can work two ways. That is, as shown below, foreign family law can sometimes negate that which might be considered an adoption under principles of American law.

Section Three:
INS Experience in Adoption

Section One established that questions like the child's best interest and "real" family relations are not foreign to Federal courts. This section establishes that the same questions are even less foreign to INS. The section argues that the Federal Government has ample experience in intercountry adoption and with adoption within foreign countries to assert its own authority in the field.

241/ Eddleman, Charles L.; "Immigration and Adoption of Operation Baby Lift Orphans: Tough Decisions in Family Law"; Orange County Bar Journal, 1977 Volume 4: pp 164-181.

Section Three also shows that reliance upon foreign family law for defining individual status will not always be a convenient position for those who advocate foreign adoption. That is, in cases that involve IR-2 visas, INS often denies the existence of adoptive relationships, based soley on foreign family law, though the adoptive relationship might well be recognized if American Constitutional principles prevailed. In those cases, the interests of individual citizens might be better served if INS were to apply American principles of family law or if the Federal Government chose to delegate this element of immigration to the States under the same rationale that the States, not the Federal Government, regulate family law and adoption in the United States. However, Federal law offers no role to the States in those cases.

INS Experience in De Facto Adoptive Relationships

INS has had ample reason to address de facto family relationships in cases of immigrant adoptees who differ significantly from the children who are the subject of this paper. These adoptees are adopted abroad by families living abroad, both alien and citizen families, who do not seek entry into the United States for at least two years following the adoption. Either as children or, later, as adults, these adoptees enter under an IR-2 visa, as established members of a family unit.

Since the 1957 Act, Section 101 (b)(1)(E) of the Immigration and Nationality Act has defined "child" to include one who has been adopted abroad before the age of 16 and "has thereafter been in the custody of, and has resided with, the adopting parent or parents for at least two years" before entering the United States. A child who qualifies under 101 (b)(1)(E) is considered a full

member of a family unit that has already been established. This also is the sole procedure for a non-citizen to secure a visa for an adopted child from abroad.

To obtain an IR-2 visa, citizens file an I-130 petition. Because all immediate relatives are included in the I-130 and because adopted children are not the only group covered under the IR-2 visa, Federal data cannot identify the number of adopted children who enter under this procedure.

The procedure is very different from that for the I-600. INS must balance the Congressional desire to protect family unity with the Congressional desire to avoid bogus adoptions for the sole purpose of circumventing immigration laws. 242/ Because this balancing act is sometimes confused by local adoption law and/or custom in a particular foreign country in which an American family may have resided for two years, the balancing act is not always an easy one. INS frequently must determine whether or not a family exists in fact. This determination has made the I-130 the subject of Federal judicial review.

In its earliest appeals under section 101(b)(1)(E), INS and the BIA sought to balance the need to determine bona fide family relationships with a strict constructionist's approach to the legal status and legal obligations that the foreign adoption created in the foreign country between parent and child. The BIA heard its first appeal of a denied I-130 in 1959.

In 1959, in Matter of M, 243/ an alien Italian family had adopted an infant in Italy in 1949, but did not receive a final decree from an Italian court until 1955. One year later, the family petitioned to enter the United States as

242/ INS Technical Analysis of Section 23 of S. 1006; July 30, 1957.

243/ Matter of M (8 IN 118) March 20, 1959.

permanent residents. All members of the family except the adopted child were approved for visas by INS. The visa for the adopted child was denied, based on the failure to satisfy the two-year requirement following an adoption decree.

On appeal, the BIA noted the ambiguity created by the language in the statute. The ambiguity resulted from a basic question on whether the 2 years started when the child began living with the family or when the family obtained a final decree. The BIA addressed the ambiguity within the context of its interpretation that the statute had been designed by the Congress to protect existing family units from disruption.

> This legislation was designed to ameliorate the harshness and inequity of certain situations where there existed bona fide family units.
>
> Where a law is susceptible of more than one meaning, the true spirit of the law should provide the true guide. ...(I)f an ambiguity exists it should be construed in favor of the person whom the Congress intended to benefit. 244/

The Administrative Law Judge at the BIA determined that the statute was intended to benefit bona fide family units, whereupon the substantive family relationships had to be reviewed. BIA found that the child had been adopted at the age of just eight months and had been "reared and maintained and resided with the petitioners continuously" for six years. Consequently, "the beneficiary (child) was a bona fide member of the household" and was to be treated as such in the visa petition. BIA reversed the initial denial of the petition and ordered that the child receive a visa with the rest of his family.

244/ Ibid.

The same section of the Immigration and Nationality Act included still another ambiguity in addition to the question of when the clock started; should the clock start or be interrupted if the citizen parent does not reside with the the child for the required two years? The INS initially construed the statute narrowly and required the child to reside, uninterrupted, for two years with a citizen parent. This ambiguity was addressed on three occasions by the Federal courts.

In Ng Fun Yin v. Esperdy 245/ (1960), a citizen of China emigrated to the United States in 1923, leaving his wife of two years behind. The wife remained in China for 37 years, during which time the husband returned to China on several occasions for a total of 7 years and 7 months. On one return trip in 1947, the couple adopted a son under Chinese law. The son remained with the alien mother in China while the father supported them both from the United States.

In 1959 the father, then a naturalized U.S. citizen, petitioned for visas for his wife and adopted son. The petition was granted for his wife but was rejected for his son on the grounds that he had not resided with the citizen parent for any appreciable time, but only with the alien parent. INS determined that Section 101 (b)(1)(E) was "remedial in nature and (was) enacted ... to reunite an adopted child with his parent or parents where a bona fide family relationship (would be) interrupted." However, INS added that, because the child had not satisfied the two-year requirement, the statute precluded INS from reaching a favorable decision on the petition.

245/ Ng Fun Yin v. Esperdy (187 F.Supp. 51) S.D.N.Y., 1960.

The Federal District Court for the Southern District of New York acknowledged the ambiguity in the statute and conceded that the INS position had some credence. However, the court found that

> ... the purpose of the (section) in question is to foster bona fide family relationships. I believe that general purpose can be implemented only by granting plaintiff's adopted son non-quota immigrant status. There is no doubt whatsoever that plaintiff and his wife have, for years, had a bona fide family relationship. There also is no doubt that plaintiff's wife and plaintiff's adoptive child have had, for years, a bona fide family relationship. The only way these two relationships can be maintained is to allow all three individuals involved to maintain a single residence. (If only) the wife were allowed to rejoin her husband, the bond between mother and child would be broken. If the bond between the mother and the child is sought to be maintained, the bond between the wife and husband must be broken. I cannot ascribe to Congress an attempt to condone such an illiogical result. 246/

Federal District Courts addressed the same question in two unreported cases in 1960 and based their findings on Esperdy. 247/ Thereafter, the BIA incorporated Esperdy in its rulings. In Matter of Y-K-W (1961), 248/ a citizen had brought his non-citizen wife to the United States in 1957, but temporarily left their adopted son of ten years with relatives in Hong Kong. Though the son had lived continuously with the mother for ten years, INS denied the petition for non-quota status because the son had not lived for any appreciable or continuous time with the citizen father. On appeal, the BIA cited the above three cases as the basis for reversing the denial, and concluded the following.

246/ Ibid.

247/ Toy You Wong Ng v. Esperdy, S.D.N.Y. Civil Action No. 60-4043, 1960; and Gim Leong Fong v. Swing, et. al.; D.C.D.C., Civil Action No. 1068-60, 1960).

248/ Matter of Y-K-W (9 IN 176) February 28, 1961.

> Once the remedial purpose of preserving ... bona fide family relationships and permitting the family to live as a unit in this country is recognized, the reasoning in Ng Fun Yin v. Esperdy appears to be compelling. ... The requirement of the statute that legal custody and residence be had with the adopting parent or parents is satisfied if had with only one of the adopting parents for the requisite two years.
>
> In reaching my decision, I wish to emphasize that in this case there has been no challenge to the bona fides of the family relationship involved. 249/

INS also has had extensive experience in addressing the status of a stepchild. Much like the practice of Federal courts, INS and the Congress have applied the test of a de facto family relationship. Since 1952, the Immigration and Nationality Act has defined a stepchild as a "child." 250/ However, the statute requires that the stepchild relationship exist at the time the petition is filed by the citizen stepparent. That is, the relationship must exist in fact.

To protect all de facto stepparent-stepchild relationships, the BIA found in 1971 that if the alien parent should die, but the child remains with the citizen parent as a bona fide member of the family, the child is entitled to an IR-2 visa, provided he or she is otherwise eligible under immigration law. 251/ Similarly, Congress took action in 1957 to establish that a child born out of wedlock to an alien parent qualifies as a stepchild when the alien parent marries a citizen. 252/

249/ Ibid.

250/ 8 U.S.C. 1101 (b)(1(B).

251/ Matter of Pagnerre (13 IN 688) 1971.

252/ 71 Stat. 639; September 11, 1957.

However, if a stepchild is no longer a member of a citizen's family in fact, due, for example, to divorce, the child no longer qualifies under Section 101 (b)(1)(B). 253/ Similarly, if INS determines a marriage to be a sham, a child is not entitled to an IR-2 visa. 254/ Again, the family relationship must exist in fact.

I-130 Denials Upheld, Based on Local Law

These findings on behalf of an existing family unit have been based exclusively on interpretation of the Immigration and Nationality Act. However, as suggested in the beginning of this section, local foreign law can sometimes cause INS to deny I-130 petitions, though they might be approved if the principles of American family law were applied. For example, most Moslem countries apply Islamic law to all questions of family and personal status. Because Islamic law does not recognize adoption in any manner, an adoptive status that satisfies the requirements of an I-130 cannot be established in a country in which family status is determined by Islamic law.

The BIA has addressed this question under I-130 petitions for adoptive children and adoptive siblings. In Matter of Boghdadi 255/ (1968), INS denied an I-130 petition filed by a naturalized citizen on behalf of his brother who, when a child, was said to have been adopted by the petitioner's parents in Egypt in 1942. Twenty-six years later, a naturalized American citizen sought an IR-2 visa for his brother on the basis of the brother's having been adopted.

253/ Matter of Simicevic (10 IN 363) 1963.

254/ Matter of Teng (15 IN -- I.D. 2452).

255/ Matter of Boghdadi (14 IN 305) March 27, 1968.

The BIA found that, until January 1956, the Egyptian Civil Code granted jurisdiction on all matters of family and personal status to religious courts. However, if a Christian or Judaic court could not decide the issue based explicitly on its own religious law, the issue reverted to Islamic law. To determine if the benificiary in Boghdadi enjoyed a legally recognized adoptive status in Egypt in 1942, the BIA reverted to Rabbinical law, which the BIA determined did not address adoption in any manner. Therefore, the issue had to be reviewed under Islamic law, which denied any system of legal adoption. Consequently, the INS District Office had denied the petition and the BIA sustained the denial.

The BIA addressed the same question of Islamic law in an I-130 petition filed on behalf of adults who had been adopted when children in South Yemen. In 1973, the BIA found that, because Islamic law applied in the Yemens, "there is no system for legal adoption (there, so) petitioners cannot establish that the relationship by adoption arose there." Further, "Islamic law does not recognize the validity of any mode of filiation where the parentage of the person adopted is known to belong to a person other than the adopting father." As a result, even where adoption might be practiced to some degree in Islamic countries, adoption carries no legal rights or status whatsoever. Because the BIA found that neither legal nor customary systems of adoption exist in South Yemen, no adoptive relationship, as understood in the United States, can be initiated in Yemen. 256/

In Matter of Benjamin (1974), the BIA addressed a question similar to that in Boghdadi. A petitioner claimed to have adopted a child in Iraq under Chaldean Catholic law, which the petitioners claimed applied the Hammurabic

256/ Matter of Ashree, Ahmed and Ahmed (14 IN 305) March 30, 1973.

Code to family law and which, thereby, recognized a legal adoptive status. The BIA consulted the Library of Congress and found that the claim that the Hammurabic Code was applied by the Chaldean Church was unclear, but that, in any event, that Code did not recognize adoption in any manner. Besides sustaining the denial of the I-130 petition, the BIA added that "adoption" in countries under Islamic law enjoyed the status only of "charitable help to a needy child." This was insufficient to establish an adoptive relationship under immigration law. 257/

However, where adoption exists by custom, even if a civil code or an applicable religious law does not explicitly address adoption, Federal courts have held that INS must recognize the adoptive status. Again, local law is the primary basis for determining the de facto existence of a family relationship abroad.

In Mila v. District Director, INS 258/ (1980), a Federal District Court reversed an INS denial of an I-130 petition. The case originated in Tonga and INS based its denial on the cases cited above. The District Court found that Tongan law did not address adoption, but that Tongan courts had, since the constitution of 1875, enforced a number of ancient customs that had not been addressed explicitly by the constitution nor by subsequent statute. Adoption, as known in the West, was found to be one of those ancient customs that Tongan courts routinely recognized. Hence, the District Court found that a legal status could be established for an adoptive relationship in Tonga and, therefore, that the petition, filed on behalf of an adoptive sister, should have been granted.

257/ Matter of Benjamin (15 IN 709) 1974.

258/ Mila v. District Director, INS (494 F.Supp. 998) D. Utah, 1980.

This case did not overturn the INS and BIA practice of applying local foreign law to determine the basis and nature of personal and family relationships. Rather, the court in fact applied the same principle, but in this case found that local custom, as upheld by local courts, could establish the legal relationships that INS felt should determine the issue at hand.

Other precedents exist to establish that, for immigration purposes, a child's adoptive status is determined by local national law. Below is a list of national laws involved in BIA cases in which this principle has been confirmed.

> Burma: Two types of adoption exist; one confers legal status; the other confers only ceremonial recognition of "special relationships." 259/
>
> China: The adoption must be in writing, except where the child is raised from infancy by the family, since this type of adoption is recognized by traditional law in China. 260/
>
> Czechoslovakia: Adoption is accomplished only by a court decree; it is not recognized by tradition when a family raises a child from infancy without legal status. 261/
>
> Haiti: Adoption is given legal status only if the child is under six years old. 262/
>
> Hong Kong: Chinese traditional law recognizes adoptions established by rearing a child from infancy. 263/
>
> India: adoption of a son by a Sihk is invalid if the parent has a living son. 264/

259/ Mila.

260/ 54/ Matter of C.F.L. (8 IN 151) 1959; and Matter of Kwok (14 IN 127) 1972.

261/ Matter of Zapletalova (12 IN 258) 1967.

262/ Matter of Aladin (15 IN -- I.D. 2425).

263/ Matter of Yue (12 IN 747) 1968.

264/ Matter of Purewal (14 IN 4) 1972.

Denials of I-600 Petitions by INS

With more than 62,000 approved adoptions in ten years (IR-3 and IR-4), INS in fact has no peers in adoption experience. INS continuously makes substantive evaluations of prospective adoptions; in 1984, the determination was favorable 8,600 times, or an average of 717 times per month! However, the decisions are not always favorable. Historically, INS has rejected a stable rate of about 4½ percent of all I-600 petitions. 265/

Very few denials of I-600 petitions have been appealed within INS and no cases involving a denial of an I-600 have ever reached a Federal court. However, some I-600 denials reviewed by the Board of Immigration Appeals (BIA) within INS offer a sense of the factors that concern INS, as well as some sense of the capacity of the INS to review the petitions.

In Matter of Suh, 266/ (1962), INS had denied a petition on the grounds that "the petitioner and spouse have failed to establish that the orphan will be cared for properly if admitted to the United States." From the fingerprint check through the FBI, INS found that the petitioning husband had been convicted of various crimes at least twice in each of three States. On that evidence, plus evidence of a less than honorable discharge from the U.S. Army, INS denied the petition. This type of evidence is very difficult for State adoption officials to obtain and include in their decisions, and in fact almost never is sought.

In the appeal of a denial in 1964, the BIA noted the failure of petitioners to meet the preadoption requirements of the State of New York. The BIA noted

265/ Krichefsky, 1961; and INS internal reporting forms "G-23".

266/ Matter of Suh (10 IN 624) November 6, 1962.

that this alone precluded favorable treatment of the petition under the Immigration and Nationality Act. 267/ This would have been ample reason for INS to reject a petition and for BIA to deny the appeal. Nevertheless, BIA added its own evaluation of the petition and found it wanting.

> It is apparent from ... welfare records, the difficulty which (the petitioners) have experienced in maintaining rent payments, and their sposmadic work records, that they are already committed to obligations of support for their six children which have become burdensome. The ability of the (petitioners) to care for the beneficiary properly ... has not been established. 268/

This passage is noteworthy for a number of reasons. As suggested above, the BIA could have cited only the failure to meet State preadoption requirements, but chose instead to add its own review of the merits of the petition. Secondly, this is the only BIA appeal in which State preadoption requirements are mentioned at all, and even in this case they were mentioned only in a single sentence. The BIA did not address the basis of a State role, except to cite the appropriate section of the Immigration and Nationality Act. However, the added review of the merits indicated that the BIA felt empowered to review the basis on which a petition may have been rejected by a State. In this case, the BIA reviewed the basis for New York's rejection and agreed with New York.

In both cases cited above, INS in fact completed its own independent review of the petitioners' capacity to care for and raise a child properly. Capacity to support a child is a basic item of concern to INS, as is the moral capacity of a petitioner to raise a child. No minimally required income is

267/ Matter of T-E-C (10 IN 961) January 15, 1964.

268/ Ibid.

identified, but the practice of INS indicates that one need not be wealthy to satisfy INS that a petitioner can support a child. For example, in T-E-C, the BIA made the point at some length that the work records of both prospective parents were unstable and that their subsequent income was already badly taxed to support their existing family of eight. The qualititative standard applied in T-E-C by INS and by the State of New York appear reasonable.

These cases suggest that INS makes an independent decision on all I-600 petitions, regardless of whether the child will enter the United States with a final decree from another country (IR-3 visa) or under one or another form of custody from a foreign court (IR-4 visa). In an IR-3 visa, the States are not involved at all, so the independent nature of the INS review is a bit more obvious with this class of children. However, even with the now much larger class of IR-4 visas, in which the Congress has included the States, the approach at INS appears to assume a completely independent review. The State review is in addition to, not in place of, the INS review. INS describes its responsibilities in the review of I-600 petitions as follows. Note, that INS makes no distinction whatever in its treatment of I-600 petitions as a function of whether a child will enter the United States under an IR-3 visa (with a final foreign decree) or under an IR-4 visa.

> The Service must decide whether the ... child is an orphan and whether the prospective adoptive parent(s) are able to take care of one or more orphans properly. When there is unfavorable information about the prospective adoptive parent(s), the Service concludes that proper care could not be given to a child ... the Service makes an unfavorable determination. (Emph added.) 269/

269/ "The Immigration of Adopted & Prospective Adoptive Children"; INS, Washington, D.,C., 1984; pp 3 and 7.

IR-3 visas provide the most direct and unchallenged area in which INS has had extensive experience in unilaterally assessing the propriety of adoptions. The States are excluded from any role in an IR-3 visas prior to the child's entry into the United States, based on a final foreign decree. Yet, foreign adoption decrees for IR-3 children establish only de jure family relationships, not de facto relationships. In fact, both the IR-3 and IR-4 children enter the United States to begin new family relationships. Consequently, INS reviews petitions for both visas under the same I-600 procedures. The documents reviewed and the substance of the review are identical for either visa.

Nevertheless, Section 101 (b)(1)(F) of the Immigration and Nationality Act excludes the States from passing on the propriety of an IR-3 visa, even though a child is entering a family relationship every bit as new and as yet unestablished as that of an IR-4 child. Once again, Congress accepts the foreign law as the controlling factor in determining individual status. With the IR-3 visa, Congress recognizes a de jure family relationship and, hence, the decision to grant or to deny the petition is retained exclusively by the Federal Government. Yet, a number of States contend that an IR-3 visa does not confer upon the child a legal adoptive status that is recognizeable in the United States.

This claim is typically based on a single case, from a State court, and on the assertion that family law is exclusively the reserve of the States. The only American court to rule on the legal status of a foreign decree for an I-600 child has been a State court in Tennessee, which ruled on a finding of abandonment, not a final order of adoption.

In McElroy, 270/ (1974) the Tennessee court ruled on a truly unique case. In 1967, an unmarried Korean woman gave birth to a daughter two months after the American father had been returned to the United States by the American military. One year later, the father returned to Korea, married the child's mother, declared his paternity and secured a U.S. passport for the child from the Embassy in Seoul.

When his wife's exit visa was delayed by the Korean government, the father returned home to Tennessee, where his wife and daughter were to join him upon obtaining an exit visa. However, by 1970, the child and mother had not arrived and the father had lost all contact with his wife, despite his well documented efforts to locate her and to continue supporting his family.

Eventually, the father learned that his daughter had been abandoned by his wife and, through normal Korean procedures (see Chapter Two), had been placed for adoption with a family in Tennessee by Holt Adoption Agency of Korea. Upon the family's petition to adopt the child in Tennessee, McElroy contested the petition and sought custody of his then seven-year-old daughter. The Tennessee court ruled in his favor, rejecting arguments from the petitioning family that Tennessee should recognize the order of abandonment from Korea.

Lee Breckenridge 271/ examined this case in detail in 1977 and found the Tennessee court to have reached a reasonable decision, but for the wrong reasons. The court found that the Korean decree was not entitled to comity, i.e., recognition of the act of a sovereign country, because the decree was (1) a

270/ re McElroy, (522 S.W. 2d 345, Tennessee, 1974).

271/ "The Validity of Foreign Abandonment Decrees for Purposes of Adoption in the U.S."; Breckenridge, Lee; Harvard International Law Journal; Winter, 1977.

judicial proceeding, which traditionally precluded it from comity, and (2) because the administrative elements of the Korean process were those of a municipality and not of a sovereign government. Hence, coining a new term, the Tennessee court found that a "subdivision rule" denied comity to the Korean administrative findings regarding abandonment.

Breckenridge argues convincingly that Korean findings of abandonment are not based on judicial proceedings in the sense of an adversarial proceeding. Secondly, as noted in Chapter Two, Korean municipalities are involved in adoption proceedings according to national law. Hence, Korean administrative findings of abandonment are acts of a sovereign national government, despite the delivery of various services by a municipality, and therefore are entitled to comity. Breckenridge goes on to cite substantial precedents in which non-adversarial judicial proceedings had been extended comity in the United States and additional precedent to show the "subdivision rule" to be erroneous. In short, the only I-600 case to be contested in a State court was decided on less than profound reasoning.

This was a one-in-a-million case. To cite this case as evidence of serious weaknesses in intercountry adoption indirectly weakens the argument of agency advocates, as a respected agency was involved in this placement. The point is not that the agency was at fault; it was not. However, McElroy provides no more evidence that intercountry adoption is beset with problems that demand a State role than it provides evidence that agencies bungle most cases.

All requirements had been fully met under Korean law and American immigration law, and a reputable adoption agency had made a good-faith placement. Those facts were never in dispute in McElroy, so INS procedures were not addressed. The "real" issue was that the natural father had persistently tried

in equally good faith to locate his daughter, though this was unknown to Korean officials, American immigration officials or Holt of Korea at the time. He clearly had not surrendered parental rights as they are understood in the United States nor, for that matter, as they are understood in Korea, where the law provides for legal challenges to adoption petitions. Much as in the United States, petitions and even final decrees can be revisited; "finality" is an elusive creature.

In addition, though Tennessee is an area of relatively modest activity in intercountry adoption, the Tennessee court had the one-in-a-million luxury of direct jurisdiction over the petitioning family, the natural father and the child in a dispute that arose from a jurisdiction half a world away. Direct jurisdiction and the court's responsibility to protect the custodial rights of a resident of Tennessee over a child located in Tennessee would have been more than adequate grounds for the court to consider the father's challenge. Breckenridge concludes that the decision was reasonable only because the court had the luxury of direct jurisdiction and because the father clearly had not surrendered his parental rights.

The Tennessee court, in effect, got lucky. Its decision was reasonable, but its rationale was not. Consequently, borrowing a phrase from Holland v. Missouri, to rest a claim of State authority on McElroy "is to lean on a slender reed." Four years later, in 1978, the Tennessee Supreme Court indirectly suggested that the reasoning in McElroy was indeed a slender reed, as the Court ignored the case in its search for a Tennessee precedent involving a foreign judicial decree. In Hyde v. Hyde 272/ the Tennessee Supreme Court ruled on the recognition of a divorce decree obtained from the Dominican Republic by a

272/ Hyde v Hyde, (562 S.W. 2d 194, Tenn. 1978).

Tennessee couple. Neither member of the couple objected to full implementation of the Dominican decree, but, upon their petition to their county government for recognition of that decree, the county objected. In its search for an appropriate precedent, the court stated that

> We have not found any case in which Tennessee courts have considered what effect should be given a judicial decree from a foreign nation, but the courts of this state have recognized the doctrine of comity in cases where the rights of parties under laws of other states were at issue.... (Emphasis added.)
>
> The rule of comity to be gleaned from these cases is that ... Tennessee will enforce the substantive rights which litigants have under the laws of the other jurisdiction if such rights are not contrary to the public policy of Tennessee. 273/

The Tennessee court in Hyde noted that comity is extended only at the discretion of the jurisdiction of forum. However, if a decree did not conflict with Tennessee policies, comity would be extended. The court added that "resting as it does on the non-obligatory discretion of the forum, comity defies both precise definition and uniform rules of practice." In its landmark ruling in Hilton v. Guyot, the U.S. Supreme Court in 1896 also cited the imprecise meaning of comity.

> Comity ... is neither a matter of absolute obligation ... nor of mere courtesy and good will. ... It is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of persons who are under the protection of its laws. 274/

273/ Ibid.

274/ Hilton v. Guyot (16 S.Ct 143, 1896).

In the same year in which McElroy was decided, the Supreme Court of Connecticut decided a case involving the enforcement of a Mexican divorce decree. In Yoder v. Yoder, the Connecticut court (1974) ordered the ex-husband to pay medical costs for a child in the custody of the wife, pursuant to the Mexican decree. The court determined that

> Where there has been opportunity for a full and fair trial before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice ... and there is nothing to show either prejudice in the court or in the system of laws under which it was sitting, or fraud in procuring the judgement, ... the merits of the case should not, in an action brought in this country, be tried afresh. 275/

In sum, comity is discretionary; it is not required of a State. However, its principles indicate that, assuming that no procedures repugnant to our laws are involved, foreign decrees of adoption or abandonment should receive comity in the United States. The argument is strengthened by the Congressional recognition of such decrees as the basis for the immigration of I-600 children. Though comity is not an absolute requirement, it is not to be dismissed out of hand.

Yet, the confusion evident in McElroy is sometimes assumed to have definitive meaning. As McElroy was being considered by the Tennessee court, Elizabeth Cole referred to the case as a source of defining State authority in intercountry adoption. 276/ Similarly, in a letter from the Commonwealth of Virginia in July 1979, the State noted the following.

275/ Yoder v. Yoder, (31 Conn. Supp. 345; 330 A.2d 825, 1974).

276/ Cole, CLWA; 1976.

> In the event that a couple receives a final decree of adoption from another country, (it is) not automatically recognized in the State of Virginia.... When an adoption petition is filed (in Virginia), the requirements of Virginia must be satisfied before a final decree can be granted.
>
> The law requires that an investigation be completed and that a report (from the Commissioner of Welfare) be submitted to court for the judge's consideration.... Information (on)the suitability of petitioners is reported as well as circumstances regarding the child's placement and adjustment in the home. In addition, legal documents regarding termination of parental rights and the agency's authority to recieve and place children for adoption will be required in order to determine that the child is legally free for adoption. Documentation of the agency's authority to consent and evidence of the termination of parental rights is often the most difficult information to obtain; however, it is essential and (everyone) must be advised of its necessity. 277/

The potential for disaster here is considerable. For example, "legally free for adoption" according to whom and by what standards? What happens if a State determines that, under its concepts, parental rights were not "properly" terminated? Is the State of Montana, for instance, to provide relief to a resident of another country whose local law does not recognize his legal standing in the matter? Further, is the child's immigration status suddenly changed? That is, the child has been admitted to the United States by the Federal Government on the strength of a de jure family relationship. However, in the hypothetical case, a State has just denied the basis for the child's admission. Is the child to be deported as an alien who suddenly has no legal basis for being in the United States, despite the fact that the child probably has been in the family for over a year when a petition is reviewed by a State court?

277/ Letter of July, 1979, from Intercountry Adoption Coordinator, Commonwealth of Virginia.

The image of an innocent child suddenly in legal limbo probably would cause one to respond with "of course not," but, if one accepts the authority of the States to act independently on IR-3 adoptions or on IR-4 custody, why not? Can the State treat the family as a foster family and, under its police power, choose to place the child with "more suitable" adoptive parents, and thereby negate the de jure family relationship established by a foreign court and recognized by the United States as the basis for the child's immigration? Could the injured family then expect to go to Federal court to establish a de facto family relationship consistent with Stanley, or assert a de jure family relationship based on prior Federal recognition of the foreign decree as the basis of the child's immigration? Whether such a family was determined to be a family in fact and/or a family with previously secured legal status, should a Federal court demand that the State establish the parents to be "unfit," as required in Stanley, which must meet a far tougher standard than to find that they are not the most appropriate parents?

The only way to preclude these possibilities is for Congress to make explicit in the U.S. Code that which appears to exist already in fact: that the Federal action of admitting the child on the strength of a foreign adoption decree indeed confers legal adoptive status that both the child and the child's adoptive family can assert anywhere in the United States without subsequent State action. Congress, not 50 different States, must remove this ambiguity in immigration law.

Finally, at a more operational level, for what practical purpose would a State decide that it needs to review documentation regarding parental termination, a foreign agency's authority and, ultimately, the child's legal availability for adoption? As shown at length in Chapter Two, INS has the capacity to be familiar with local foreign law and practices and will have

reviewed all the pertinent documents. More significantly, on-site State Department officials will have reviewed the same documentation and, as also shown in Chapter Two, 11 of 12 children come from countries where State Department personnel deal with intercountry adoption all the time. They will know the local actors involved, the local courts, local agencies, etc. No visa will be issued to a child whose legal availability has not been established under the foreign law, which controls the question of individual status in immigration cases. In addition, foreign procedures also treat intercountry adoption seriously and apply substantial regulatory and judicial procedures. If the government of the child's country-of-origin doubts the child's legal availability, no final order or temporary order, nor exit visa, will be granted.

In the end, if parental rights have been improperly terminated in, say Peru, chances are quite remote that a State adoption official some 4,000 miles away will be the first official in the whole process to recognize and identify the error. Indeed, a problem may be identified, if defined by American standards, but precedent has repeatedly established that local foreign law or custom defines individual status for purposes of immigration.

Yet, a State acts reasonably when it insists that its requirements be met in full. After all, a family is petitioning a State to grant its plea for an order of adoption. The difficulty, then, does not lie with the States, but with a Federal statute that places the States in a difficult if not impossible position.

The Congress has excluded States from any role prior to the admission of an alien orphan whose adoptive citizen parents have obtained a final foreign adoption decree (IR-3 visas). Congress should take the next step and recognize explicitly a legal adoptive status for those children when they are admitted to this

country. Under the current system, the Congress recognizes the foreign adoption decree as the basis for the child's admission as an immediate relative. This is consistent with the established principle that the local foreign law or custom defines family status for purposes of immigration. However, when the adoptive parents later seek an American adoption decree, the current system breaks with all traditional reasoning by subjecting the family relationship, which was the basis for admission by the federal Government to these United States, to a post-facto review by the States. Consequently, Congress effectively permits the possibility that its own action on an immigrant visa, a field where its plenary power and exclusive jurisdiction are beyond question, can be negated by a later State action.

The same reasoning would suggest that the Federal Government in fact recognizes an adoptive relationship in the case of IR-4 children. Those children also are admitted by the Federal Government upon Federal classification as immediate relatives. As with the IR-3 children, the nature of that "immediate" relationship is something more substantial than that of a charitable act or that of a distant cousin. The nature of the immediate relationship is none other than parent-and-child. As in the hypothetical case outlined above with an IR-3 child, an alien orphan who is admitted as an immediate relative by Federal action should not be allowed to be thrust into an ambiguous status by a State action some twelve or more months after being admitted as an immigrant by the Federal Government. The Congress needs to ensure full recognition of the family relationships that Federal immigration law has authorized since 1948.

Summary

Chapter Three established that States have no inherent powers in immigration; the Constitution has been interpreted consistently to exclude the States from any role in immigration. Because intercountry adoption is, in the first instance, a question of immigration, State police powers lack jurisdiction. Chapter Four has added that States cannot take action to "protect themselves" against the effects of Federal immigration law, nor can States exclude paupers and orphans under the rationale of ensuring fiscal integrity.

Yet, Federal law places the States in the impossible position of having to apply those premises to State action in the field of immigration. Because Congress has not asserted its own powers in the field by extending a legal adoptive status to Ferderal actions in immigration, foreign decrees of abandonment, custody and adoption, which are the basis for a child's admission by the Federal Government, are treated by the standards of 50 different States. The very approval or disapproval of a citizen's petition to the Federal Government for the immigration of "an immediate relative" is thus subject to 50 different standards, rather than a uniform Federal standard.

In addition, fundamental questions about the child's best interests and even the existence or non-existence of a family or an adoption are far from foreign to the Federal courts and still less foreign to the INS. At a minimum, the Federal Government has more than ample authority and experience to establish the legal adoptive status of the orphan immigrant.

CHAPTER FIVE

RIGHTS, PRIVILEGES AND COMPELLING INTERESTS

This dissertation has not argued that immigration is a right; it is not. Rather, it is a privilege extended by the Congress, which determines the conditions under which an alien is admitted and allowed to remain in the United States, such as satisfying State pre-adoption requirements. However, a different perspective is required when a citizen petitions the Federal Government to classify an alien orphan, who is eligible for adoption under the laws of a foreign country, as an immediate relative for purposes of immigration.

This chapter builds on Chapters Three and Four to pose some questions about our constitutional or regime values. The Chapter examines whether Congress' delegation of part of its plenary authority over immigration to the States in intercountry adoption and the resulting variations in State pre-adoption requirements conflict with the fundamental rights of a citizen. The chapter examines whether we have a "right" to pursue adoption and a "right" to uniform criteria and treatment of our petitions to the Federal Government to classify an alien as an immediate relative for purposes of immigration. The goal is not to establish that current procedures under Section 101(b)(1)(F) of the Immigration and Nationality Act are expressly unconstitutional or "illegal." However, the chapter uses constitutional values to argue that the current system conflicts with certain fundamental constitutional norms by inviting the establishment of 50 different sets of rules and regulations governing how American citizens must traverse Federal immigration law to fulfill a desire to have and raise children.

Section One:
Compelling Governmental Interest

The Supreme Court applies the test of a compelling govern-mental interest whenever fundamental rights are restricted by governmental action. When fundamental rights are not involved, less demanding tests are applied: varying levels of "heightened scrutiny" and rational relationships to legitimate governmental interests. However, "no showing of mere rational relationship to some colorable state interest would justify substantial infringement of a party's constitutional right...." 278/

In 1945 the Court offered a powerful comment on the meaning of compelling interest: "only the gravest abuses, endangering paramount interests, give occasion for permissable limitation" of fundamental constitutional rights; such a criterion is not easily met. 279/ "Compelling" means just that: the interest of the government must be self-evidently so significant that all other interests are rightfully subordinated.

Yet, even when government can establish a compelling interest, if its actions infringe upon fundamental constitutional rights, the action must pass the test of "no alternative means." That is, government must show that its action pursues a compelling interest and that no alternative means exist by which that interest can be secured without infringing upon the constitutional rights in question. The Supreme Court has applied the "no alternative means" test in numerous cases, particularly those affecting First Amendment rights. In Sherbert

278/ Sherbert v. Verner (83 S.Ct. 1970) 1963.

279/ Thomas v. Collins (65 S.Ct. 315) 1945.

v. Verner (1963), the Court addressed the alternative means test in the denial of unemployment rights to an individual who had refused Saturday employment on religious grounds.

> Even if the possiblibility of spurious (unemployment) claims did threaten to dilute the (State's unemployment) fund and disrupt the scheduling of work, it would plainly be incumbent upon the (State) to demonstrate that no alternative forms of regulation would combat such abuses without infringing upon First Amendment rights. 280/

The Court had also invoked the "no alternative means" test three years before Sherbert in Shelton v. Tucker. In that case, the Court found that

> In a series of decisions this Court has held that (governmental interests) cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be reviewed in the light of less drastic means for achieving the same basic purpose. 281/

Presumably, when Congress delegated part of its authority over the immigration of alien orphans, the "reasonable governmental interest" was ensuring that the alien orphans would be adoptable under State laws in the United States, thereby protecting the best interests of the children and protecting the State against public charges. However, this governmental interest has its weaknesses.

First, as preceding chapters have shown, the power of the Congress in immigration is plenary. Under that plenary power, Congress could confer legal adoptive status on the class of immigrants at issue. Second, INS has had sufficient experience in intercountry adoption to protect a child's best interests

280/ Sherbert v. Verner.

281/ Shelton v. Tucker (81 S.Ct. 247) 1961.

and to protect against public charges. Of course, intercountry adoptions do fail on occasion and, in a small number of cases, a foreign child can become a public charge, with or without State intervention (as is true of domestic adoption). The level of concern over a possible public charge, though, is out-of-scale with the problem. No system of intervention will be 100 percent effective, and the few failures that occur (with or without State intervention) often are interpreted as evidence of widespread failures in intercountry adoption. Though no evidence exists to support such an interpretation, the common response is to increase intervention, even though its level may already have been substantial.

Third, States cannot exercise their police powers over individuals not under their immediate jurisdiction, as in divorce and custody cases. Presumably, a State is even less able to exercise jurisdiction over a child who has yet to enter the United States, let alone that particular State.

Therefore, if constitutional rights were involved, the delegation of Federal powers over this class of immigration visas might fail the compelling interest test; Congress is not compelled by jurisdictional limitations to delegate its authority in intercountry adoption to the States. Further, if this delegation were to meet the test of a compelling interest, it might fail the subsequent test of alternative means, for an alternative clearly exists: "let the Feds do it." Even if fundamental rights were not involved, the same reasoning may cause the delegation to fail the test of a reasonable governmental interest, since INS reviews the same evidence as do the States under largely comparable concerns.

As mentioned in preceding chapters, Federal courts have seldom addressed adoption directly. Consequently, other constitutional issues must be reviewed to ascertain whether the congressional delegation infringes on the

fundamental rights of prospective citizen parents. We should start by recognizing that the Supreme Court has never clearly estableshed a guide for

> ... putting content into ... 'compelling state interest.' ... The courts have found the uniform administration of welfare laws, the regulation of improper legal solicita-tion, and the need for jurors as less than compelling state interests, while protecting citizens from the dangers of marijuana and providing a uniform day of rest have passed the test. 282/

Despite the lack of a clear definition, a review of cases touching areas most closely related to adoption and the immigration petitions filed by citizens on behalf of alien orphans suggests that some fundamental rights might be restricted for less than compelling governmental interests. Questions touching various aspects of childbirth and childrearing have been addressed at length by the courts, and the Supreme Court has found tht the custodial rights of parents are personal and fundamental. 283/ The rights of unwed fathers in the children thay have "sired and reared" also have been found to be fundamental and personal. 284/

The Supreme Court has addressed abortion since 1971. 285/ Though a woman does not have an absolute constitutional right to an abortion, the Court has repeatedly found that a woman's right to an abortion is fundamental. 286/ In

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282/ Rohr, John; "Civil Servants and Second-Class Citizens", Public Administration Review, March, 1984, pp 135-139.

283/ Sylvander v. New England Home for Little Wanderers; Lehman v. Lycoming Country; Davis v. Page; Santosky v. Kramer.

284/ Stanley v. Illinois.

285/ U.S. v. Vuitch (91 S.Ct. 1294) 1971.

286/ Doe v. Bolton (93 S.Ct. 793) 1973; City of Akron v. Akron Center for Reproductive Health, Inc. (103 S.Ct. 2481) 1983.

Roe v. Wade (1973) the Court held that, in the first trimester, a woman has a liberty interest in abortion and that the Court had to protect the "freedom of personal choice in matters of marriage and family life." 287/

Ten years later, in City of Akron v. Akron Center for Reproductive Health (1983), the Court served notice in an extensive footnote that its findings in Roe will not be easily overturned.

> There are especially compelling reasons for adhering to stare decisis in applying the principles of Roe v. Wade. That case was considered with special care. It was decided first during the 1971 Term, and reargued -- with extensive briefing -- the following term. The decision was joined by the Chief Justice and 6 other Justices. Since Roe was decided in February 1973, the Court repeatedly has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not terminate her pregnancy. 288/

That right is entitled to constitutional protection and may be regulated by the States only to the degree that a compelling governmental interest can be established. 289/ Prior to the point at which the fetus is viable, the States are restricted to regulating abortion principally for the purpose of protecting the health of the mother. 290/ At least through the first trimester, the decision to abort or not to abort belongs exclusively to the woman and her physician.

287/ Roe v. Wade (93 S.Ct. 784) 1973.

288/ City of Akron v. Akron Center for Reproductive Health, Inc. (103 S.Ct. 2487n) 1983.

289/ Roe v. Wade (93 S.Ct. 705) 1973; Bellotti v. Baird (99 S.Ct. 3035) 1979; Harris v. McRae (100 S.Ct. 2671) 1980; City of Akron; and Doe v. Bolton.

290/ Harris v. McRae; Roe v. Wade, City of Akron and Simopoulos v. Virginia (103 S.Ct. 2532) 1983.

> Because the state has a legitimate interest in the health of women who undergo abortions, it may properly assert important interests in safeguarding health and in maintaining medical standards. However, this interest does not become compelling until approximately the end of the first trimester of pregnancy; until that time, a pregnant woman must be permitted ... to decide to have an abortion ... free of interference from the state. 291/

Though a State has an interest in regulating abortion, a State's interest in the unborn becomes compelling in abortion only after the fetus reaches "sustained" viability, with or without the assistance of artificial support systems. Prior to sustained viability, the State's interest is restricted to protecting maternal health and life. However, while regulating for health purposes, the States cannot go beyond accepted medical practices so as to restrict, in fact, the opportunity to obtain an abortion. 292/ For example, in a case from Georgia shortly after the decision in Roe v. Wade, the Court found that protecting the pregnant woman's health cannot justify statutory requirements that restrict abortion by procedural complexity, thereby restricting access to abortion by artificially increasing costs.

> The provision of the Georgia abortion statute requiring that abortions, unlike other surgical procedures, be done only in a hospital accredited by a private organization is invalid as it is not based on differences reasonably related to purposes of the act in which it is found.
>
> The requirement of the Georgia statute that two Georgia licensed physicians confirm the recommendation of the woman's own consultant, a procedure not required in any other voluntary medical or surgical procedure, has no rational connection with

291/ City of Akron.

292/ City of Akron; Doe v. Bolton; Planned Parenthood Ass'n of Kansas City v. Ashcroft (103 S.Ct. 2517) 1983; Colautti v. Franklin (99 S.Ct. 679) 1979.

> the patient's needs and unduly infringes on the physician's right to practice. 293/

The Georgia statute did not prohibit abortions nor regulate the personal decision to obtain an abortion, but it did make abortions more difficult to obtain. The nature of that added difficulty, restricting abortions to private hospitals and requiring the consent of two consulting physicians, did not withstand judicial scrutiny. States may regulate abortion procedures, but not by restricting access through artificial barriers. Prior to viability, even the State interest in preserving the integrity of the family is secondary to the fundamental and personal right of a woman to choose and to obtain an abortion.

> The Missouri statute requiring consent of the spouse of a woman seeking an abortion after the first twelve weeks of pregnancy unless licensed physician certifies that abortion is necessary to preserve the mother's life was unconstitutional, in that the state cannot delegate to a spouse veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy and, because it is the woman who physically bears the child and who is more directly and immediately affected by pregnancy. 294/ (Emphasis added.)

These are powerful words. A husband cannot be granted a veto by the legislature over his wife's decision to abort. Since not even the State can exercise such power over the individual and because a pregnancy more directly affects the woman, her liberty and personal interests become more substantive than do those of a husband in such a case. 295/

293/ Doe v. Bolton; also see Planned Parenthood Association of Kansas City v. Ashcroft (103 S.Ct. 2517) 1983.

294/ Planned Parenthood Association of Central Missouri v. Danforth (96 S.Ct. 2831) 1976.

295/ Ibid.

Similarly, even parents of minors are not guaranteed a role in the decision by their minor daughter to abort. Though a State may reasonably determine that parental consultation is desireable and in the best interests of a pregnant minor, any requirement that the parents be consulted is subject to two important limitations. First, the minor must be provided the opportunity to establish that she is mature and well enough informed to make the abortion decision independently of her parents. Secondly, if she is unable to establish an adequate level of maturity before a court, she must be provided the opportunity to convince the court that an abortion would be in her best interests. 296/ If the minor successfully establishes either point, she is entitled to seek and obtain an abortion and is entitled to sustained anonymity. In sum, "State and parental interests ... must give way to the constitutional right of a mature minor or an immature minor whose best interests are contrary to parental involvement." 297/

The Court also has found that adults have a constitutionally protected right, under the First Amendment and the right to privacy, to obtain information about and to practice birth control. In Griswold v. Connecticut (1965), the Court found a Connecticut law prohibiting the use, or the assistance in the use, of birth control devices to be a law that "touches directly on an intimate relationship of husband and wife." Justice Douglas' majority opinion added that

> Marriage is a coming together for a better or worse, hope-fully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony, not political faiths. 298/

296/ Bellotti v. Baird; City of Akron; H.L. v. Matheson (101 S.Ct. 1164) 1981.

297/ City of Akron.

298/ Griswold v. Connecticut (85 S.Ct. 1678) 1965.

Justice Goldberg's concurring opinion, with the Chief Justice and Justice Brennan joining, more explicitly established privacy in marriage as a fundamental right. Both Justices Douglas and Goldberg added that, at a minimum, the Ninth Amendment recognized the existence of a number of fundamental rights that had not been explicitly addressed in the first eight Amendments.

Similarly, in 1942, the Court had found unconstitutional an Oklahoma statute that required sterilization for certain classes of "habitual criminals," as defined in the statute. 299/ In addition to important issues of "invidious classification," the Court found that

> this case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race — the right to have offspring.
>
> We are dealing here with legislation that involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.
>
> (Justice Stone, concurring, added that) there are limits to the extent to which constitutionality can be pressed, especially where the liberty of the person is concerned. 300/

Though adoption may not be equivalent to procreating, per se, it may well be equivalent to "the right to have offspring" and may "touch on the intimate relationship of a husband and wife." Though moderated by the public interest in child welfare, adoption also may be every bit as "sacred" as Justice Douglas identified marriage to be in Griswold. At a minimum, adoption certainly qualifies for another characteristic of family life that Justice Douglas identified as sacred

299/ Skinner v. State of Oklahoma (62 S.Ct. 1110) 1942.

300/ Ibid.

and as deserving judicial reverance: it "promotes a way of life, ... a harmony." Again, the caveat is in order: the Court has never addressed these values in adoption, especially not as part of immigration law. The point here is to raise the question of how current statute meets or conflicts with constitutional values.

The right of governments to regulate adoption is not at issue; child welfare is a clear governmental interest. However, the modes of regulation and subsequent actions are open to debate, particularly as they affect intercountry adoption and Federal immigration petitions. If birth control and abortion are fundamental rights protected by the Constitution because they promote privacy in a "sacred" marrigae, "a harmony (and) a way of life," and "freedom of personal choice in matters of marriage and family life," can equal and consistent treatment by the Federal Government of a citizen's right "to have offspring" through the Federal system of immigration be any less protected? At a minimum, State restrictions on citizens' exercise of their right "to have offspring" through immigration and adoption should merit a more demanding test than merely bearing a reasonable relationship to a legitimate governmental purpose.

The position of the Court on other issues surrounding fundamental rights makes the case against the current policy in intercountry adoption still stronger. The Court has repeatedly protected the fundamental right to freedom of travel against the exercise of the police power. In 1969, in Shapiro v. Thompson, the Court addressed issues of direct interest here. The case involved statutes and regulations in two States and the District of Columbia that required certain residency periods before an applicant could qualify for welfare benefits. The court found that the objective of these laws and regulations was to discourage the migration of needy persons, and found them unconstitutional for that reason.

> all citizens must be free to travel throughout the United States uninhibited by statutes, rules or regulations which unreasonably burden or restrict this movement.... If a law has no other purpose than to chill the exercise of constitutional rights by penalizing those who choose to exercise them, it is patently unconstitutional.
>
> Though a State has a valid interest in preserving fiscal integrity, any classification which serves to penalize the exercise of interstate travel, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional. 301/

The Court held that these laws were not "patently" unconstitutional, as the Court conceded that a State could have an interest of some degree in this issue. However, the Court found that interest to be insufficient to pass a constitutional test that could justify restricting the fundamental right to travel. To this, the Court added that "Congress may not authorize States to violate the Fifth Amendment." 302/

The case from the District of Columbia required different principles. The District had argued that, because it was a Federal entity and not a State, the Fourteenth Amendment could not reach its action. However, the Court applied Shapiro to the District under the Fifith Amendment. Though the Fifth Amendment contains no equal protection clause, "it does forbid discrimination that is so unjustifiable that it is violative of due process." The Court held that the Fifth Amendment "prohibits Congress from denying public assistance to poor persons otherwise eligible soley on the ground that they have not been residents of D.C. for one year."

301/ Shapiro v. Thompson (89 S.Ct. 1322) 1969.

302/ Ibid.

The District of Columbia had made a similar argument 15 years earlier in Bolling v. Sharpe, which was decided by the Court in conjunction with the landmark school desegregation case, Brown v. Board of Education. 303/ The District argued that the Fourteenth Amendment could not reach school segregation in the District, because it was a Federal district, not a State. The Court, however, again spoke to the notion of an equal protection element in the Fifth Amendment as a Federal guarantee, thereby reaching segregated schools in the District. The Court found that the District, like the City of Topeka in Brown, could not operate segregated schools. In Bolling, the Court found that

> the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law' and, therefore, we do not imply that the two are always inter-changeable phrases. But, as this court has recognized, discrimination may be so unjustifiable as to be violative of due process. 304/

In sum, the Court has found at least a qualified Federal protection against egregious violations of equal protection, and that Congress cannot authorize the States to violate the Fifth Amendment. Further, States cannot penalize nor obstruct the exercise of free travel without establishing compelling interests, nor can States establish barriers to migration without compelling interests. The cases cited above applied these principles to citizens, while Truax, et. al., applied the same principles to resident aliens. 305/ Similarly, States cannot take action to protect themselves from Federal immigration policies.

303/ 75 S.Ct. 753, 1955.

304/ Ibid.

305/ Truax v. Raich.

Yet, a number of State policies in intercountry adoption constitute nothing short of barriers to a class of migration by restricting where intercountry citizen families can reside. For example, certain States require prospective parents adopting internationally to post a bond of anywhere from $5,000 (as in Illinois) to $10,000 (as in Kentucky) before the State will consent to a Federal petition on behalf of an alien orphan. Yet, families adopting domestically in those same States are not required to post such bonds.

The State interest in a bond would be to protect the State against the possible burden of a public charge, should the adoption collapse after the child enters the State, or "disrupt," as the jargon has it. However, in addition to the questionable premises behind such a perceived interest, which are explored in Chapter Seven, Shapiro clearly states that, despite "a valid interest in preserving fiscal integrity," a compelling interest must be established to justify restrictions on freedom of travel.

Shapiro, of course, addressed an issue only indirectly related to foreign children who have yet to enter the United States. However, the case directly applies to the adoptive parents' freedom to travel prior to the arrival of their children. Shapiro also firmly holds that State concerns about possible public charges and fiscal effects are not "compelling" in immigration. 306/

Federal petitions for orphan visas face more substantial variations due to the common practice among the States of delegating, in turn, to private organizations the authority that Congress has delegated to the States. All but three States restrict to licensed agencies the authority to perform home studies.

306/ Sherbert v. Verner.

Federal statute requires only that a State-licensed individual or agency conduct a home study, but, since only three States (Alaska, Iowa and New York) license individual professionals for that purpose, the overwhelming majority of citizen petitioners for either an IR-3 or an IR-4 visa must locate a private agency to perform the home study.

Though each State authorizes its public welfare agencies to perform the required home study, such agencies are uniformly so short on staff that they simply do not conduct studies for families not adopting a child for whom the public agency is directly responsible. Hence, no real alternative for adopting parents exists except to seek services from private agencies, which operate in a market where supply is tightly controlled.

Because States regulate the supply of private adoption services, they also regulate the maximum fees that an agency may charge for its services, including home studies. However, as in a few other industries, the regulated maximum usually becomes the norm. Consequently, the cost of meeting the Federal requirement for a home study, presumably a uniform requirement, can vary substantially with State policies. A family living in Iowa or New York, where licensed individuals may perform home studies, can expect to obtain the required service for about $400. In neighboring States, like Connecticut and Illinois, the same families should expect to spend about $1,000 for the same services.

Other and more significant differences in cost are incurred by State actions on IR-4 visas in States that require all adoption procedures to be executed by agencies. This restricts or prevents a family from working directly with a foreign agency. A middleman, whose expenses must be met, is imposed on the system. Again, families in fact are limited to private agencies. Information on

over 600 intercountry adoptions in the Washington, D.C. area indicate that such a requirement increased total costs by about $1,200 in 1984. 307/

No basis exists for precluding the option of working through a private agency in intercountry adoption, nor is anything of the sort suggested here. Further, some foreign governments require participation by American agencies (e.g., Korea), requirements that are beyond the reach of domestic law or even domestic concern. However, unless compelling or substantial governmental interests are established, and unless subsequent policies clearly advance those interests, Federal law, through delegated authority, should not impose an extra burden on a citizen family's efforts to adopt a child.

A State might argue that such regulations support its interest in child welfare. However, as Chapter Seven will show in some detail, no evidence exists to support the notion that agency involvement produces more successful adoptions; such requirements are merely articles of faith. Yet, despite the lack of supporting evidence, States might make a case for these restrictions in the adoption of local children over whom a State has custody and/or jurisdiction. However, in intercountry adoption, the added middleman is imposed in a highly restricted market, and substantially increases costs in a Federal immigration petition filed in behalf of a child over whom a State has no claim whatsoever.

In contrast to these restrictions which Federal law sanctions on intercountry adoption, the constitution guarantees the right to practice birth control and the right to an abortion against State actions that needlessly increase costs or that impose unnecessary hurdles which indirectly limit the opportunity to

307/ Latin America Parents Association, Maryland Region Chapter, Workshop on Intercountry Adoption.

obtain an abortion. 308/ The Supreme Court has found that governmental efforts to regulate birth control and/or abortion may conflict with personal rights, fundamental rights to privacy, the sanctity of marital relations, the freedom of personal choice in matters of marriage and family life, and, in general, with society's interest in supporting harmony and a way of life.

If measured by comparable standards, certain State regulations in adoption may be found to violate our constitutional values, even in domestic adoption. Certain of those State regulations are especially likely to be found wanting in intercountry adoption. That is, the administrative and nominal costs imposed by State regulation of abortions within their own jurisdictions must meet a compelling interest. Likewise, a rigorous standard should be applied to State actions that affect citizens' rights to be treated equally by the Federal Government as they pursue adoption through a Federal immigration petition for beneficiary orphans otherwise eligible for immigration.

Can Congress, in effect, mandate that citizens' petitions to the Federal Government to classify an alien as an immediate relative be treated differently, based soley on the geography of citizens' homes? Can Congress delegate in a way that has the effect of applying significantly different standards to a citizen's Federal petition based on, say, whether the citizen lives in St. Louis, Missouri or East St. Louis, Illinois? Regardless of where citizens reside, they are petitioning the Federal Government to classify an alien as an immediate relative for purposes of immigration. This clearly is part of Congress' plenary power in immigration.

308/ City of Akron; Planned Parenthood; et. al.

The immigration petition is the vehicle by which some 8,600 citizen families in 1984 exercised their "sacred" right "to have offspring" and, thereby, to "foster a way of life, ... a harmony" and through which they exercised their "freedom of personal choice in matters of marriage and family life." Those citizen families are entitled to have their "immediate relative" petitions for immigration purposes treated uniformly and equally by the Federal Government.

To argue that geography and State boundaries justify sig-nificantly different treatment of these Federal petitions, one must be prepared to support the possibility of extreme State actions in the field. Could, for example, Vermont unilater-ally decide that it will approve no intercountry adoptions, based on an asserted State interest in fostering the adoption of "Vermont's own"? Could Vermont establish a residency requirement of a year, 5 years, etc., or a minimum annual income of $500,000 for intercountry adoptions? Why not? At a more practical level, can a State require a substantial bond from parents adopting abroad, but not require such a bond from other adopting families. Can Congress allow the fate of a Federal petition that a citizen files for immigration purposes to be substantially affected by certain requirements for citizens from certain States but not required of citizens who file the very same Federal petition from another State? Similarly, can State regulations impose high costs, though the available evidence contradicts the asserted rational basis for the regulation?

Courts may deem such measures to be "arbitrary and capricious" and, thereby, in violation of the Fourteenth Amendment, without ever reaching the questions of fundamental rights raised here. Similarly, if we assume that State authority in the field of adoption can preclude the Federal authority in immigration, State claims about fostering local adoption or protecting against

possible public charges may indeed be sufficient to satisfy a test of a rational connection to a reasonable governmental interest.

However, when States establish restrictive adoption policies that effectively add restrictions to immigration requirements for alien orphans, do the new policies violate the dictum from De Cana v. Bica and from Takahashi, discussed in Chapter Three, that such policies cannot be in excess of anything contemplated by the Congress? Is a bond of $10,000 "in excess of anything contemplated by the Congress?" In fact, the reasoning in DeCana and Takahashi may even dictate that, if a pre-emptive State role is to be preserved in intercountry adoption, the Congress would have to consider each and every new action that any State takes if it affects intercountry adoption. This is hardly attractive, either to the States or to the Congress.

State criteria are the subject of Chapter Seven, but for the discussion here, the major effect of these separate, private criteria is a rather straight-forward conflict with constitutional guarantees of equal protection (as in Bolling) and, as shown below, sometimes with the First Amendment. A counter argument might hold that, by relying upon state standards, Federal policy is, in effect, equal in its treatment of citizens. However, the notion of equal protection in fact is at odds with the very real differences in standards among the States and, therefore, of the levels of difficulty and expense with which some citizen families are burdened. In the end, the Federal Government applies different standards, and imposes different levels of restrictions and expenses on petitions from citizens, due only to the accident of the geographic location of their homes within the United States.

Section Two: State Delegation and The First Amendment

State requirements for agency involvement may create a more apparent constitutional conflict under the First Amendment. Shapiro 309/ held that Congress cannot authorize a State to violate the Fifth Amendment. Presumably, neither can Congress authorize a State to violate the First Amendment.

The difficulty with the First Amendment arises from the traditional practice of "religious matching" in domestic adoption and from the strong position of religiously-affiliated agencies in the adoption field. The Department of Health and Human Services reported in 1981 that 16 percent of all agencies performing services for intercountry adoption had sectarian religious requirements. 310/ This is an understatement, as it fails to include agencies that claim to have no formal religious test, but which clearly apply such a test in practice.

For example, agencies active in intercountry adoption in Europe after World War II included Lutheran Social Services (Germany), Greek Social Services (Greece) and Catholic Relief Services (Poland). In Korea, Lutheran Social Services and Catholic Relief Services were joined by the Seventh Day Adventitsts and, in 1956, by what is now known as the Holt Adoption Program of Eugene, Oregon. 311/ Among these agencies, only Holt had a somewhat indirect religious connection. The legendary Harry Holt began placing Korean children with

309/ Shapiro v. Thompson.

310/ Intercountry Adoption Guidelines, American Public Welfare Association and the Department of Health, Education and Welfare, Children's Bureau; Washington, D.C. (1979), p. 1.

311/ Holt-Korea is separate from Holt-Eugene (Oregon).

adoptive families in the United States out of a profound personal conviction that all children were entitled to a good home. As a dedicated Christian, early on "his major require-ment was that applicants ... be believers in Jesus Christ. Holt reasoned that a truly Christian home was, by definition, a good home in which to raise a child." 312/ Holt-Eugene has come a long way since its early days, and is now the largest American agency active in intercountry adoption, with operations in Korea, the Philippines, India and, most recently, Brazil. Holt has become more flexible in its policies, and religion is said to be no longer an exclusionary factor at Holt-Eugene. However, in its pamphlets the agency continues to describe itself as "a Christian, non-denominational, non-sectarian organization." This type of label transmits conflicting messages.

Similarly, Jerry Fallwell describes the placement practices of his "Save the Children" as efforts to ensure that children are placed with "good, solid Christian families." A long list of smaller adoption agencies have comparable operating definitions of a "good family."

All this is perfectly acceptable for a private agency that performs a private function. However, when the private agency is performing a service required by government, especially in a market restricted by regulation, the nature of the issue changes; private organizations become arms of the State.

Religious matching has long been practiced in American adoption. The Child Welfare League of America states the matter succinctly.

312/ Berman, p. 119.

> Opportunity for religious and spiritual development of the child is essential in an adoptive home. A child should ordinarily be placed in a home where the religion of the adoptive parents is the same as that of the child, unless the (birth) parents have specified that the child should or may be placed with a family of another religion. 313/

Because most States have included this principle in their adoption laws, "applicants without any formal religious affiliation sometimes will be disapproved as adoptive applicants." 314/ Prospective parents of the "wrong" religion also may be denied the opportunity to adopt. For example, Meezan, Katz and Russo found in 1978 that 37 percent of all Americans who adopted American children independently, i.e., without the assistance of agencies, were Jewish. Meezan concludes that this is clear evidence the extent to which Jewish Americans are restricted in their opportunity to adopt through usual channels in the United States; their only real alternative is to avoid the traditional route altogether.

A questionnaire developed for this paper confirms Meezan's point. The question-naire found that of all adoptive American parents in U.S.-Korean placements, only 6 percent were Jewish. Under Korean law, all those placements had to be made by an international or American adoption agency. Conversely, of U.S. adoptions from Latin America, where U.S. agencies typically have not yet established a firm base, 31 percent of adopting American parents were Jewish.

Back-of-the-envelope computations indicate that American Jews adopt much more frequently than the rest of the population, whether we look at

313/ Meezan. William, Katz and Russo; Adoptions Without Agencies: A Study of Independent Adoptions; Child Welfare League of America (N.Y., 1978), p. 43.

314/ Social Work and the Law. p. 379.

domestic adoption, intercountry, or both. For example, assume that domestic adoption by non-relatives is about evenly split between agency placements and independent placements, and that domestic adoption accounts for 80 percent of all non-relative adoptions. If Jews constitute about 6 percent of families adopting through agencies (based on the corresponding percentage in agency-controlled Korean-American placements) and 37 percent of families adopting independently (from Meezan), this alone would indicate that Jewish-Americans account for about 15 percent of all non-relative adoptions. To this, we can add 6 percent of the American families adopting in Korea and 31 percent of those adopting from Latin America. In short, Jewish families account for about 18 percent of all families adopting non-relative children in the United States.

Perhaps this indicates that Jewish-Americans are more open to adoption than is the rest of the population. Whatever the correct interpretation, it would not explain the disparity in the rates at which Jewish families appear in agency versus non-agency adoptions.

The disparity may be explained in part by factors other than discrimination. Some Jewish adoption professionals have suggested to me that a sense of ethnic purity might help explain a preference among Jewish families for Latin America, where a child's physical characterisitcs may make his non-Jewish descent less obvious. Other factors may contribute to a disproportionate number of Jewish families in American independent adoptions. For example, perhaps the large number of Jewish Americans in the legal and medical professions increases general access to trusted individuals who are more likely to be approached by women who wish to arrange independent placements for their children.

Even if explanations like these make some sense, certainly they fail to explain how 3 percent of the population accounts for 37 percent of non-agency domestic adoptions and 31 percent of intercountry adoptions in which the participation of American agencies is limited, but a much smaller share (about 6 percent) of adopting parents in agency-controlled placements. A significant degree of religious discrimination, indirectly tolerated by public policies, seems difficult to explain away.

Lest the message be misread here, note that most religiously-affiliated agencies active in intercountry adoption are considerably more flexible about religion in intercountry adoption than in their domestic programs. For example, as of mid-1985, the Director of Intercountry Adoptions for Catholic Charities of Baltimore was a non-Catholic. Agencies such as Associated Catholic Charities, Lutheran Social Services, Episcopal Social Services, etc., will require only that families be active participate in some religion. Still, even this more flexible position excludes the non-religious, at least those foolish enough, under the circumstances, to acknowledge that they are non-religious.

Note too that Jewish families and the non-religious may not be the only victims of religious matching in adoption. Members of the "wrong" Christian church often will find a "need not apply" message between the lines, if not right up front. Again, this would be acceptable with a serivce that a client voluntarily chooses to obtain from a particular supplier, but the nature of the issue changes when government both requires the service and restricts the supply.

Concern over this issue in domestic adoption is not new. Testimony before the United States Senate in 1974 by parents who had adopted domestically without the assistance of agencies cited their earlier rejection by agencies on

religious grounds as the principal reason why they sought the independent alternative. At the same hearings, Judge Nanette Dambitz cited her experience in presiding over adoption proceedings for the New York Family Court and concluded that independent adoptions in the United States should continue because the one element that the United States had yet to develop in adoption was "a sufficient network of agencies that are truly non-sectarian." 315/

Religious matching not only is tolerated in domestic adoption, but in fact is required, in varying degrees, by most State laws. In addition, the effect of religious discrimination extends to intercountry adoption and, thereby, to Federal regulation of immigration. On its face, this would seem to violate the establishment clause of the First Amendment: "Congress shall make no law respecting the establishment of religion." Yet, religious tests are applied in intercountry adoption and become part of the process by which a family obtains approval of its petition to the Federal Government for the immigration of an alien orphan.

Federal courts have never addressed the question of religious matching and State courts have addressed it on very few occasions, only one of which related explicitly to intercountry adoption. However, no court has yet explored the constitutionality of religious matching statutes. State courts have simply cited State statutes and then decided each case under the relevant statute. In the two most recent cases, State courts found religious matching, as practiced, to violate the statutes at issue.

The most recent case, and the only one involving intercountry adoption, was heard by the California Supreme Court in 1975. An Episcopalian couple

315/ Congressional Record, April 3, 1974, p. S5099.

brought an action against Family Ministries of World Vision, an Evangelical Christian agency placing children from Cambodia only with Evangelical families. The California court did not address the constitutionality of matching, but found that Family Ministries had violated the State statute. 316/

The California Supreme Court found that "in cases where religion is unknown, the law merely requires adoption agencies to place the child in the home that is best able to meet his needs." 317/ The court found that Family Ministries had been placing Buddhist children exclusively with Evangelical families and held this to violate the statute. The court added that Jews and Catholics were excluded arbitrarily -- apparently in addition to Episcopalians.

World Vision argued that Cambodian law had transferred legal parental authority to World Vision, under a system comparable to those in Korea and South Vietnam, as outlined in Chapter Two. Under Cambodian law, World Vision enjoyed the powerful status of a "parent." Therefore, World Vision contended, it had full authority to transfer custody of the child to Family Ministries and, as a "parent," it had the right under California law to restrict the religion of adopting parents.

The court, however, rejected this argument on the basis that the statute was intended to protect the religious affiliation of the child; since no Buddhists were among the applicants, the agency could not restrict the religion of parents for purposes of placing the children for adop-tion under California law. The only acceptable restriction under the statute would have been to give absolute preference to qualified Buddhist applicants.

316/ New York Times, November 16, 1975, p. 28.

317/ Ibid.

Three years prior to Family Ministries, a New York case had addressed religious matching requirements in a local adoption. In Dicksen v. Ernesto, the New York court found that "religion is but one factor in the placement of a child for adoption." 318/ Further, "conformity with 'the religious wishes of the (birth) parents of the child,' though desireable, is not mandatory." 319/ Consequently, the New York Court let stand a cross-religious adoption. However, as in Family Ministries, matching per se was not examined for its constitutionality.

The earliest major case on the issue of matching came from Massachusetts in 1954. In Petition of Goldman, 320/ a Catholic woman gave birth, then knowingly, and in writing, consented to the adoption agency's placing her infant with a Jewish couple. Two years later, upon review of a petition for a final adoption decree from the adopting parents, the court denied the petition, using a strict interpretation of a State statute, which required religious matching "whenever practicable." The court held "whenever practicable" to require matching in any case in which an agency receives an application from an acceptable couple of the appropriate religion. The court added that "it makes no difference ... that the child's natural mother has consented to a cross-religious adoption." 321/ Based on this strict interpretation, Massachusetts agencies would be virtually prohibited from making any cross-religious placements.

318/ Dicksen v. Ernesto (30 NY 2d 61; 281 N.E. 2d 153; 1972): appeal dismissed (407 US 917, 1972); see New York Law Journal, p. 266.

319/ Ibid, p. 265.

320/ Petition of Goldman (331 Mass. 647; 21 N.E. 2d 843; 1954); see New York Law Journal

321/ Ibid, p. 265.

The Goldman finding of 1954 would probably have a different outcome today, as the Supreme Court has established more definitive interpretations of the establishment clause. Yet, we should note that the Court denied certiorari in 1972 in Dicksen and in 1975 in Family Ministries. The Court offered no comment on the denials, but the Court may have seen no reason to entangle itself in the issue through two cases that had found in favor of the discriminated parties.

The definitive test for the establishment clause was stated by the Supreme Court in 1973, in Nyquist:

> To pass muster under the Establishment Clause, the law in question, first, must reflect a clearly secular legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and, third, must avoid excessive entanglement with religion. 322/

The NYU Law Journal 323/ has outlined the basic arguments necessary to support matching requirements under Nyquist. The first would be to construe the "best interests of the child" to be the "secular purpose," which the Journal notes historically has been an easy standard to satisfy. However, this could be countered with at least with two important opposing arguments. First, such a "secular purpose" implicitly assumes that religious training is a requirement of civil morality. Second, infants and other very young children might not yet have a religion of "their own." The matching requirement makes considerably more sense with an older child, whose religious training and sense of religious identity might be among the few things that he/she brings into a new family setting.

322/ Committee for Public Education and Religious Liberty v. Nyquist (413 U.S. 756) 1973.

323/ New York University Law Journal. p. 267.

The second issue, that of "primary effect," is shown by the Journal to be a matter of degree. 324/ The test is whether the support of religion is direct and immediate, or whether it is indirect and secondary. The Journal does not seek to answer the question posed, but only notes that the test easily becomes ambiguou when applieds. For example, free text books 325/ and free school buses for parochial schools 326/ have been upheld on the basis that they provide only secondary and indirect support to religion and advance the secular purpose of mandatory education for children. Conversely, public funds cannot be used to pay the salaries of teachers in parochial schools 327/ nor can religion be a basis for denying medical treatment to a minor. 328/

The apparent inconsistency in applying the "primary effect" test may be a reasonable reflection of our cultural ambiguity toward religion. That is, as the establishment clause reflects, the constitutional expression of our concern about a "state religion" and "excessive entanglement" are part of our historical fabric. Yet, respect for religion also is part of our cultural fabric, as the free exercise clasue of the First Amendment recognizes. Hence, the establishment clause has been intepreted to be something less than "an impregnable barrier in a pluralistic society." 329/ That is, the Court essentially has said that religion is so much a

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324/ Ibid, 268.

325/ Everson v. Board of Ed. (330 U.S. 1) 1947.

326/ Meek v. Pittinger (421 U.S. 349) 1975.

327/ Lehman v. Kurtzman (403 U.S. 602) 1971.

328/ Pericone v. New Jersey (83 S.Ct. 189) 1963.

329/ Zorach v. Clausen (343 U.S. 306) 1952.

part of our cultural fabric that some overlap between the secular and the sectarian is to be expected and must be tolerated. Further, a clear line of demarcation between the two cannot be defined.

The establishment clause is not to be a vehicle for inhibiting religion, but is intended to establish government's utter neutrality toward religion, both generically and among various sects, i.e., "the governmental obligation of neutrality in the face of religious differences." 330/ However, one can reasonably ask whether matching requirements maintain that neutrality. Should government, in any way, attribute a particular religious creed to an infant, as the Goldman court clearly did in Massachusetts? Secondly, can government use the apparatus of the state on behalf of religious bodies to retain their infant "members?"

The most solid defense for religious matching is that the free exercise clause of the First Amendment prohibits government from restricting the efforts of religious bodies to retain their infant members just as it prohibits government from giving preference to adult petitioners of particular religious bodies. No argument would be offered here if this defense addressed only cases in which citizens freely sought the assistance of a religious organization in an unregulated market. However, this is not the case in adoption. The supply of adoptive services is restricted by licensing practices and, in all but 3 States, by requiring families to obtain some or all adoptive services from licensed agencies.

One also may contend that, because adoption is not a right, this argument is irrelevant and, therefore, the question of religious discrimination is a straw man. This would be a weak case for two principal reasons. First, as argued throughout this chapter, we might find that we have constitutionally protected

330/ Sherbert v. Verner.

rights at least to pursue adoption as one expression of the "right to have offspring" 331/ or as an expression of the "sacred" character of marriage that "fosters a way of life ... a harmony." 332/ Second, we might find that an equal protection element in the Fifth Amendment protects or establishes a right to expect that a citizen's petition to the Federal Government for classifing an alien orphan as an immediate relative for immigration purposes will be treated without consideration to religion or where one lives within these United States.

Finally, excessive entanglement also is a matter of degree, hence the qualifier "excessive." Certainly, government must respect the right of religious bodies to behave according to their religious principles. As stated above, religion is a vital part of our social and cultural fabric, so this dissertation would never argue to prohibit religious organizations from active participation in adoption. That not only would be unconstitutional, but would be a rediculous position for any advocate of adoption. Religious agencies provide truly vital services in the field to birth parents, adoptive parents and, indeed, to the children.

However, the establishment clause provides a good case for expanding the supply of adoptive services, including the availability of home studies and placement services, in intercountry adoption. In domestic adoption, the Federal Government would have little interest in scrutinizing State policies. However, in intercountry adoption, State regulations typically are far more restrictive than the minimum Federal statutory requirement that a home study be performed by an individual professional. State actions that restrict the availability of adoptive

331/ Skinner v. State of Oklahoma.

332/ Griswold v. Connecticut.

services and/or that require that all services be obtained only from agencies force the issue of religious discrimination into immigration policy. Congress can resolve the issue by striking the State clause from Section 101(b)(1)(F).

Matching requirements have questionable secular purposes and an arguable primary effect, particularly when very young children are involved. To the degree that public policy tolerates religious exclusion in domestic adoption, it would appear on its face to conflict with the establishment clause. However, more to the point for our purposes, the degree to which religious exclusion occurs in intercountry adoption. Congress, in effect, tolerates a religious test in a citizen's Federal petition for the immigration of an alien.

In sum, the tension between the establishment clause and religious matching requirements has never been addressed explicitly by the courts. In the meantime, more and more States require participation by American-based agencies in intercountry adoption. Similarly, all but three States allow only agencies to perform the required home study and other pre-placement services. The tension goes further if a State restricts these services to agencies actually located in the State (as in Missouri and Virginia), which severely restricts the supply of services from which a family can choose.

The inherent conflict applies to <u>all</u> families seeking to adopt abroad under Federal I-600 procedures. This is the case because Section 101(b)(1)(F) of the Immigration and Nationality Act requires a home study for families, whether or not the family secures a foreign decree prior to entering the United States with their adopted child. The Federal law requires a home study by an individual, i.e., a social worker, <u>or</u> an agency, subject to State statutes or policies. Since only three States authorize licensed individuals to perform home studies, families are

restricted to licensed agencies in most cases. At a minimum, families who pay $1,000 instead of $300 for the same Federally required home study may have serious doubts that they have received equal protection (as in Bolling). Similarly, families may doubt that they have received due process if their effort to adopt is delayed or even denied because they had difficulty obtaining or paying for extra translations and authenticated documents, additional releases from a birth parent, etc., based soley on the location of their home within the United States.

In the end, one effect seems inescapable: the third-hand delegation of Federal responsibility to private organizations invites and tolerates religious exclusion as a critical part of the immigration process. When some 3 in 8 independent placements within the United States and 1 in 3 Latin American adoptions in the United States involve Jewish families, one is hard-pressed to argue that exclusion is not practiced and that members of certain "wrong" religions are not excluded from more traditional opportunities to adopt.

Summary

This Chapter has used Supreme Court opinions to argue that the current system for regulating intercountry adoption conflicts with a number of our constitutional and regime values. The current system invites 50 different sets of rules and regulations by which American citizens must pursue, under Federal immigration law, the desire to have offspring. Secondly, the chapter has identified a number of family-related principles that the Supreme Court has found to involve fundamental rights. In order for government to regulate in those areas, government must meet the tests of compelling interest and no alternative means.

The chapter has established that some truly "sacred" norms are at issue in intercountry adoption. At a minimum, therefore, the relevant constitutional norms require that government tread carefully in this field. Congress' plenary power in immigration seems to require equal and consistent treatment of any immigration petition filed by a citizen. Immigration is not a right, but all citizens, under the Immigration and Nationality Act, are "entitled" to petition the Federal Government to classify an alien as an immediate relative. Those same citizens also are entitled to have their petitions treated equally and with consistent criteria -- rather than by 50 different systems of immigration. The fate of their petitions should not rest, in any degree, with the accident of geographic location within the United States.

Other rights also appear to be involved. The Supreme Court has found that restricting the practice of birth control, or the dissemination of relevant information violates the "sacred" character of marriage and inhibits the "foster(ing) of a way of life, a harmony." The Court also has found that the sterilization of criminals violates "a right which is basic ... the right to have offspring." Finally, abortion has been found to involve fundamental rights. At least through the first trimester, abortion involves "the fundamental right to make the highly personal choice whether or not to teminate (a) pregnancy" and the right to "freedom of personal choice in matters of marriage and family life,"

Efforts by adult citizens to adopt can lay claim to these same principles and constitutional protections. Efforts to adopt a child relate substantially to: "the right to have offspring"; "freedom of personal choice in matters of marriage and family life"; and a "sacred" marriage that "fosters a way of life, ... a harmony." These constitutional principles indicate that citizens indeed have a

right to pursue an adoption. When citizens exercise that right under Federal law, as in intercountry adoption, Congress must ensure that the right is not subject to possible violation of the establishment clause, that citizens are assured equal treatment, and that citizens' freedom of travel is protected, as families can, in effect, be excluded from residing in or moving to a particular State.

All this is not to say that government has no compelling interest in regulating adoption, be it intercountry or domestic. Government has a compelling interest to protect the best interests of a child. However, a State may be hard-pressed to substantiate its compelling interest in a child who has yet to enter the United States, let alone the jurisdiction of the particular State. The compelling interest in an alien child, who still resides abroad, rests properly with the Federal Government, not with a State.

Even if the State role were found to advance compelling interests, questions of alternative means and the relationship of certain regulations to the espoused purpose may find that the current system comes up short. Chapters Three and Four established that a very real alternative means exists: "let the Feds do it." INS has extensive experience in the field, and on-site State Department personnel, as well as INS officials, are far more likely to identify any problems that may exist with foreign laws and regulations than is a State official for whom the principles of foreign family law are indeed foreign. An even more basic question is whether a problem exists with foreign laws and procedures. The evidence cited in Chapter Three suggests that no such problem exists in fact.

Similarly, questions must be raised about the assumption that immigrant children entering the United States under a final adoption decree from abroad (IR-2 and IR-3 visas) have no guarantee of legal adoptive status in the United

States. Can a State really void the immediate relative status on which foreign children have been admitted to the United States? This dissertation has held that nothing of the sort could be the case, but even if it were the case, any notion that full-faith-and-credit offers some universal guarantee of legal adoptive status once a State has acted on an adoption petition just does not stand up under scrutiny.

Finally, the secondary delegation of State reponsibilities to private organizations bears even less relationship to compelling interests or to notions of serious problems abroad. Part Three establishes that participation by an agency has no influence on whether an adoptive child succeeds in a new family setting. Further, and more consistent with the contents of this chapter, agency-only restrictions of one sort or another appear to conflict with the "freedom of personal choice in matters of marriage and family life" and frequently invite religious discrimination in violation of the establishment clasue.

In contrast to the constitutional weaknesses in the current system, the change in Federal law proposed by this dissertation is perfectly consistent with constitutional norms. A uniform Federal system, subject only to Federal regulation and criteria, would ensure equal treatment, equal access to the opportunity to adopt, consistent protection of the "sacred" character of family matters and assurance that a family will not be frustrated in its effort to adopt because the family belongs to the "wrong" religion or because it lives on the wrong side of a State boundary.

The proposed change also avoids any conflict with constitutional norms that could develop after the child enters the United States. The proposed change would confer legal status on the adoptive family relationship that would merit full recognition in any of these United States.

PART THREE: ADOPTION

Part Three places intercountry adoption within its adoption context and adds to the case made in Part Two. Chapter Six provides a sense of scale to show that intercountry adoption indeed is a major element in American adoption and family building, and that all relevant trends suggest it will continue to increase in relative importance at least for the next decade. This chapter presents findings from an original questionnaire distributed among intercountry parent-support groups to establish a profile of the children and of the parents of intercountry adoption. The profiles indicate that the children are over-whelmingly healthy and very young, and that the parents are predominantly mainstream, middle class America -- not "the rich." The parents' profile suggests neither a group that wanders about the world to flaunt foreign laws nor a group that particularly requires the assistance of "experts."

Chapter Seven reviews the professional literature for commonly identified problems against which the States and private agencies are assumed to offer protection. Building on Part Two and Chapter 6, the chapter shows most assumed problems to be non-problems and, further, that even where identified problems materialize, the common remedies fail to establish a rational connection to the problem. This goes one step further than Part Two, which argued that the current system fails to meet the test of "compelling governmental interests." Chapter Seven shows that the current system also fails the less demanding test of a rational connection to a reasonable governmental interest; the interest may well be reasonable, but the rational connection is absent.

CHAPTER SIX

THE ADOPTION CONTEXT

This chapter places intercountry adoption within the context of American adoption. Section One reviews the level of intercountry adoption and the countries of origin of the children. Section One shows that the number of intercountry adoptions reached 9,417 in 1985, that the countries of origin have changed from the early predominance of European countries to the predominance of Asian countries (particularly Korea), with Latin America and India emerging over the past 10 years as important countries of origin.

Section Two offers a sense of the relative importance of intercountry adoption in the United States. This section also shows that intercountry adoption has changed from a curiosity to a major alternative for family building in the United States, as demonstrated by its increasing share of non-relative adoptions in the United States: from the historically modest level of 2 percent in 1970 to 20 percent by 1984. This is based on INS data from Part One and an original estimate of non-relative adoptions in the United States developed with data from 16 States.

Section Three provides new and fairly extensive information on who the parents and children are in intercountry adoption by presenting findings from a questionnaire that was circulated among parent-support groups in eight States and which generated responses on 203 intercountry adoptions. The questionnaire is supplemented with information provided by parent-support groups about general membership. As a result, Section Three presents findings from 203 adoptions to show the age and health of the children, the age of the parents and the adoptive

parents' religious identity, education, household income and marital status and, if married, number of years married. The sex of the children by countries of origin is also reviewed, based on information on 453 intercountry adoptions. Section Three also examines the rate of participation by American adoption agencies in adoptions from Korea, Latin America and India, based on information from 297 intercountry adoptions.

Section One:
Scale of Intercountry Adoption and Countries of Origin

Countries of Origin: The Data

The Congress first provided special visas for alien orphans in the Displaced Persons Act of 1948. The intent was to provide relief to American military families who, in the wake of war-time devastation in Europe, had adopted children while stationed abroad but were then unable to obtain visas for their children upon being ordered back to the United States. Tables 2 through 5 showed in detail the number of children who have entered the United States since 1948, by country and region.

From 1948 through 1984, Table 2 showed that 120,000 alien orphans have entered the United States under IR-3 and IR-4 visas. This does not include all children adopted from foreign countries. Four groups of children are not included in the INS orphan data: (1) children from independent nations of the Western Hemisphere prior to 1969; (2) also prior to 1969, children from countries in which the immigration quota was not exceeded in a particular year; (3) children from countries whose quotas were filled, but who received visas before the quota was reached in a given year; and (4) children who are adopted abroad, remain with their families for two years, and enter the United States under IR-2 visas.

Of these four groups that would have gone uncounted prior to 1969, the children who were adopted and lived abroad with their families for at least two years probably constitute the largest group. Among the countries of the Western Hemisphere, Table 2 showed that, prior to 1969, Canada would have been the only significant country of origin that would not have been recorded. The table showed that Latin American countries did not become significant in the data until the mid-1970's. In addition, quotas from most countries in other regions were severely over-subscribed and rather few children would not have received an orphan visa. Nevertheless, some children from Europe and Latin America prior to 1969 certainly were missed by the INS reporting system, and significant numbers of Canadian children were missed. Table 2 showed 257 children from Canada in 1969, with substantial numbers following for the next few years.

The Immigration and Nationality Act of 1965, which went into effect in 1969, established a quota for the Western Hemisphere and required that all alien orphans obtain an orphan visa. Consequently, since 1969, the INS data is complete, save for one group, the adopted child who remains abroad with adoptive American parents for 2 years following a foreign adoption. That child is treated the same as any child in the family who may be born abroad and is admitted to the United States under a different visa (an IR-2). This class of adopted child is reported by INS with other immediate relatives under I-130 petitions, not the I-600 that applies to the other adoptive children. Consequently, this class of child cannot be identified within the INS data, nor within the State Department's visa data. However, this omission is not highly significant to this paper as it applies principally to Americans who are already living abroad for extended periods of time; they are not going abroad for the express purpose of adoption and,

therefore, are not really the subject of this paper. Nevertheless, these children continue to go unrecorded as a distinct class of immigrants.

Trends in Countries and Regions of Origin

As stated in the Introduction, the children of intercountry adoption now come from everywhere, with about 70 countries of origin reported annually by the INS. However, most children come from a limited number of countries. With slight variations from year to year, Table 8 showes that five out of six of the children come from just five countries: Korea, Colombia, India, the Philippines and El Salvador, respectively. About 12 out of 13 of the children come from just 11 countries, with the six additional countries all located in Latin America.

TABLE 8

MEAN WEEKLY & MONTHLY ORPHAN VISAS ISSUED BY U.S. EMBASSIES IN SELECTED COUNTRIES: FY 1984 and FY 1985

	TOTAL	Monthly	Weekly
Korea	10,959	456.6	105.4
Colombia	1,209	50.4	11.6
India	979	40.8	9.4
Phillipines	941	39.2	9.0
El Salvador	676	28.2	6.5
Honduras	374	15.6	3.6
Chile	361	15.0	3.5
Brazil	358	14.9	3.4
Mexico	320	13.3	3.1
Guatemala	284	11.8	2.7
Costa Rica	162	6.8	1.6

Source: From Tables 2-5; Visa Office, Department of State, Washington, D.C.

Regional concentration has been an historical characteristic of inter-country adoption, but the areas of concentration have changed over the years. Europe was the sole region of the children under the 1948 Act, when just three countries accounted for 73 percent of the children (Germany, Greece and Italy). When Congress extended eligibility for special treatment to Asian orphans in 1953, Japan and Korea quickly became major countries of origin, as the Philipines did soon thereafter. Korea remains the predominant country of origin and the Philipines remains important, but Japan is no longer a major player in the system.

Under the 1948 Act, the number of visas issued to orphans was rather modest. Table 2 showed that, in its first five years, the "orphan program" averaged just 813 visas annually. The number of visas increased thereafter with the extension of eligibility to Asian orphans, with an annual average of 1,282 orphan visas under the 1953 and 1957 Acts. Activity increased to an annual average of 1,630 orphan visas from 1963 through 1968. Since then (1969-1984), the program has experienced a rapid and sustained increase, with an average annual rate of increase of 11.3 percent over 15 years. In 1969, 2,080 foreign orphans entered the United States; five years later the number surpassed 4,000.

Table 9 shows intercountry adoption to have peaked temporarily in 1976 and 1977, when the so-called "Babylift" from Southeast Asia brought the number of immigrant orphans to 15,043 over a 27-month period (including the Federal Transition Quarter). Since 1977, Vietnam and Thailand have virtually ceased as countries of origin. At the same time, Korean placements declined for a short period, due to a temporary change of policy in Korea. As a result, total intercountry adoptions declined for a few years in the late 1970's. However, the decline in Korean placements has been reversed, and rather dramatically so.

Table 9
INTERCOUNTRY AND OTHER NON-RELATIVE ADOPTION
IN THE UNITED STATES: 1965 - 1985 (ESTIMATED)

YEAR	TOTAL	INTERCOUNTRY	US-BORN	PERCENT ICA
1965	76,700	1,457	75,250	1.9
1966	80,600	1,686	78,925	2.1
1967	83,700	1,905	81,800	2.8
1968	86,300	1,612	84,700	1.9
1969	88,900	2,080	86,825	2.3
1970	89,200	2,409	86,800	2.7
1971	82,800	2,724	80,075	3.3
1972	67,300	3,023	64,275	4.5
1973	59,200	4,015	55,175	6.8
1974	49,700	4,770	44,925	9.2
1975	47,700	5,633	42,075	11.2
1976	45,450	6,552	38,900	14.4
Transition Quarter		1,998		
1977	42,825	6,493	36,325	13.5
1978	42,800	5,315	37,475	12.4
1979	43,425	4,864	38,550	10.8
1980	43,375	5,139	38,225	11.8
1981	44,925	4,868	40,050	10.8
1982	45,750	5,818	39,925	12.7
1983	44,800	7,138	37,650	15.9
1984	43,075	8,597	34,475	20.0
1985	45,000	9,417	35,600	20.9

SOURCES: See Table 1; this is a copy of Table 1 reproduced here for the reader's convenience.

The temporary decrease also was partly offset by the emergence of Latin America, particularly Colombia and El Salvador, and, later, India as significant regions of origin. Therefore, even during the temporary decrease in total intercountry adoptions, non-Korean placements continued to increase. With the resumed increases from Korea, intercountry adoptions approached 6,000 in 1982, surpassed 7,100 in 1983, reached 8,600 in 1984, and surpassed 9,400 in 1985.

Increased Importance of Intercountry Adoption in the United States

This section shows that intercountry adoption not only has continued to increase in absolute terms, but even more rapidly as a percentage of non-relative adoption in the United States. The section presents an original estimate of non-relative adoptions in the United States and documents a marked decline in adoption since 1970. The section goes on to outline the causes of the sharp decline.

The original estimate of adoptions since 1975 first requires a review of the adoption data that is available in the United States, which can only be described as abysmal. Prior to 1975, the United States Children's Bureau, then part of the Department of Health, Education and Welfare, now the Department of Health and Human Services (HHS), collected adoption data from the 50 States and the District of Columbia. Based on this data, the Children's Bureau published annual estimates of relative and non-relative adoptions. This at least provided a unified source for national estimates. However, HHS has not collected and reported this data since 1975. In addition, most States have abandoned their reporting systems since HHS ended its system. Consequently, adoption data in the United States is so incomplete that the most basic questions cannot be answered,

such as whether the level of adoption is high or low. Fiegelman says it well when he describes the available data as "increasingly meager." 333/

To fill this void, all 48 continental States and the District of Columbia were contacted for this dissertation to obtain information on the number of non-relative adoptions since 1975. Only 16 States could provide useable information on the number of non-relative adoptions that had taken place within their jurisdictions, and 7 of those 16 were able to respond only because certain individuals kindly made special efforts to provide data, as their States did not routinely collect and report it. Only 4 States could provide detail on the children and their adoptive families (Minnesota, South Carolina, Washington and Wisconsin), so the hope of developing a national profile of non-relative adoptions had to be abandoned.

About half the remaining States have some type of data, but make no distinctions between non-relative adoptions and relative or step-parent adoptions. Even where data is routinely collected and reported, or becomes available through a special effort, the data is not comparable among the States. States may report petitions filed, petitions granted, placements made, or birth certificates amended. The data may be reported for the calendar year or for the fiscal year (which also is defined differently among the States). Some State reporting systems include intercountry children from the date they enter their American family (based on placements or approvals), while other States do not include them until a petition is filed or granted, or until a birth certificate is amended.

335/ Feigelman, William and Arnold Silverman; Chosen Children; Preager Publishers (New York, 1983), p. 10.

Despite these rather fundamental caveats, the data from the 16 States (shown in Appendix A) was used to develop national, annual estimates of non-relative adoptions in the United States since 1975. The estimate is simply a pro-rata exercise, using 1975 as the base year. The results are not presented here as definitive but, due to inconsistencies among the official data available, to indicate something vaguely defined as "adoption activity," rather than any measure in particular, such as placements, petitions, etc.

Though the estimates have their weaknesses, they are based on the most complete set of adoption numbers available. Secondly, they reflect the same types of data reported by HHS through 1975, and the 16 States which had useful data provide an adequate base for extending the HHS data. In short, weaknesses notwithstanding, they are the most extensive estimates available.

The other respected source of data on adoption comes from the National Survey on Family Growth (NSFG). The NSGF includes annual estimates of non-relative adoptions through 1981. However, the NSGF estimates appear to be low for the early 1970's and high for the last few years covered, particularly for 1981. Further, the NSFG offers two convincing disclaimers on its annual estimates.

> The NSFG can provide some insight into the likely direction of recent adoption trends, although it cannot provide reliable estimates of adoptions for any given year. (p. 9) The number of adoptions falling into the sample for each year is too small, and the sampling variables of the estimates too large. For this reason, NSFG (annual) estimates must be interpreted with great caution. 334/

334/ "Adoptive Plans, Adopted Children, and Adoptive Mothers: United States, 1982"; Christine A. Bachrach; Family Growth Survey Branch, Division of Vital Statistics, National Center for Health Statistics, U.S. Dept. of Health & Human Services; Washington, March, 1985), p. 11.

For the reasons stated by the NSFG, its estimates are not used here, though they are represented below in the interests of general information, since, as the NSFG has stated, its survey provides "insight into the likely direction of recent adoption trends." The direction of trends identified by the NSFG are consistent with those identified by the data developed here for domestic adoption. However, due to the nature of the study period for the NSFG (the ten years from 1973 through 1982), the NSFG understates the current importance of intercountry adoption to American family formation.

Federal data through 1975 (Table 9) shows that non-relative adoptions in the United States increased steadily after World War II. From 1957 through 1966, non-relative adoptions increased by an average of 6.6 percent annually, a rate that doubles every seven years. For the next four years, 1967-1970, non-relative adoption continued to increase but at a more modest average of 2.9 percent annually, and peaked at 89,200 in 1970. For the next five years, adoptions plunged in the United States by an average of 12.5 percent annaully.

Using data from 16 States, Table 9 also estimates non-relative adoptions annually from 1975 through 1985. The table shows that the sharp decline identified by Federal data from 1971 through 1975 continued through 1977, but that non-relative adoption has stabilized since 1978 at about 45,000 annually.

The data developed for this paper and the NSFG reach a number of common conclusions. The NSFG concludes that "the general consensus is that the annual numbers of adoptions remain low." This is certainly the case if we compare 1970 with the estimates for recent years in Table 9. However, the NSFG adds that "the different types of data available from the NSFG all point to a reversal of the downward trend in numbers of adoptions observed in the national

data after 1970." 335/ I would modify this only to note that the rapid decline from 1970 through 1975 appears to have been "arrested," not "reversed." The Federal data through 1975 shows a sharper decline in adoption than that estimated by NSFG and the stabilization indicated in Table 9 since 1977 is too modest to qualify for the reversal indicated by the NSFG.

While total non-relative adoptions in the United States fell rapidly, then stabilized at a new and substantially lower level, intercountry adoption began a rapid and sustained increase. From 1969 through 1985, intercountry adoption increased at an average annual rate of 11 percent. With these opposite trends, intercountry adoption has become an increasing percentage of total adoptions in the United States and is now an important alternative for family building in the United States (as well as in Canada and Western Europe); it continues to increase steadily, both in absolute and relative terms.

Table 9 indicates that intercountry adoption was indeed little more than a curiosity on the fringe of American adoption as recently as 1970. Through 1970, intercountry adoption accounted for just two percent of non-relative adoptions in the United States. Intercountry adoptions began increasing as a percentage of American adoption shortly thereafter, reaching 10 percent in 1975.

The sudden influx of Babylift children increased that percentage still more, at least temporarily. Some 2,200 Vietnamese and Cambodian children were admitted to the United States on the Attorney General's authority to grant probationary entry; these children did not affect the immigration data on orphans until their immigration status was changed, mostly during 1976 and 1977. By

335/ Ibid.

coincidence, the Federal Government was changing its fiscal year in 1976, from July–June to October–September. Hence, the Transition Quarter (TQ) covers the 3 months from July 1 through September 30, 1976. That quarter shows the influence of the Babylift on the data of that period, with those three months representing an annual rate of nearly 8,000 children.

By 1978 and 1979, intercountry adoption accounted for 12 and 13 percent of non–relative adoptions (excluding immigrant orphans who entered in the Transition Quarter). For the next four years, with the passing of the Babylift and the temporary decline in Korean placements, intercountry adoptees accounted for a more modest but still significant share (10 to 11 percent).

With the end of the decline in Korean placements, plus sustained increases from other regions of the world, intercountry adoption accounted for one in eight non–relative adoptions in the United States in 1982. This figure rose to one in six in 1983 and to one five in 1984 and 1985 (see Table 9). Intercountry adoption had changed; no longer unusal, it had become a major alternative in American family building. Now at 9,400 families in a single year, and increasing steadily, intercountry adoption soon should account for one–fourth of non–relative adoptions. This compares dramatically to the late 1960's, when, at about 1,500 a year, intercountry adoption accounted for just one in 50 non–relative adoptions.

Table 9 shows that intercountry adoption accounted for 20 percent of all non–relative adoptions in 1984 and 1985. This estimate may appear high, but, in fact, it is consistent with other estimates. For example, the NSGF acknowledges the weakness of its annual estimates, but, as a snap–shot of adoptive families, the NSGF is enjoys some authority. The NSGF estimates that intercountry adoption accounted for 12 percent of all non–relative adoptions from 1973 through 1982.

This is a 10-year aggregate, so it understates the role of intercountry adoption in the latter half of the study period. Nevertheless, the NSFG estimate for those ten years is very consistent with my cumulative estimate for the same period, which Table 9 shows would be 11 percent. The NSFG study period ended in 1981, so it does not include the rapid increase in intercountry adoption since then. In short, the NSFG estimate of the relative role of intercountry adoption in the United States for the ten-year study period (12 percent) is consistent with my estimate in Table 9 for that same period.

Similarly, Fiegleman used data from the Children's Bureau to estimate the relative role of intercountry adoption in 1974. He found intercountry adoption to account for nine percent of all non-relative adoptions in the United States in 1974. Table 9 shows an estimate of 11 percent for 1974. Again, the few sources available for comparison confirm the sense of scale established in Table 9.

Finally, Table 9 indicates that domestic non-relative adoptions have declined even more severely than general State data would indicate, as intercountry adoptions have replaced some of the overall decline. When non-relative adoptions peaked at 89,200 in 1970, about 87,000 of the children were American-born. Domestic placements then fell by an annual average rate of 13.2 percent through 1977. In 1985, about 45,000 non-relative adoptions took place in the United States; less than 36,500 of the children were American-born.

Numerous authors and researchers cite studies to show the rapid decrease in domestic non-relative adoption through about 1977. Some of those authors rely upon the same Federal adoption data cited here, while others rely on survey material. For example, Benet cites a drop of 90 percent in the number of children placed in adoptive homes by the Los Angeles County Adoption Agency,

the largest agency in the world, from 1965 through 1975. 336/ Barbara Joe notes a drop of 11 percent in the number of white children available for adoption in a single year, from 1969 to 1970. 337/ Meezan 338/ cites data from the National Center of Social Statistics to show an additional decline of 6,400 non-relative adoptions in the United States from 1970 to 1971 (also reflected in Table 9).

Meezan goes on to cite a host of figures that indicate the decline in non-relative adoptions in the United States from 1970 through 1974. 339/ Among 89 adoption agencies that he surveyed during that period, Meezan found that placements fell by a total of 41 percent with two-fifths of the agencies reporting decreases of more than 50 percent. Meezan also found that over half the agencies had been forced to close their waiting lists at least once in the preceding 2 years.

Paula Dranov reports that in 1977, three years after Meezan's study period, half of all adoption agencies were not accepting applications for healthy white infants and that 70 percent had closed applications at least once in the preceding two years. 340/ A telephone survey of public adoption agencies in the Washington-Baltimore area undertaken for this dissertation indicates that the situation has become even more lean since Meezan's and Dranov's study periods, particularly for public adoption agencies.

336/ Benet, Politics of Adoption, p. 2.

337/ Joe, Barbara E.; "In Defense of Intercountry Adoption"..

338/ Meezan; Adoptions Without Agencies, p. 25.

339/ Meezan, p. 25.

340/ Paula Dranov: Cosmopolitan; December, 1984; p. 249.

Causes of the Decrease in Domestic Adoption

The dramatic decline in non-relative adoptions in the United States, particularly domestic adoptions, can be attributed primarily to social changes. The most significant change in social values affecting adoption is the proportion of unmarried mothers now choosing to retain custody of their children. Children born to unmarried mothers, particularly young unmarried mothers, had been the traditional source of most adopted children in the United States. Baker notes that 80 percent of children born to unwed mothers in 1968 were placed for adoption. Just 10 years later, according to Baker, this had completely reversed, with 80 percent of unwed mothers choosing to raise their children, with only 20 percent placed for adoption. 341/ In 1984, Dranov 342/ estimated the same historical ratio of 20-80 cited by Baker, but estimated the current ratio at 90-10. Earlier in 1984, Newsweek cited the same 90-10 ratio. 343/ Telephone interviews conducted for this dissertation with public agencies in the Baltimore-Washington area providing support services to unwed mothers uniformly confirmed that, by 1984, the percentage of children born to unwed mothers and then placed for adoption had fallen to less than 10 percent and was approaching five percent.

Still another factor often cited is the increase in abortions in the United States since the Supreme Court's decision in Roe v. Wade. However, the effects of abortion on adoption can be overstated. First, Roe v. Wade was not handed down until January, 1973 and would not have had a major influence on adoption

341/ Baker, p. 1.

342/ Dranov, Cosmopolitan, p. 249.

343/ Newsweek, February 13, 1984.

until 1974. However, by 1974 much of the decline in domestic adoption had already taken place, as Table 9 shows.

Yet, with over 1.5 million abortions per year, abortion has to be part of the explanation. Dranove cites an estimate of the effect of abortion on pre-married, teenage pregnancies: 38 percent end in abortion, with another 13 percent ending in miscarriage. 344/ Abortion's real effect on the equation may be to reinforce the reversal in the rate at which unmarried mothers seek adoption for their children. That is, those women who now choose to carry to term probably are more likely to have been among the 20 percent who would have chosen to raise their children some 10 or 15 years ago.

The total number of adoptions obviously is influenced directly by the number of children available for adoption. With most unwed mothers now raising their children, plus the availability of legal abortions and the increased effectiveness of birth control, the "supply" side of adoption has been substantially reduced, but has been partly offset by continued increases in births among unwed teenaged mothers in the United States. Peter Alsberg reports that the number of unmarried women giving birth increased from about 7 per thousand in 1964 to about 17 per thousand in 1981. 345/ The Economist recently reported that the United States has the highest rate of teenage pregnancy among Western industrialized countries and is the only such country in which the rate of teenage pregancy continues to increase. 346/

344/ Dranov, Cosmopolitan, p. 249.

345/ Peter Allsberg; The Washington Post; November 21, 1984; p. 30.

346/ The Economist, London, August,1984.

This would indicate that more children would be available for adoption if all else had remained equal -- but all else has not remained equal. The decrease in the number of available children has been accompanied by a substantial increase in the number of couples and single persons seeking to adopt, or the "demand" side, if you will. As a result, the swing in the ratio of applicants-per-child-available has been nothing short of startling.

Demographic changes alone would be enough to create an imbalance between the number of children available for adoption and the number of adults who seek to adopt. The generation of the post-war baby boom has been in the family-forming years for some time now, while the birth rate long ago resumed a downward trend in the United States. The U.S. Census Bureau shows that the number of Americans in the 25 to 44 age group increased by 40 percent from 1968 through 1983. 347/ When accompanied by a declining birthrate, this shift alone would create a major change in adoption.

A second factor affecting the "demand" side of adoption in the United States has been the decrease in fertility among married persons of child-bearing years. The exact size of this decrease varies according to different sources, but the reported scales are consistent. The National Survey on Family Growth estimates that infertility among married women of child-bearing age increased from 4 percent in 1960 to 11 percent in 1980. 348/ Resolve, a support group for infertile couples, estimates that the figure had increased to 15 percent of married American women in child-bearing years by 1984. 349/ Kleiman estimates that

347/ Bureau of the Census, U.S. Department of Commerce, Series P-23.

348/ NSFG, on infertility.

349/ Dranov, Cosmopolitan; December, 1984.

the rate of infertility among married couples of child-bearing age has increased from one-tenth in the late 1950's to one-sixth in 1979. 350/

This marked increase in infertility may be explained by a number of factors, such as the negative effects of certain intra-uterine devices, the tendency of Americans to marry a bit later in life, and the trend of waiting longer before trying to have a child. Perhaps as a result of these or any number of other factors, many women are in their early and mid-thirties before they first try to bear children, only to find that their peak fertility has passed.

In addition, an important alternative in adoption has been closed to most white families over the past decade. Fiegelman and Silverman cite data from the Childrens' Bureau to show that adoption of black children by white families peaked at 2,574 in 1971. 351/ Thereafter, in response to serious objections from minority groups, transracial and transcultural adoption declined quickly in the United States. The watershed was 1973, when, Altstein reports, 352/ the number of black children placed with white families fell by 30 percent in a single year. Fiegleman and Silverman note a decrease of 60 percent from 1972 through 1976 in the number of black children placed with white families. 353/

All these trends have combined over the past 10 or 20 years to reverse the supply and demand relationships in adoption: a 40-percent increase in the population in family-forming years; a three-to four-fold increase in infertility; a decrease of some 90 percent in the rate at which unmarried mothers release their

350/ See Feigelman and Silverman, p. 17.

351/ Feigelman & Silverman, p. 12.

352/ Altstein, pp 10-11.

353/ Feigelman and Silverstein, p. 12.

children for adoption, despite the slightly offsetting effects of continued increases in teenage pregnancy; the reluctance to place black children with white families; and the availability of legal abortions. Back-of-the-envelope arithmetic indicates that the number of children born out of wedlock and placed for adoption dropped by about 70 percent from 1968 to 1984, while the number of families seeking to adopt each available child multipled by something like 15-fold.

No definitive estimate can be offerred on the number of families seeking to adopt each available child, nor can any definitive estimate of the number of adoptable children be offerred. Estimates of the number of waiting children range from 10,000 to 100,000. The problems in estimating the number of children are principally: (1) given that few States can even tell how many children are adopted within their jurisdictions each year, the information simply is not out there; and (2) casual estimates typically have no way of making a distinction between the child who is in the care of an agency but who is not legally available for adoption versus the child who is available for adoption.

Similarly, estimates on the number of parents seeking to adopt are little more than informed guesses. My personal experience includes information on the question from only one agency, the largest adoption agency in Virginia. As part of a group interview in 1977, I was told that in the preceding ten years, the number of young children available for placement by the agency had declined by two-thirds, while the number of filed applications (not necessarily the same as the number of interested families) had increased six-fold. This is a swing of 18-to-1 in the ratio of applicants per child available. 354/

354/ Catholic Charities of Northern Virginia.

In 1984, Newsweek estimated 40 applicants per healthy infant. 355/ In 1967, the Encyclopedia of Social Work estimated that the number of applicants per child available had already reached 104. 356/ Just four years later, the Encyclopedia estimated that the number of applicants had surpassed 200 per child. Local officials interviewed for this dissertation in the Baltimore-Washington area reported comparable ratios of applicants-to-children in 1984. Based on their recollection of what was decsribed as telephone logs, in which telephone inquiries about adoption are briefly noted, those officials estimated ratios ranging from 100 to 150 per child in 1984. 357/

The higher estimates here almost certainly overstate the case, depending on the definition of "applicant" and "available child". Surely, some callers noted in the cited telephone logs may have been double-counted and some may not yet really have decided to pursue adoption actively. Further, the level of telephone inquiries would vary from month to month. Still, even after allowing for over-statement, the message remains the same: the number of adults seeking to adopt simply overwhelms the number of children available. Whether we accept a ratio of 200-to-1, 100-to-1, or "only" 50-to-1, we can safely conclude that, for each child available, the number of families seeking to adopt is very, very substantial.

This very high ratio, whatever it is in fact, is a problem of white America, hence the references above to young white children. Simply put, the

355/ Newsweek, February 13, 1984.

356/ The Encyclopedia of Social Work; Vol. 17, Issue 1.

357/ Inquiries by telephone, November, 1984; jurisdictions included: the District of Columbia; (in Maryland) City of Baltimore and counties of Baltimore, Charles. Howard, Montgomery, and Prince Georges; (in Virginia) Cities of Fairfax and Falls Church and Counties of Alexandria, Fairfax, Loudon, and Prince William.

supply-demand relationships are different among black Americans, whose age structure is younger than that of white Americans and who tend to adopt at only about two-thirds the rate at which white families adopt. 358/ In any event, the relative shortage of adoptable children is characteristic of white Americans. Though the white American family wishing to adopt the stereotypical young, healthy infant can sometimes still do so, that family must be very lucky.

Due to the very high demand per child available, most agencies today can accept applications from prospective parents only periodically. Public agencies in particular reflect the dramatic increase in the number of prospective parents per child available. Public agencies generally place very few children today, particularly few young, healthy white children. Such children today typically are placed by private volunteer agencies or without the assistance of any agency, i.e., independently.

Ironically, two public agencies near Washington and Baltimore reported that when they do come upon a healthy white infant, they sometimes have no applicants seeking such a child. Beacuse so many families now "know" that public agencies do not have accesss to such children, those seeking the healthy white infant seldom bother to file an application with a public agency, which then can face the paradoxical problem of not being able to place the once typical child of adoption. This at least suggests that adults who seek to adopt such a child should leave no stone unturned, including public agencies; it is always worth a phone call.

In sum, the "demand" side has increased due to the demographics of the Baby Boom and a major increase in infertility. In addition, adoption simply appears to be a far more acceptable alternative than it was just one or two

358/ National Survey on Family Growth, Table 6.

generations ago. At the same time, the number of children available for adoption in the United States has declined markedly over the past 15 years due principally to the reversal in unwed mothers' willingness to place their children for adoption and, to a less significant degree, to the effects of abortion.

Consequently, non-relative adoption has fallen from its peak in 1969 and 1970. Though stabilized now, at about 45,000 annually, it is about half the 1970 rate. The decline in domestic adoption has been even greater, with the sustained increase in intercountry adoption having replaced some of the domestic decrease. The result is that domestic adoption appears to be continuing to decrease, albeit much more slowly than was the case immediately following 1970.

Infants have been the basis for outlining the swing in supply-and-demand relationships in Amercian adoption in the past 15 to 20 years only because they offer a useful sense of scale. They are not the only children in adoption.

Adoption agencies, particularly public agencies in and around urban centers, have changed their emphasis from placing adoptive children to that of providing care and crisis intervention for the child who is not available for adoption, i.e., the child who lives with his or her familiy or who needs foster care but whose parents have not surrendered their rights to the child. Local public agencies in Maryland and Virginia, in response to telephone inquiries in the autumn of 1984, consistently indicated that about 80 percent of their resources now are dedicated to crisis intervention. Public agencies also have redirected their adoption resources; they now emphasize recruitment of adoptive parents for hard-to-place children -- older children, minority children, handicaped children, and those with medical needs.

Consistent with this change in emphasis among public agencies, the author's telephone inquiries found that the number of children placed with adoptive families by public agencies in the Baltimore-Washington area is very modest. For example, Fairfax County, Virginia is a jurisdiction of some 700,000 people. The County expected to place just 22 children in 1984, the same number placed in 1983; none of the children were white infants. Other jurisdictions reported much the same situation. Generally, healthy white children who are free for adoption simply do not find their way to public agencies any more. Only one jurisdiction in the entire Washington area expected to place as many as five white infants in 1984, and that jurisdiction was on the urban fringe.

One major benefit of the high degree of imbalance between supply and demand is that hard-to-place children, once a euphemism for impossible-to-place, are being successfully placed in adoptive homes. Adopting families now are encouraged to consider the older child and more and more families recognize that an older child brings every bit as much to a new family as any other child.

All the public agencies interviewed by telephone in the Baltimore-Washington area reported sustained success in placing older and other hard-to-place children. Some agencies in fact have enjoyed so much success that they now report long waiting lists even for older children. For example, the City of Alexandria, Virginia reported, with justifiable satisfaction, its rather dramatic success in recruiting families for older children in the City's custody.

However, in most cases, the white couple who wishes to adopt the healthy white infant may well need to be more than in the right place at the right time; that couple also will frequently need to have the right "credentials." That is, to adopt a healthy white infant in the United States through a private adoption

agency, couples usually will find that they must be no more than 35 years of age, married at least five years, fairly affluent, be without serious medical problems, preferably infertile and, frequently, a member of the right religion.

Agencies often are criticized for their selectivity, and sometimes justifiably so. However, except perhaps for the selected age criteria and the question of the right religion, agencies simply find themselves in a no-win situation due to the number of applicants per child available. Given the distorted supply-demand ratio, if agencies are not highly selective, they will be mercilessly criticized when the inevitable happens: the occasional adoption that simply does not work out. Similarly, the supply-demand ratio may implicitly require agencies to pursue some sense of equity in the placement of children. This may explain, in part, why families with two or more children find their search for adoption extremely difficult when they seek the healthy white infant.

In sum, supply-demand ratios, changes in social mores, and the frequently exclusionary (though sometimes defensible) practices of adoption agencies limit the prospects for adopting the traditional healthy white infant. The same factors also have changed the nature of adopting older children, who are no longer the "fast track" to adoption that they were a few short years ago. Still, older children are an attractive and more viable alternative in domestic adoption.

These factors go a long way in explaining why Americans adopted a total of 41,000 foreign children from 1980 through 1985. The facts of American adoption continue to make more American families aware of alternatives in Korea, Latin America, India and elsewhere.

Section Two
Findings from Intercountry Adoption Questionnaire

A questionnaire was developed for this dissertation and circulated among parent support groups in 8 States to obtain basic information on who the parents and children are in intercountry adoption. Responses on 203 intercountry adoptions were received. (See the Appendix for a copy of the questionnaire.) Some parent support groups also provided information on certain questions from their general membership. With this supplemental information, information on the number of children in a family, the sex of the children and their countries of origin are based on 453 intercountry adoptions. Findings on the rate of participation of American adoption agencies in intercountry adoption are based on information from 297 such adoptions.

The findings on the health of the children, household income, age of parents, the age of children at the time of adoption, home ownership, and the religion, education and marital status of the parents all are based on the 203 questionnaires received. Findings are reported for intercountry adoption in general, while any significant differences in intercountry adoption between regions of the world also are reported.

The questionnaire in no way represents a statistically representative sample. It merely represents the responses from people that I could reach in various meetings and social functions. It also suffers from the classic weaknesses of all adoption surveys: the population in effect was self-selected and may or may not be representative, and the response was small. Still, the questionnaire offers data on far more intercountry adoptions, and in more detail, than is available elsewhere. With a minimum of 203 responses on some questions and up to 457 on

other questions, the data taken from the responses is a useful step toward building a base of information about intercountry families. In sum, the data is expanded to the universe in this section, not because it is presumed to be statistically representative, but because: (1) it is the largest set of data available; and (2) with up to 453 responses on certain questions, the data cannot be dismissed.

Findings: The Children

The most succinct characterization of the children of intercountry adoption is that they are healthy and very young. This section summarizes the findings on the children and gives special attention to the health of the children, because their general state of health is almost universally misrepresented in the literature and prospective adoptive parents too often receive poor information.

Health of the Children. Just two percent of Korean children and four percent of Latin American children were reported to be in less than good health by their adoptive American parents upon entering the United States. Weighted by the distribution of intercountry adoptions over the past six years (1980 through 1985), only 2.5 percent of all intercountry children would be considered by their parents to be in poor health upon entering the United States. These findings are consistent with preliminary data from the survey of member families conducted by the Latin America Parents Association's Maryland Region Chapter. 359/ Of course, the findings from the questionnaire used here are based on subjective judgements by the parents, but these parents make a strong statement that flatly contradicts most popular characterizations of intercountry adoption.

359/ Newsletter, LAPA Maryland Region Chapter, June-July-Aug, 1985; pp 17-19.

The usual portrayal of intercountry adoption suggests that the children range from generally sickly to seriously ill. The popular press is the greatest offender here, but because the professional literature should know better, its standard image of ill health is less forgiveable. A recent feature article in the Wall Street Journal is representative of how the popular press portrays the health of intercountry children. Among the "challenges" and "frustrations" that prospective parents must face in intercountry adoption, according to the Journal, is "the sickliness of foreign orphans." According to the Journal,

> foreign adoption shares with American adoption a scarcity of healthy infants.... Whatever handicaps each adoptive couple decides it can live with, all have to be prepared for illness and usually correctable disabilities. 360/

If nothing else, the persistent growth in intercountry adoption and the very young median age of the children indicate that intercountry adoption in fact is not besieged with terribly sickly children nor with "a scarcity of healthy infants." The Journal quotes a spokeswoman for the International Concerns Committee for Children: "Malnourished, lice, rickets, scabies, 2 different-sized feet, webbed left hand -- that's a healthy kid." 361/

Such a portrayal badly misses the mark, but is only too common. To the degree that such portrayals are based on anything at all, they characterize the unusual as the norm. Even popular articles that generally support intercountry adoption tend to focus on the unusually ill child and invite readers to assume that the child is representative.

360/ Wall Street Journal; May 21, 1985; p. 30.

361/ Ibid, p. 30.

A September 1984 article in Glamour Magazine was generally positive toward intercountry adoption. 362/ Yet, it focussed on a couple who had adopted a Chilean child in 1982 who was malnourished and "on the verge of pneumonia." Similarly, a generally positive article in Cosmopolitan 363/ focussed on a couple who had adopted two "seriously malnourished" children from Mexico. Still another positive article in a popular magazine focussed on a family who had adopted two children from Latin America. Their son was described as "suffering from malnutrition in a Colombian orphanage," while their daughter "lay limp and unresponsive in a bleak institution in Bolivia." 364/ Keep in mind, these characterizations come from basically positive articles.

Even if we take these portrayals of particular children at face value, and that may be an unwise concession, are we to assume that they are representative of the nearly 22,000 immigrant orphans who entered the United States over the three years that the articles address? The answer, based on articles such as these, clearly would be "yes."

Otherwise serious books can be equally misleading on the health of the children. For example, Wishard and Wishard offer this advice to ensure that a child is healthy: "Have your child evaluated by your own doctor before you agree to adopt. The U.S. Consul staff can recommend a suitable local doctor." 365/

362/ Glamour Magazine; Eric K. Goodman, "The Adoption Maze", p. 324.

363/ Dranov; Cosmopolitan; December, 1984.

364/ Women's Day; April 30, 1985; p. 43.

365/ Wishard and Wishard, p. 6.

This suggestion sounds eminently wise -- except that it seems unaware of the procedures outlined in Chapter Two. As that chapter showed, the U.S. Consul Officer not only "may" arrange for the physical examination of a child, but must do so. Otherwise, the child, like any other immigrant, will be denied an immigration visa. Furthermore, the Consul exercises some control over these examinations by requiring prospective immigrants to be examined by a physician approved by the Consul for such purposes. The Consul may indeed be willing to recommend another physician to a family, but that physician's examination, useful though it may be, will not get the child a visa.

This requirement of a physical examination is far from new: it has been required of every immigrant since 1891. Its purpose is to detect communicable diseases. For immigrant orphans, the examination also is intended to identify any additional mental or physical defects that might cause an adoption to break down. As outlined in Chapter Two, if a child has problems that the parents' petition fails to mention, the Consul must so advise the petitioning adoptive parents. Petitioners must respond in writing, acknowledge that they have been properly advised and explicitly state that they still intend to complete the adoption. Without such a written response and commitment, the Consul cannot issue a visa.

In addition, the Consul must personally view the child in all IR-4 petitions (in IR-3 petitions, by definition, the petitioning parents are present with the child). In short, any detectable diseases, developmental problems, disabilities, etcetera, will be identified in advance. Suggestions that devastating surprises about mental or physical health lurk ahead in the darkness of intercountry adoption are just not based on facts.

At a minimum, popular accounts like those cited ignore the extensive regulatory system that is in place, which is taken seriously by U.S. embassies. This is not to suggest that the State Department is an agent for Americans adopting abroad; that is not the State Department's mission. The Department has its own interests to protect: it would like to avoid having local national minors stranded in an international limbo due to unnecessary and serious surprises to adopting parents. Either the existence of this protective system is news for many commentators on intercountry adoption, or they too casually dismiss it.

A more widely circulated commentary on the health of intercountry children comes from The Baby Chase. 366/ In relating his personal experiences in an unsuccessful attempt to adopt in Latin America in the mid-1970's, the author alledges a conspiracy among "Spanish doctors" to conceal serious problems from prospective American parents. The allegation is presented with no apparent awareness of the medical requirements discussed above. That system makes self-evident nonsense of any notion of a broadly based conspiracy by local physicians. Further, "Spanish doctors" probably should have been "Spanish-language" doctors; otherwise we imply that we should expect to find the medical profession in Latin America dominated by members from Hoboken.

These portrayals of the health of intercountry children are only too common. The degree of misrepresentation is difficult to overstate. Personal experience indicates that nearly all sessions with couples beginning to explore intercountry adoption include allusions to these very articles and books. or to other equally sensational and misinformed portrayals.

366/ Kornheiser, Tony; Baby Chase.

More serious students of adoption also seem to take for granted that intercountry adoption is characterized by predominantly sickly children. For example, the Intercountry Adoption Guidelines published by the Childrens' Bureau and the American Public Welfare Association in 1980, include a six-page appendix for assessing the health of a child.

In one of the few serious studies of intercountry adoption, Fiegelman and Silverman conclude that "parents who adopt Colombian children frequently mention the physical disabilities of their adopted children." 367/ They report that among a sample of 46 children adopted from Colombia in 1976, 24 percent (11 children) were hospitalized immediately upon or shortly after arriving in the United States. The authors cite corresponding figures of 12 percent among children adopted from Korea and 9 percent among children adopted domestically. This would suggest that about one-seventh, or 14 percent, of intercountry children end up in the hospital upon their arrival in the United states.

With due respect to the authors, their sample badly overstates the children's health problems. Responses to the questionnaire used here did not come close to that proportion (some 2.5 percent in less than "good health"), nor does preliminary data, cited above, being compiled by LAPA-Maryland. My personal experience includes exposure to some 700 or 800 intercountry adoptions, and is consistent with the more positive findings. The most common of the not-so-common problems is fungal diaper rash (no small source of discomfort to an infant, but a minor problem). The most common significant problem is parasites, but that is corrected quickly, and it occurs with only a very small number of the children. The children also may be identified as small by American pediatricians,

367/ Feigelman and Silverman, p. 43.

but a family need not be surprised if told that its newest member is small compared to American-born children.

Fiegelman and Silverman at least tried to develop some evidence before reaching their conclusion. In contrast, most such portrayals are reached rather casually and are based on little more than third-hand stories and feature articles that focus on the unusual case -- the normal, healthy, well-adjusted child is not much of a story.

Besides being badly misinformed, portrayals of almost universal and serious illness among intercountry children cannot easily explain how and why intercountry adoption has sustained an average annual growth rate of 11 percent since 1968. Are we to assume that the 41,000 families who adopted abroad from 1980 to 1985 brought home 41,000 sickly children? The fact is, of course, that these portrayals are badly exaggerated. The children of intercountry adoption are healthy, and overwhelmingly so.

Age of the Children. In addition to being healthy, the children also are remarkably young, as shown in Table 10. The weighted median age for the children in the questionnaire was just five months when they entered their adoptive American families. The reported median age of children from Latin America was even younger: just 3.5 months. Table 10 indicates that 55 percent of the children from Latin America in the past six years were less than four months old. This very young profile of Latin American children is exactly consistent with preliminary findings now being compiled by the Maryland Region Chapter of the Latin America Parents Associ-ation. 368/ Over half the Korean children in Table

368/ Newsletter, LAPA Maryland Region Chapter, June-July-Aug, 1985; pp 17-19.

10 were over four months but less than six months of age. with 13.2 percent under four months of age. In all, 80 percent of the children of intercountry adoption would be 12 months old or younger.

TABLE 10: MEDIAN AGE OF THE CHILDREN IN PERCENT

Age	Lat.Amer.	Korea
Under 4 Months	55.0	13.2
4 to 6 Months	10.8	42.1
Over 6, Under 12 Months	9.0	13.2
12 - 18 Months	9.9	5.3
Over 18, Under 36 Months	5.4	6.3
3 Years & Over	11.7	10.5
Median (in Months)	3.5	5.5

SOURCE: Original Questionnaire.

Feigleman and Silverman reported on the age of intercountry children in their study of children adopted in 1976. They reported that two-thirds of the children from Colombia were under two years of age and that only five percent were over six years of age. They compared this to their findings on children adopted from Korea and from the United States: 20 percent and 40 percent, respectively, were over six years of age. 369/

The very young profile reported here is quite different from that of intercountry adoption in previous eras. In 1961, Krichefsky undertook a review for INS of all petitions for alien orphans who entered the United States from

369/ Feigelman and Silverman, pp 127-128.

September 1959 through December 1960. She found that, over those 16 months, the median age of children from Greece was the youngest among the principal countries involved: 1.5 years. Krichefsky went on to report the following median ages for children from other countries: 1.8 years for Germany; 2.8 years for girls and 3.8 years for boys from Italy; 3.0 years for boys and 1.5 years for girls from Korea; and 11.0 years for children from China and Taiwan. 370/

Combined, the data reported here and elsewhere suggest that the age of intercountry adoptees generally continues to get younger and younger. Obviously, this pattern can only go so far, and it appears to be approaching its reasonable limits. The countries for which Krichefsky noted median ages acccunted for 68 percent of the children who entered under the 1957 Act. The ages that she reported would indicate an overall median age among all children of about 36 months, under the 1957 Act. Today that median is about five months.

Sex and Race. Krichefsky also reviewed the sex of the children from the countries in her study period. She found that one sex or the other tended to predominate in different countries: two-thirds of Korean children were girls; two-thirds of the children from China and Taiwan were boys; and 60 percent of the children from Italy and Greece were boys. 371/

The questionnaire undertaken for this dissertation found Krichefsky's conclusion on the distribution of sex among the children still applies: one sex or the other predominates in most countries. Of the major countries involved, only El Salvador showed a 50-50 split between boys and girls. (See Table 11.)

370/ Krichefsky, IN Reporter; 1961.

371/ Ibid.

TABLE 11: SEX OF THE CHILDREN

Country	% Boys	% Girls
Korea	28.8	71.2
Chile	43.1	56.9
Colombia	54.1	45.9
El Salvador	50.0	50.0
All Countries	39.3	60.7

SOURCE: Original Questionnaire.

The questionnaire found that the predominance of girls among Korean adoptions remains almost unchanged from Krichefsky's study. Krichefsky found "two-thirds" to have been girls in 1959-1960; the questionnaire found 69 percent to be girls in the 1980's. The most common explanation for this is that Korean mothers, consistent with cultural values, are more reluctant to part with sons.

In contrast, Chile was the only country in Latin America where girls were in a clear majority (57 percent). Colombia showed 55 percent boys while the remainder of Latin America, excluding El Salvador and Chile, showed 58 percent boys. In total, Krichefsky's findings indicated a split of 60 percent girls and 40 percent boys; that overall split remains unchanged.

Krichefsky also reviewed the degree to which the race or national origins of the children matched that of their adopting American parents. She found that, with the major exception of children from Korea, Americans who adopted foreign children under the 1957 Act generally adopted children of their own racial or national origins. This has changed completely by the mid-1980's. 372/

372/ Ibid.

Krichefsky noted that 80 percent of the children who entered from China and Taiwan were adopted by American couples in which at least one partner had been born in Taiwan or China. Among children adopted from the Philippines under the 1957 Act, half the wives and 40 percent of the husbands had been born there.

Among European children adopted under the 1957 Act, Krichefsky reported that 25 percent of Italian children, 20 percent of Polish children and 16 percent of Greek children were adopted by American couples in which at least one partner had been born in the child's native country. The narrow classification used by Krichefsky, parents born in the child's native country, does not account for second- or third-generation Americans whose ancestry derived from the child's country. Further, particularly for the European children adopted under the 1957 Act, this overlooks American parents who adopted children with racial heritage similar to their own, but with different national origins from their own ancestry.

In all, Krichefsky's findings indicate that about 60 percent of all non-Korean orphans from Asia and about 20 percent of orphans from Europe were adopted by couples in which at least one partner was born in the child's native country. If Krichefsky had included second- and third-generation European ancestry and links between different European countries, her non-Korean estimate would approach 80 percent of adopting American parents who shared racial and national origins with their adoptive children.

Based on the author's questionnaire reported here, the corresponding figure today is only about three percent, as the nature of intercountry adoption has changed since the era examined by Krichefsky. Korea, then only emerging as the predominant country of origin, provided the first major break, and a lasting one, in the practice of adopting "your own." Korean-American adoptions

immediately and permanently shattered long standing assumptions that Americans would not adopt across racial and cultural lines. Korean children established, and continue to reaffirm, that race simply is not an issue to many Americans as they go about family building. Children from Latin America and, most recently, India add to the evidence that race or national origin need not be a barrier.

Intercountry adoption has become synomymous with transracial or transcultural adoption, an alternative that is now largely foreclosed in the United States. 373/ In the questionnaire reported here, only two percent of Korean-American parents identified themselves as being of the same racial or national origin as their children. Similarly, only five percent of parents of adopted children from Latin America identified themselves as such. If we assume that virtually all the (now few) European children in intercountry adoption are adopted by American parents of similar racial or national origin, a maximum of about three percent of all parents of intercountry adoption would share a racial-national connection with their children today.

Summary on the Children. In sum, the children of intercountry adoption are very young and healthy. Overall, girls continue to predominate, as they did some 25 years earlier, though boys are in the majority in most of Latin America. Though the overall sexual ratio of the children remains unchanged in 25 years, two other charcteristics have changed: the children are considerably younger than they were 25 years ago (three years then versus 0.3 years now) and, generally, they are no

373/ "Transracial" and "transcultural" adoption are used here to include adoptions of Latin American and Asian Indian children, most of whom are caucasian like their adopting parents. No other term neatly captures this notion. For example, "transracial" is simply incorrect and "trans-ethnic" is inappropriate, because infants are not yet socialized in a way that transmits ethnicity.

longer adopted by Americans with immediate ancestral ties to the native countries of their children.

Findings: The Parents

Income and Costs. The most succinct finding on the parents of intercountry adoption is that they are upper middle class, but not "rich." Parents are well educated and moderately affluent. All but one percent of adopting parents owned their homes when their child entered their family. Table 12 shows that the median household income reported for 1983 was $48,100, or about twice the national median.

TABLE 12:
HOUSEHOLD INCOME, 1983
OF INTERCOUNTRY FAMILIES (IN PERCENT)

($ 000)	Lat. Am.	Korea	Total
Under 35	14.9	21.3	19.3
35-39	11.9	12.8	12.5
40-44	12.9	10.6	11.2
45-49	11.9	10.6	11.0
50-54	15.8	14.9	15.2
55-59	7.9	4.3	5.3
60-64	13.9	12.8	13.1
65-69	1.0	6.4	4.9
70 & Over	9.9	6.4	7.4
Median (in $000)	$49.7	$47.5	$48.1

SOURCE: Original Questionnaire.

The mean cost of an intercountry adoption reported for 1983 through the Spring of 1984 was $5,400. This includes all costs, such as preparation of documents, translations, travel, home study fee, costs for placement services, etc. The median for total reported costs in Korean adoptions was just $4,900, while the median reported for Latin American adoptions was $6,000. The major difference in costs is attributable to variations in travel costs. Typically, Korean-American adoptions are arranged by American agencies and the parents need not travel to and from Korea, however most (though not all) parents who adopt in Latin America must travel there. The effect of travel is most readily apparent in comparing costs among countries in Latin America. For example, median reported costs for Colombia were only slightly higher than those reported for Korea ($5,200). In contrast, adoption from Chile was reported as the most costly among Latin American countries, partly reflecting higher costs of travel.

Despite variations, these median costs should dispel still another common negative stereotype of intercountry adoption: it does not require a king's ransom. At a median of $5,400, the cost of an average intercountry adoption would be comparable to that of an uncomplicated birth in the United States. A complicated birth could well exceed the cost of the typical intercountry adoption. The major difference in cost between intercountry adoption and the cost of an American birth among middle class families is that adoption requires a direct outlay by the parents versus depending largely on insurance to cover the costs of a birth. Even with a median income of $48,100, the direct outlay of $5,400 is no small undertaking. Again, the families are doing fine, but they are not rich. Note too that the median household income for families adopting from Korea did not differ significantly from that of families adopting from Latin America. The

median 1983 household ioncome for families adopting from Korea was $47,600, while the corresponding figure for Latin America was $49,700.

Education. The parents of intercountry adoption are highly educated. In all, 40.2 percent of the parents who responded to the questionnaire had at least a Master's degree (though not necessarily at the time of adoption). Table 13 summarizes the educational levels reported by parents. Mothers are shown to have roughly the same educational profile whether their children are from Korea or Latin America. One-third of mothers have at least a Master's degree, with the median level of formal education among mothers being "some graduate school." Just under 10 percent of mothers reported high school as the highest level of formal education completed and 68 percent reported at least a Bachelor's degree.

TABLE 13

FORMAL EDUCATION OF INTERCOUNTRY PARENTS (IN PERCENT)

	High Schl	2-Year/ Tech	BS/BA	Some Grad	MS/MA	Doct, JD, PhD.	Median Years
MOTHERS							
Korea	10.0	22.5	15.0	20.0	27.5	5.0	16.1
Lat Am	8.6	21.6	17.2	18.1	26.7	7.8	16.2
Total	9.5	22.2	15.8	19.3	27.2	6.0	16.1
FATHERS							
Korea	10.0	17.5	17.5	22.5	22.5	17.5	18.1
Lat Am	1.8	8.8	17.5	10.5	45.6	15.8	19.8
Total	6.9	9.5	17.5	18.0	31.2	16.9	18.8
TOTAL	8.2	15.8	16.6	18.6	29.2	11.5	16.5

SOURCE: Original Questionnaire.

Among fathers, the level of formal education was even higher; 47 percent have at least a Masters degree, while one in six has a PhD, JD, MD, or Doctorate. A total of 76 percent have at least a Bachelor's degree, while just one in 12 did not complete at least a two-year college or technical program. Fathers of Latin American children had a somewhat higher educational profile than fathers of Asian children, with nearly 2 full years of additional formal education.

Marriage and Age. The age and marital profiles of intercountry parents indicate a basic readiness for a child. Couples responding to the questionnaire had been maried a median of 8.5 years when their children entered their home, as shown in Table 14. The same median of 8.5 years applied to Korea, El Salvador and to Latin America as a whole, while the median for couples adopting from Colombia was 9.0 years, compared to 8.2 years for couples adopting elsewhere in Latin America (excluding both Colombia and El Salvador).

The median age was 34 for adoptive mothers and 35 for adoptive fathers for both Latin America and Korea, but with a greater age variation among parents adopting Latin American children: 46 percent of the adoptive fathers of Korean children were within plus or minus one year of the median age, compared to 28 percent of the fathers of Latin American children. Just two percent of the mothers of Korean children reported their age to be 38 or older at the time their children entered their home, compared to 17.4 percent of the mothers of adopted Latin American children. Similarly, 10 percent of the fathers of Korean children were age 40 or more when their children entered their families, compared to 17 percent of fathers of Latin American children.

TABLE 14
YEARS PARENTS MARRIED WHEN
CHILDREN ENTER THE UNITED STATES

Country	Median	Mean
Korea	8.5	8.6
Other Asia	8.0	8.8
Colombia	9.0	9.9
El Salvador	8.5	8.3
Other Lat.Am.	8.1	8.2
Total	8.5	8.8

SOURCE: Original Questionnaire.

Presence of Other Children in the Family. The number of other children present in the family when an intercountry child entered was virtually identical whether families adopted from Korea or Latin America. Of the 453 intercountry adoptions on which data was obtained on the presence of other children, 209 of the children (46 percent) entered families in which at least one other child was already present. The existing children included birth children, children adopted in the United States, and other intercountry adoptees. An additional 7.1 percent of intercountry children entered their new families accompanied by one or more biological siblings, while another 3.5 percent followed in their families by a birth child or a domestic adoption. Finally, one in every four I-600 petitions was filed by parents who had adopted abroad before.

Summary on Parents. The principal point emerging from the questionnaire and the supplemental material is simple, but important. That is, the measures cited here would indicate that parents who pursue an intercountry adoption are mature and, though not rich, are quite capable of supporting a child.

The "average" mother is 33 years old and has had some graduate school training. The "average" father is 35 years old and has at least a Master's degree. The parents have been married 8½ years, own their home and, in 1983, had a household income of $48,100. In addition, nearly half the parents already have at least one child and one-fourth have been through the intercountry system before. In short, the parents in intercountry adoption are not naive babes in the wood.

This conclusion is important to the central thesis of this paper: that the regulatory system already in place is sufficient without adding a State role. The parents do not appear to require the mandated assistance of American adoption agencies, nor does their profile raise great concerns about their willingness and ability to follow the laws and regulations of all jurisdictions involved.

The parents are regulated by Federal immigration procedures and by the State Department's Consular Officer in the foreign country, as well as by various agencies in the foreign country, such as juvenile courts, orphanages, government adoption agencies, public child welfare agencies and the Foreign Ministry. Those regulatory systems are thorough and effective, and may well be excessive even without involvement by American States, and the profiles of neither the parents nor of the children suggest that any additional regulatory agents are required.

Section Three: Agency Participation

Whether or not the participation of an adoption agency should be required remains controversial both in intercountry adoption and in adoption in general in the United States. The rate at which licensed American or international adoption agencies participated in the adoptions reported in the questionnaire varied substantially among different regions of the world. However,

the questionnaire and INS data combine to indicate that rates of agency participation are higher in intercountry adoption than in domestic adoption.

As required by Korean law, all Korean-American placements are undertaken through American or international agencies, and all 80 responses on Korean-American adoptions to the author's questionnaire reported placements through agencies. Because Korea remains the dominant country of origin in intercountry adoption, this alone assures that some 55 percent of all intercountry placements would take place through an agency. In sharp contrast, only 17 percent of adoptions from Latin America were reported to have used American agencies. However, 42 percent of Latin American adoptions reported in the questionnaire took place through agencies licensed in the foreign country. These are agency placements, albeit not American agency placements. The remaining 41 percent of adoptions from Latin America were reported as independent, i.e., without the assistance of an adoption agency (though still subject to judicial review and, in most countries, to review by a public child welfare agency).

An insufficient number of responses was received on adoptions from India to allow for any generalization (20 responses). Despite the limited numbers, the early history of Indian placements would suggest patterns comparable to those of Latin America.

Overall, American or international adoption agencies appear to participate in two-thirds of all intercountry adoptions, while about 19 percent are "direct" through a foreign orphanage or agency, and 15 percent are independent. In sum, about 85 percent of all intercountry placements are made by American or international agencies.

The different rates of agency participation between adoptions in Korea and those in Latin America can be explained by the differences in the history of intercountry adoption in the respective countries. The origins of intercountry adoption in Korea were comparable to those in Europe and Japan: a large American military presence sparked awareness among Americans of substantial numbers of orphans in a country devastated by war. As the American presence in the region became more substantial and as the adoption of native children by Americans increased, American adoption agencies helped fill a void by facilitating the placement of Korean orphans in American families.

Since the passage of the Act of July 29, 1953, which first extended eligibility to Korean and other Asian children for special orphan visas, American agencies have become well established in Korea. The system works smoothly and is well organized. This also goes a long way in explaining the somewhat less costly character of Korean-American adoption. Agencies have been in place for up to 35 years and generally do a first class job.

In Latin America, the origins of intercountry adoption are quite different from those of Europe, Northern Asia and Southeast Asia. First, total war had not led to a massive and long-term American military presence. Rather, Latin America did not emerge as important in the field until the opportunity to adopt in the United States had fallen significantly. When Americans began to explore adoption from those regions, both the adopting parents and the adoption sources were far more decentralized than was the early experience in Europe and Korea.

In addition, despite the historical status of third-world economies, Latin America had not suffered the social, economic and institutional devastation of total war. The organizational and economic voids experienced in post-war Europe

and Japan, then in Korea in the early and mid-1950's and, still later, in Southeast Asia were not present in Latin America in the 1970's. Unlike Korea in the 1950's, the countries of Latin America already had their own child welfare systems in place when Americans began to adopt their nationals in significant numbers.

Another major difference is that adoption has been viewed positively by Latin Americans (though not necessarily adoption by foreigners). For example, until the severe and sustained recession beginning in the mid- to late-1970's, Latin American countries with a substantial middle class (e.g., Argentina, Brazil and Costa Rica) had absorbed their orphaned children domestically. This changed when Latin America's economies plummeted, but former trends may emerge again when the world economy recovers.

These factors create a very different environment for intercountry adoption in Latin America compared to earlier experiences in Europe, Japan and Korea. The organizational and profesional skills of international and American agencies were not required to fill a cavernous void. Local organizations, local professionals, and local traditions of adoption were already in place.

In addition, in most Latin American countries the notion of surrendering control of the adoption of their children to a foreign organization touches a sensitive nerve of national pride. Consequently, despite the current political disruptions in much of Central America, American and international adoption agencies have not been able to establish a strong foothold. This may change as intercountry adoption experience grows in the still relatively new areas of Latin America and India, but, as yet, American agencies have not established the broadly based relationships and well routinized systems in Latin America that they established in Korea and, earlier, in post-war Europe. This general point also

applies to India, but less so, because that situation is changing. American and international agencies have increased their direct activity in India in recent years.

Agency Participation and Exclusion

This section reviews different combinations of parental characteristics from the questionnaire that might exclude people from adopting in the United States, though the section is written with some sympathy for the no-win situation that adoption agencies face when weighing flexibility against demanding standards. When an adoption breaks down, and some adoptions do indeed break down, an agency can face severe (and unfair) criticism if its criteria have been less than very demanding. Nevertheless, agencies use certain key criteria for less than compelling reasons. The section offers some insight into the number of American families whose opportunity to adopt might be seriously damaged if the exclusionary effects of certain factors commonly used in American adoption were extended to all intercountry adoptions via a Federal or State mandate that all intercountry adoptions be conducted through American agencies.

A comparison of the ages of the children and parents between domestic and foreign adoption provides a good example. The American Public Welfare Association (APWA) recommends to its 400-plus member adoption agencies that parents be of "normal age" for a child of a given age. APWA recommends a maximum difference of 40 years between the age of the older parent and that of the child. The rationale is reasonable and straightforward: agencies should assure themselves to the extent possible that parents will survive to raise the child to adulthood and independence. However, many agencies set 35 as the maximum age at which a parent will be considered for an infant in domestic placements.

The questionnaire indicates that 24 percent of the adoptions from Latin America, where American agencies have not yet established a strong base, involved at least one parent over 40 years of age. In contrast, only four percent of adoptions from Korea, where American agencies are well established, involved at least one parent over 40. A total of 20 percent of adoptions from Latin America violated APWA's recommended 40-year rule; none of the reported Korean-American adoptions violated that rule.

The effective break-point for parents to be considered for infants and toddlers in agency-sponsored intercountrty adoption appears to be 38 years of age. Just 4 percent of Korean-American adoptions included a parent 38 or older, none of whose adopted children were under three years old, compared to 27 percent of the adoptions from Latin America. In short, age alone could probably have excluded 27 percent of those who adopted from Latin America had they pursued a comparable American adoption instead.

Religious identity also stands out as a major difference between agency and non-agency adoptions. Of those responding to the questionnaire, Jews accounted for just 6.5 percent of adoptive parents in Korean-American placements (2.6 percent of mothers and 10.5 percent of fathers), compared to 31 percent of parents among Latin American adoptions and 20 percent for Indian adoptions. Such a difference suggests that some degree of religious discrimination is inherent in agency-sponsored intercountry adoption; among Korean-American adoptions, 58 percent of respondents to the questionnaire indicated that their child was placed by a religiously affiliated agency compared to just two percent in the case of Latin American adoptions.

This apparent discrimination, however, is not universal. Most religiously-affiliated agencies use religious tests in domestic adoption, but not in their intercountry programs. Generally, agencies affiliated with more traditional Christian churches show no evidence of religious discrimination in their intercountry programs, e.g., Catholic Charities, Episcopal Social Services, Lutheran Social Services, etc. However, this is clearly not the case for all religiously-affiliated agencies in intercountry adoption.

As Chapter Five discussed in some detail, a relatively modest 16 percent of American-based agencies active in intercountry adoption explicitly require applicants to be a member of a specific religion. 374/ This understates the exclusionary effects of religion as a factor. Claims that religious discrimination occur in adoption are not easily dismissed; some Americans clearly are denied certain alternatives in adoption. Religious criteria would be perfectly acceptable if the supply of services were unlimited and families approached particular agencies on a strictly voluntary basis. This, however, is not the case.

In addition to issues of age and religion that may exclude some parents from domestic adoption, intercountry adoption also appears more flexible in its treatment of families who already have children, particularly families with two or more children, and in its treatment of parents married for a relatively short time. notwithstanding the median of 8.5 years married.

Korea has been particularly flexible in its required length of marriage. In 1984, Korea increased its minimum marriage requirement from two to three years. This type of requirement can be a major concern for couples who marry a

374/ National Directory of Intercountry Adoption Resources; U.S. Department of Health Education and Welfare, 1980.

bit late in life. For example, if we assume a 35-year age rule for the domestic adoption of infants, plus the common requirement in the United States that a couple be married a minimum of five years, a couple must marry well before the 30th birthday of the older partner. Similarly, couples who marry in their late 20's can easily pass the 35th birthday before actively exploring adoption. The five-year rule in American adoption would have excluded 13 percent of those who responded to the questionnaire: 6 percent of respondents were over 40 and 7 percent were over 35 but not married for five years.

This same criterion of five years has become more commonplace in Latin America, though many agencies there who use it (still a distinct minority) are willing to bend on their own requirements if they can be convinced to work with a particular couple. In any event, Korea remains the most flexible on this point.

Finally, the presence of other children could well have excluded many families from a domestic placement, particularly those families with two or more children. If we assume that agencies have a moral obligation to achieve some sense of equity, the exclusion of families with two or more children from adopting a healthy infant is not unreasonable. Nevertheless, 12 percent of the families who adopted Korean children adopted infants and already had two or more children; the corresponsing figure for Latin America was 10.6 percent. These families could not have adopted an infant in the United States through an agency.

In sum, criteria commonly used by most adoption agencies in the United States are not capricious and are defensible. Still, they exclude certain families from the types of adoptions they desire. Adoption agencies can respond that children other than healthy infants <u>are</u> available in the United States and that families not able to adopt infants here should consider those other children. Many

families in fact do so; witness the change that has occurred in recent years in the placement of older children. However, not all families choose this alternative; their needs, as they define them, would not be met by domestic agencies.

This section has shown that just three criteria (age, years married, and the presence of two children) would have combined to exclude many families who select the intercountry alternative. Age alone would have excluded comparable domestic adoptions for 27 percent of the families who adopted from Latin America. The presence of two or more children would have excluded an additional 12 percent of all intercountry families from a comparable adoption in the United States. Finally, a five-year marriage requirement would have excluded an additional seven percent of all couples, most of whom were in the double bind of knowing that they would be too old to be considered for an infant if they were to wait until they had been married five years.

These three factors alone would have combined to preclude comparable domestic adoptions for just over half the families who adopted from Latin America and India and one-fifth of all families who adopted from Korea. If we add the apparent religious factor and speculate about the percentage of intercountry parents who are excluded due to a previous divorce (not addressed in the questionnaire), the share of families excluded from comparable domestic adoptions would go still higher. In addition, these estimates are based only on those who have been successful in pursuing an alternative to domestic adoption. Consequently, these estimates may well understate the degree to which objective, albeit defensible, criteria exclude families from domestic adoption. Most of those families end up never adopting a child.

This section, however, does not imply that if agencies would only change their criteria, standards, or practices, chances for a domestic adoption would change for most families. Agency criteria simply cannot influence the external facts cited earlier on the huge difference between available children and the number of adults seeking to adopt. Given the distorted ratio, agencies would be remiss in their responsibilities toward the children if criteria were not demanding.

However, this section does support an argument for averting mandated participation of American agencies in all intercountry adoptions. The chapter has shown that, given the opportunity, American agencies apply a considerable extent of exclusionary standards to intercountry adoption. Adoptions particularly from Latin America indicate that a high degree of flexibility would be lost if American agencies were to receive a mandate from Congress or all 50 States to participate in all intercountry adoptions. Such a mandate would further extend the apparent religious discrimination experienced in this part of immigration policy.

Chapter Summary

This chapter has outlined factors that have led to a steady and rapid increase in intercountry adoptions since the early 1970's. Intercountry adoption was shown to have changed from a curiosity that accounted for just two percent of all non-relative adoptions in the United States to a major alternative for family building that now accounts for 20 percent of all non-relative adoptions. That dramatic change took little more than a decade to occur, following a sharp and sustained drop in domestic non-relative adoptions.

The decrease in domestic non-relative adoptions was attributed to major social changes. The principal change was shown to be the reversal in the

traditional decision of unmarried mothers to seek adoption for their children. That change has been so dramatic, from some 80 percent of unwed mothers seeking adoption in 1968 to only about 10 percent by 1984, that its influence dwarfs other factors, except perhaps that of basic demographics. With the post-war baby boom now in the family building years, the change in the readiness of unmarried women to raise their children alone has compounded the shift in supply-demand equation that would have occurred in any event. These are the two dominant factors. Other factors, such as birth control and abortion, also have been significant, but their effects are less clearly defined. A final factor identified as affecting the change in American adoption is the increase in infertility among married women in child-bearing years, perhaps as a result of changes in the professional characteristics of married American women and the tendency to pursue family rearing slightly later in life than in earlier generations.

The chapter provided significant profiles of the children and parents of intercountry adoption. The children were shown to be healthy and very young. The chapter also showed that the nature of intercountry adoption has changed, as the children, once typically of the same ancestral heritage as their adoptive American families, almost uniformly now are adopted by American families of a different ancestral heritage. Korean-American adoption in particular was identified as having altered permanently notions of racial and cultural matching.

The chapter also showed a profile of parents in intercountry adoption indicating a stable and mature group. Parents typically are in their mid- to late-30's, homeowners, married 8½ years, well educated, and with a household income of $48,100 in 1983. Few differences were identified between parents who adopt from Korea and those who adopt in Latin America.

Significant differences were identified in the rate at which American adoption agencies participate in intercountry placements. Agencies were shown to determine all Korean-American placements, but a modest 18 percent of placements from Latin America and 16 percent from India. These different rates of participation reveal a degree of exclusionary criteria, e.g., age, religion, presence of other children and years married that exclude many families from domestic placements. These exclusions are reflected to a lesser extent in the practice of American agencies active in intercountry adoption.

The chapter concluded by arguing that, if the participation of American agencies were mandated in all intercountry adoptions, exclusionary standards could find their way into intercountry adoptions from those regions that thus far have remained flexible. Yet, the chapter made clear that it was not arguing or implying that if American agencies would just change their practices, domestic adoption would change significantly. Agency practices simply are not going to affect the external facts of supply and demand. Further, agencies offer useful services that families may choose to obtain and, because the relationship of supply to demand is so distorted today, agencies are in a no win situation. If they were not demanding in their criteria, they would be inviting merciless criticism when the occasional failure inevitably occurs. Further, agencies may also risk being less than fully protective of the interests of the children for whom they are responsible. In short, no easy answers exist, but the social and demographic trends involved all indicate that intercountry adoption is likely to continue its rapid increases for at least another decade. By then, American public policy permitting, today's estimated 20-percent share of American adoption attributed to intercountry adoption may well seem modest in retrospect.

CHAPTER 7

PRE-PLACEMENT STATE REGULATION AND COMPELLING GOVERNMENTAL INTERESTS

This chapter builds on all the preceding chapters. Part Two of this paper showed that restrictions enacted by government must meet one of two constitutional tests, depending on the constitutional nature of the regulated behavior. If government restricts the exercise of a fundamental right, a compelling governmental interest must be established. Though the components of "compelling governmental interest" have never been precisely defined, that test is very difficult for government to meet. If the restriction does not touch on a fundamental right, a much less demanding test is applied: government action need only bear a rational connection to a reasonable governmental interest.

This chapter examines the governmental interests and objectives that are pursued through the State clause in Section 101(b)(1)(F) of the Immigration and Nationality Act. Presumably, the governmental interest involved in adoption is the best interest of the child. Traditionally, the States have exercised their police powers to protect the child's best interest. However, the issue is not so straightforward in intercountry adoption, in which basic questions about Federal-State relations in immigration are important, as are questions about Federally guaranteed rights.

This chapter shows that objectives and assumptions in pre-placement services go beyond the best interests of the child in intercountry adoption and include unfounded prejudices, plus general policy preferences which are out of place in immigration policy, suggestions of protecting adoptive parents from

themselves, and, generally, helping couples to strengthen their marital relationships.

Whether these governmental purposes are legitimate or not in domestic adoption is irrelevant, but the chapter concludes that such interests do not establish a compelling governmental interest for a pre-emptive State veto in matters of immigration. Further, the chapter shows that some assumed problems may not be problems at all, but are based on stereotypes and misinformation. Worse, misinformation is often cited to support still more misinformation and stereotyping. The chapter concludes that fundamental limitations on administrative capacity and the limitations and nature of the social sciences may combine to deny even the less demanding test of a rational relationship to reasonable governmental interests.

Section One:
Pre-Placement Services

The "solution" to presumed problems is almost universally that of involving American adoption agencies in order to reduce perceived risks. The presumed solution rests upon two implicit assumptions: (1) that adoption professionals can identify those who will make acceptable parents; and (2) that American agencies have the administrative capacity to ensure that all rules and regulations have been met in any jurisdiction in the world.

Chapter Two established that the States lack the necessary staff and the administrative-technical capacities to police, or even recognize, violations of statutes and regulations in jurisdictions throughout the world. Therefore, that chapter concluded that Section 101 (b)(1)(F) fails to offer any serious protection or action against violations of foreign law that might occur. Similarly, Chapters

Two and Four showed that INS requires much the same set of documentation that most States require, and that INS has had extensive experience in reviewing adoptive placements and in determining the legal status of individual adoptees under foreign national and state/provincial law. Therefore, 101 (b)(1)(F) does not add to the professional capability to regulate intercountry adoption.

The only substantive area remaining in which 101 (b)(1)(F) may hope that the States can make a substantive contribution is in pre-placement services. However, almost no public agencies perform those services for intercountry families, due to staff and budgetary limitations. Consequently, when we speak of pre-placement services by the States, we in fact are speaking of pre-placement services performed by private adoption agencies.

The Model State Adoption Act, developed under the auspices of the U.S. Department of Health, Education and Welfare (now Health and Human Services) offers a good example of the general objectives attributed to pre-placement services. The Act states that "exploration and assessment ... are necessary to reach a decision regarding the applicant's capacity to parent a child." 375/ The Intercountry Adoption Guidelines, which represents much the same professional community as does the Model Act, suggests that, after a foreign agency determines that an intercountry placement is appropriate for a child, "a suitable plan should be developed" and that "extensive information on both parties is essential for the development of such a plan." 376/ The Guidelines also describe the character of the subsequent pre-placement services:

375/ Model State Adoption Act, Section 205; Federal Register, p. 10629).

376/ Intercountry Adoption Guidelines, p. 9.

> the pre-placement process is a 2-way counseling and decision-making process between the applicants and the agency/agent. The process helps applicants decide whether adoption is a suitable plan for them as well as evaluate their potential as parents.... 377/

Elizabeth Lawler, of the Child's Aid Society of Pennsylvania and the Child Welfare League of America, speaks to the same issues in selecting families for foster care (not adoption), but her observations and recommendations are pertinent here. Lawler says that "there is general agreement among agencies about what to look for in the family." She adds that "a definitive selection process is at work." 378/

The Model Act, the Guidelines and Lawler's work identify various factors and characteristics that agencies are expected to learn about the adopting parents through a- home study, or "family assessment". Those items are identified in Table 15. The factors identified in the table are significant for their intellectual assumptions and for the roles that are suggested.

Everyone might agree that the characteristics cited in the table are desireable and that knowledge about them would be valuable. However, Elizabeth Lawler poses the most fundamental question when she speaks of presenting such material to students: "how can you tell?" Her response is less than compelling: it is "related to professional methods and skill." Students are told that "the social worker is in the position of representing the reality of placement." 379/ Students who persist in their doubts are advised to "remain objective." With responses like

377/ Ibid, p. 49.

378/ Lawler, p. 9.

379/ Lawler, p. 11.

TABLE 15
CHARACTERISTICS TO BE ASSESSED IN PRE-PLACEMENT SERVICES AS DEFINED BY ADOPTION PROFESSIONALS

MODEL STATE ADOPTION ACT

capacity to give and receive advice;

commitment to the child;

ability to cope with problems, stress, frustrations, crisis and loss;

ability to accept the intrinsic worth of a child, as well as to respect and share his past and to have realistic expectations and goals.

knowledge of the child's level of development and full knowledge of the child's history

ability to use community resources; and

positive feelings about parenting an adopted child and the ability to recognize the uniqueness and the potential of every child.

INTERCOUNTRY ADOPTION GUIDELINES

(applicants') motivation and readiness for adoptive parenthood;

expand (applicants') self-awareness and parenting capacity; and

applicants' readiness for adoptive parenthood of a foreign-born child.

ELIZABETH LAWLER (CHILD WELFARE LEAGUE OF AMERICA)

tolerance, stability and rewarding family relationships;

whether husband and wife support each other and share responsibilities of heading a family;

whether children already in the family are sure of their places;

adequate family income;

whether the community will allow the child to feel accepted;

the family life of each adoptive parent while growing up;

whether family perceptions and expectations are realistic;

how the couple met;

whether the couple has had any major differences;

how the couple has resolved problems;

whether the couple has had problems with children already in the family; and

whether the applicants are open to learning in new situations, or whether they resist new experiences and learning.

these, Lawler has not answered the fundamental question that she poses; the question still stands: "how can you tell?"

The issue is whether anyone can identify the presence or absence of the characteristics and/or answer the difficult questions posed in the table. The implication here, of course, is that you "can tell" through an objective exercise of social science, i.e., the home study. Assumptions behind the home study are those of scientific positivism. Those assumptions need to be examined because they are the foundation of so many public and private adoption policies.

Positivism applies the assumptions of the physical sciences to the study of social phenomena. Fact is assumed to be external and verifiable; it exists objectively and is "out there" for the scientist to discover. The logic of the method is to analyze objectively, then to explain and predict behavior, based on identified regularities. The assumption that regularities exist as external, identifiable fact is fundamental to a home study. The type of knowledge to be gained from a home study, as outlined by Table 15, must assume an inherent order in which we can objectively identify the presence or absence of the characteristics that make good parents. The social worker becomes a social engineer who identifies the nature of that order and its constituent regularities, from which the social engineer predicts future parental performance.

Herbert Simon 380/ identified the epistemological issue when he noted the basic limitation confronting social science. His "bounded rationality" holds that human cognition has its limits. We cannot know nor account for all the facts, all their interrelationships and all their consequences. This is compounded in

380/ Simon, Herbert; Administrative Behavior; Free Press, 3rd. Ed. (N.Y., 1976).

social science by the complexity of human activity and the inherently subjective nature of social "fact."

Simon and March 381/ contend that we compensate for our cognitive limits by filtering information with conceptual biases to make sense of the world. Objective social facts do not exist, nor do truly independent variables or singular causation. Burrell and Morgan, Weick and others argue that social fact is created; it does not exist objectively and externally. 382/

Adoption professionals are no more and no less vulnerable to these limitations than are other professionals. Practicing social workers are expected to identify and anticipate the terribly complex phenomena of family relations and parenting. These phenomena lack regularity, inherent order and neatly defined cause-effect relationships; they tax the limits of human cognition.

These doubts are increased when one considers the execution of the home study. Typically, a home study and pre-placement services consist of a maximum of three to six interviews, including group interviews and other sessions held away from the petitioners' home. Given the nature of the beast, i.e., that applicants are being interviewed as part of their effort to find an adoptive child, more than a little role play goes on. One might just imagine how many times a member of a couple has directed a partner to "be on your best behavior" immediately before a pre-placement interview.

381/ Simon, Herbert and James G. March; Organizations; Wiley (New York, 1958).

382/ See Allport, F.H.; Theories of Perception and the Concept of Structure; Wiley (New York, 1955; Bernstein, Richard J.; The Restructuring of Social and Politcal Theory, U. of Pennsylvania Press (Philadelphia, 1978); Habermas, Jorgen; Knowledge and Human Interests, translated by Jeremy Shapiro; Beacon Press (Boston, 1971) and Weick, Karl; The Social Psychology of Organizing; Addison Wesley (Reading, Mass., 1979;

In short, pre-placement services and the home study have little chance of reaching definitive findings on issues such as: a couple's capacity to cope with problems, stress, frustration, crisis and loss; the capacity to give and receive; the couple's tolerance, stability and the presence or absence of rewarding relationships; whether husbands and wives support each other and share equally in their responsibilities of heading a household; the character of the applicants' childhoods; the nature of major differences between the couple and how they have resolved them and other problems; whether applicants are open to learning in new situations; etc. Those commenting on the home study also imply that three to six interviews will enable the adoption professional to help a couple "increase their self-awareness and parenting capacity," or strengthen their marital relationship. This prospect is always mentioned at adoption workshops. Such questions and characteristics, particularly when blurred by role plays in a handful of interviews, do not lend themselves to objective facts that are out there for the trained technician to identify or influence.

Though most experienced adoption professionals recognize this, that recognition should be reflected in a more cautious position than that indicated in Table 15. More caution might simplify the home study process, and might recognize the reasonableness inherent in the Immigration and Nationality Act's recognition of home studies performed by licensed individuals. By not requiring home studies to be performed by an agency, as all but three States now require, total costs incurred in an intercountry adoption could be significantly reduced.

In sum, the knowledge assumed to be available from pre-placement services is badly overstated. Like most of us in the various social sciences, adoption professionals presume too much. However, the significance of such an

overstatement to this dissertation goes far beyond the issues of epistemology. Rather, the significance here is that these intellectual assumptions form the basis for public policy and are seldom seriously questioned by policymakers.

Yet, despite the limitations, few real alternatives exist to current practices in pre-placement services. If nothing else, social science at least makes a serious effort to be disciplined and calculated. It makes a serious attempt to define that which is, and to inform decisionmaking on that basis. The same is true of pre-placement services and the home study. That is, the home study is a serious attempt to inform prospective adoptive parents about adoption, and to get some sense of how those prospective parents will respond with an adopted child. Clearly, most alternatives fall short of being very real. For example, experiential assessment of families is not a real alternative; adoption professionals need not become the newest member of the family to make a "true" assessment.

Further, State governments have an important interest in ensuring, to the degree possible, that the best interests of adopted children are protected. The Federal Government has a similar interest in protecting the best interests of the immigrant orphan. Therefore, despite limitations, the home study is the best alternative we have for ensuring that the best interests of a minor are treated with care. Governments and adoption agencies, public or private, must decide at some point what is to be done. Presumably we want that decision to be based on something more disciplined than intuition and capricious judgement.

Consequently, the point to be made here is modest, but critical nevertheless. That is, the nature of the work performed by adoption agencies is useful and valuable. However, policymakers and adoption professionals need a more active understanding of the limitations of <u>any</u> methodology or screening tool

to predict successful parenting and the successful placement of an orphan in a family environment. Certainly, in intercountry adoption, governments need not assume that such wisdom and skill accrue more to American professionals than to foreign profesionals.

At a minimum, Federal and State policymakers should ask what will be lost if an agency, almost always a private agency, is not involved in delivering this type of pre-placement service. The U.S. Department of Health and Human Services asserts in its advisory Model State Adoption Act that "there are certain recognized risks involved in the adoptive placement of children in homes selected without the assistance of an agency." To substantiate this observation, the Model Act cites Katz and Russo, Witman, et.al. at APWA and, especially, Meezan.

Meezan contends that independent adoption has become such a scandal that "even those people who favor non-agency adoption are aligning with advocates of all-agency adoption to put the 'baby sellers' out of business." Just who "those people" are that are so aligning is not clarified, but Meezan adds:

> unless agencies relax their requirements and open their doors to middle aged persons, previously wed persons, and those of any faith or of none, unless they can be set up so that arbitrary selection and exclusion ceases to take place, ... non-agency adoption must flourish. 383/

The "known risks" to which the Model Act alludes are significant here because intercountry adoption is frequently treated as synomymous with independent adoption, particularly adoptions from Latin America, where American agencies are not well established. However, we should note that the

383/ Meezan, p. 25.

rate of agency participation (including foreign agencies) in intercountry adoption appears to exceed, and comfortably so, the rate of agency participation in domestic adoption. (See Chapter Six.)

In any event, the nature and extent of these "known risks" must be examined. Meezan, incidentally, went to some length not to identify the set of risks so casually as to be "generally known," as the Model Act chose to characterize them. Further, Meezan's findings were no stronger than those from the questionnaire used for this dissertation, though the Model Act's references to the survey imply the opposite. Below is a list of 10 sets of risks identified by Meezan for independent adoption in the United States.

> homes are not closely scrutinized;
>
> courts are reluctant to remove children from a negative home environment;
>
> for-profit sale: 22 percent of the responding agencies reported "direct knowledge of at least one such incident" in the preceding year;"
>
> confidentiality: biological and adopting parents sometimes know each other; 42 percent of responding agencies reported "direct knowledge of at least one such incident in the preceding year;"
>
> the child's right to permanency: "it has been reported that, since the adoptive parents are, in effect, contracting with the intermediary for a normal child, they are under no obligation to accept a child who is not normal;" in such cases, "the biological mother may then become responsible for the child's care;"
>
> a custody fight could ensue if the biological mother has second thoughts before a final decree is granted, or if the biological father's rights are not properly terminated;
>
> the biological mother may not receive proper counselling and may be pressured to release her child;
>
> adopting families may not receive critical information on the child's development;

> couples may have been rejected "for legitimate reasons by agencies;" 31 percent of the responding agencies reported "direct knowledge of at least one such incident" in the preceding year; and
>
> the legal process may never be completed and a child may be left in a legal limbo. 384/

In July 1981, the Journal of Marriage and the Family reviewed the survey on which the findings were based and found the survey to be no more than "a public opinion poll" among adoption agencies. 385/ We might add that references to "direct knowledge" demand some definition: was "direct knowledge" always first-hand knowledge, or were third-hand accounts reported by more than one agency? Did "preceding year" become a bit gray in the responses and invite third-hand stories that covered a number of years? In the end, the survey may indicate only the strength of various articles of faith.

To ask agencies if they had "direct knowledge" of independent adoption violating the values on which those agencies are built is meaningless. For example, knowledge of an independent adoption involving a family that had been rejected by an agency for "legitimate" reasons says nothing about the nature of those reasons. Are agencies expected to identify families that they have rejected for less than "legitimate" reasons? Much the same is true about "scrutinized homes." The survey implies a tautology: the major problem with independent adoption is that it is independent, i.e., it fails to involve an agency.

Given the nature of the questions in the cited survey and the population that responded, the conclusion to be reached might be exactly the opposite of that

384/ Meezan, p. 26.

385/ Journal of Marriage and the Family; July, 1981, p. 301.

reached in the Model Act. With something on the order of 20.000 independent non-relative adoptions taking place each year in the United States, the HHS panel could have been remarkably impressed that only 31 percent, or 22 percent, etc., of adoption agencies had "direct knowledge" of one incident in the "preceding year" that violated their professional tenets. To make a similar point, the Jounal of Marriage and the Family noted that Meezan's survey was circulated among States attorneys general and district attorneys. The Journal noted that their response was "sparse, ... perhaps indicating that independent adoption is not regarded as a sufficient problem" by attorneys general or district attorneys. 386/

The Journal seems to be asking whether a serious problem really exists. Even if we assume that one does exist, can an adoption professional affect the outcome of an adoption? Compared to independent adoptions in the United States, i.e., adoptions that are arranged privately, typically through the assistance of an attorney, physician or clergy member, but conceivably with the assistance of a hairdresser or cab driver, the evidence clearly indicates that the participation of adoption professionals has no effect at all, neither positively nor negatively, on the success of an adoption.

Despite statutory prohibitions on independent adoption in seven States and various restrictions in other States that encourage families to adopt through agencies, independent adoption continues to flourish. For example, South Carolina is commonly identified as the least difficult State in which to undertake an independent adoption; non-relative adoptions in South Carolina nearly doubled from 1976 to 1984, despite the nationwide decline.

386/ Ibid, p. 301.

Barbara Joe argues that the only real effect of statutory prohibitions or other restrictions against independent adoption is to send adoptive parents and many pregnant women to neighboring States, with no net influence on the number of independent adoptions, which persist for much the same set of reasons that more people look to intercountry adoption. 387/ In addition, some of the literature cites restrictive agency practices 388/, while others suggest that birth mothers frequently seek to avoid agency procedures. In hearings held by the U.S. Senate in 1974 and 1976, parents who had adopted independently identified 4 principal reasons for not working through an agency. 389/

greater availability of children;

shorter waiting time;

"the desire to avoid agency red tape and invasion of privacy;" and

previous "rejection by agencies on the basis of age or religion."

As cited in Chapter Five, Judge Nanette Dambitz of the New York City Family Court testified before the U.S. Senate in 1974 that, based on her experience in presiding over adoption proceedings, "private adoptions should be abolished only if they can be replaced by a sufficient network of agencies that are truly non-sectarian and (that) do not act arbitrarily." 390/

387/ Barbara Joe, statutory prohibitions on indep have no net effect.

388/ Why indep persists in US -- cites restrictive agency practices (see Snow, Festinger)

389/ U.S. Senate; S. 3298, 1974 and S. 1593, 1976.

390/ Congressional Record, April 3, 1974, p. S5099.

Meezan, in fact, was considerably more balanced in his study than either the Model Act or the above comments on "commonly known" risks would indicate. Meezan concluded that the results of his investigation did not support arguments to outlaw independent adoption. Barbara Joe offers a succinct summary of Meezan's findings.

> ... On almost all counts, independent adoptions fared much better than anticipated, especially vis-a-vis agencies, which are often deficient in some of the same areas. Almost half the agencies considered independent homes as good or better than agency homes and the median reported cost of an independent adoption (which may not represent actual total cost) was $2,223 (in 1978), less than the fee of some agencies.
>
> Over half the agencies in the study had stopped accepting applications for normal white infants, and most independent applicants who quit agencies to pursue an independent adoption did so because of the unavailability of children, delay and shortage of social workers. Natural mothers reported terminating with agencies because of their inability to provide medical and financial assistance, mandatory involvement of the biological fathers, stigma attached to agency service, and desire to have their baby go directly into an adoptive home. 391/

After all is said and done, the available evidence shows that agency adoptions are not more successful than independent adoptions. The Journal of Marriage and Family cited Meezan's conclusion on the lack of a significant difference and characterized it as "no surprise to those well acqauinted with the practice of adoption." 392/ Other authors and researchers make the same point.

391/ Barabara Joe, Public Policies, p. 49; also See Meezan, pp 35, 41, 42 and 70.

392/ Journal of Marriage and the Family; July, 1981, p. 301.

> There is no evidence that agencies do a better job of placing children than do ethical doctors and lawyers; the natural rights of the mother in fact may be more protected (in non-agency adoption); she can veto a proposed placement. 393/
>
> Studies comparing agency with independent placement show little, if any, differences between them in terms of parental characteristics or the type of problems encountered by their children. 394/
>
> Independent and agency placements were found to have equal levels of unsatisfactory outcomes after 10 years. 395/

Some of the material cited above mistakingly tries to establish independent adoption as superior to agency adoption. That, of course, is arguable, and unnecessary. For example, comments that a birth mother's rights may be better protected by an ethical doctor or lawyer probably are correct in some cases, but equally incorrect in others. Similarly, the reference to ethical doctors or lawyers exploits our cultural tendency to associate technical skills with virtue; the references could just as easily have included ethical grocers or ethical cab drivers, but presumably with less appeal to a reader. Apologists and critics alike are not shy about overstating their respective cases.

Still, the basic point remains critical: no evidence has been established in some 40 years of research and literature to show either agency or non-agency adoption to be superior. That is all that critics of statutory or regulatory restrictions need to show. Each type of adoption can have its own strengths and weaknesses. However, to argue that either is superior to the other is to pretend

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393/ Nancy Baker, p. 130

394/ Barbara Joe, p. 48; Ketchum, Bety "An Exploratory Study of the Disproportionate Number of Adopted Children Hospitalized at Columbus Children's Psychiatric Hospital"; Ohioo State University; Columbus, 1962.

395/ Witman, et. al.. p. 358.

that sharp clarity has suddenly penetrated 40 years of amorphous fog. Rather, the central point is succinctly stated in a case book on Social Work and the Law: "both independent and agency-sponsored adoptions are generally successful." 396/

The Model Act, despite its findings and recommendations, concedes the basic points made here. Though the Model Act would eliminate all third parties (i.e., the doctors, lawyers, or the hairdresser) and thereby severely restrict independent adoption, the Act noted the following:

> independent placements exist and probably would continue to occur even if proscribed ... and no evidence has been found that these placements are less successful than those handled by agencies. 397/

Assumptions about independent placements in the United States often are explicitly applied to intercountry adoptions, particularly those from Latin America, where American agencies are not well established. Wishard and Wishard offer the following caution to perspective parents on intercountry adoption.

> Non-agency foreign adoptions, ... are very similar to independent adoptions in the United States. An attorney, doctor, director of an orphanage or hospital, or interested citizen is often the intermediary who brings the children and parents together. This is usually the rule for Latin American adoptions. 398/

This passage reflects all too common misconceptions of intercountry adoption. To include a "director of an orphanage" as an example of an inde-

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396/ Brieland, Donald, and John Lemmon; Social Work and the Law: West Publishing Co. (St. Paul, 1977.

397/ Model State Adoption Act Section 203; Federal Register, p. 10659

398/ Wishard and Wishard, p. 115.

pendent (non-agency) adoption is an important misnomer. Independent adoptions and adoptions through directors of orphanages are mutually exclusive. This is not a petty distinction because the message here would imply that the absence of an American agency renders the adoption unregulated and the equivalent of a non-agency adoption.

Chapter Six indicated that 42 percent of all U.S.-Latin American adoptions work directly through foreign agencies and orphanages licensed by their governments to place children, or work directly with a public child welfare agency, such as Patronado in Costa Rica or Bienestar in Colombia. Our cultural bias often equates these placements with independent adoptions and implicitly suggests that, somehow, foreign agencies just are not up to the task of placing the children in their custody. In addition, Chapter Two established that all intercountry adoptions are extensively regulated by foreign governments and by the Federal Government of the United States. The absence of an American agency does not indicate an unregulated intercountry adoption.

This invites a basic policy question: if an adoption agency is insignificant to the success of a domestic adoption, is the same true of intercountry adoption,? The evidence here is very limited, but some evidence indirectly suggests that, once again, agency involvement does not influence the success of an adoption.

The best indirect evidence is provided by Fiegelman and Silverman. They found that Colombian children adopted by American families "had adjusted remarkably well to their American homes." 399/ Similarly, when studying Korean-American adoptees 5 years after their placement, Feigelman and

399/ William Feigelman and Arnold Silverman, Chosen Children, Praeger Publishers (New York, 1983) p. 144.

Silverman found that adjustment simply was not a major problem. In their review of the literature, Feigelman and Silverman found that "less than 10 percent of studies indicate negative adjustments." 400/ They also noted that the Korean-born children had adjusted, in many ways, better than American-born adoptees who had been adopted by parents of the same racial stock. 401/

In sum, rates of success and rates of poor adjustment were not significantly different among Colombian and Korean children adopted by American parents. This is pertinent here because, as shown in preceding chapters, Korean-American adoption is virtually synonymous with American agency placements, while Colombian-American adoption is characterized by independent and direct (foreign agency) placements. Feigelman and Silvermen, therefore, add indirectly to the conclusion that agency involvement, particularly American agency involvement, is not significant to the success or failure of an adoption, be it domestic or intercountry. Much like independent or agency adoptions in the United States, intercountry placements, whether made through American agencies or not, are generally successful.

Neither the agency nor non-agency alternative is superior to the other. The adoption literature has established that participation by agencies is irrelevant to the success of an adoption. Similarly, the limited evidence available indicates that the participation by American agencies is equally irrelevant to the success of intercountry adoptions.

400/ Ibid, p. 156.

401/ Ibid, p. 171.

Section Two:
Adopting "Your Own", and Cultural Heritage

This section outlines two common policy concerns associated with restricting access to intercountry adoption: efforts to encourage the adoption of "our own" before encouraging foreign adoptions; and reservations about denying a foreign-born child of his or her natural cultural heritage. Elizabeth Cole, of the Child Welfare League of America (CWLA), addresses the issue of adopting "our own" when she discusses the "philosophical issues" in intercountry adoption. Cole advises the following.

This is the type of mindset that makes a few people, such as this writer, nervous about the authority of American adoption professionals in intercountry adoption. Congress long ago settled the "philosophical issue" of which American citizens should "be allowed in intercountry adoption": Congress determined in 1952 that <u>every</u> American citizen is entitled to petition the Federal Government for the purpose of classifying an alien as an immediate relative. Secondly, "under what conditions" also has been determined by the Congress, as implemented by INS and the State Department. In short, the "philosophical issue" is a non-issue.

Yet, Cole's argument indeed suggests an important philosophical issue. Should the States or, under this scenario, adoption professionals and their agencies displace the Congress in determining which Americans should have an opportunity to petition the Federal Government for a preferential visa on behalf of an alien,

<u>402</u>/ Cole, p 93, para 218.

and under what circumstances? The notes on home studies suggested an assumption of considerable authority as well as wisdom, and identified judicial reluctance to terminate parental authority as a problem if professionals determine the family environment to be negative. These are heavy-handed approaches that suggest a monster may be struggling to free itself from a cage of constitutional norms.

The policy preference of encouraging the adoption of American children first is often expressed by references to adopting "our own". This preference is motivated by a noble enough intent, i.e., the placement of "waiting children" in this country. However, as previously noted, the meaning of "waiting children" gets lost in the fog of definition and questions of legal availability for adoption. The same preference also becomes entangled in a complex web of rather romantic views of cultural heritage, plus basic suspicions about the motives of intercountry parents. Wishard and Wishard offer a common example.

> Do not turn to intercountry adoption only because you think no other children are available to you. Other children are available to you. You may need to wait or accept a hard-to-place child. Many adoption professionals, in fact, discourage foreign adoptions. They feel that the United States now has too many of its own children in need of adoptive parents. 403/

The decision to adopt a child is not reached in a capricious moment. When a family first decides to explore adoption actively, chances are very slim that the family will pursue an intercountry adoption right from the start. The family simply is not far enough into the system yet even to entertain such a thought, nor to know that such an alternative is real, how to go about it, etc.

403/ Wishard and Wishard, p. 112.

Rather, the first inclination almost always will be to explore local options. Only when the hard facts of domestic adoption are confronted will most families ask the next question of what alternatives are available. This hardly makes an intercountry child any less a "first choice," nor any less wanted. It is a function of families becoming familiar with the turf and their alternatives.

The above quote also reflects a certain insensitivity in which the message seems to be "if you would only be patient, ..." However, when a family actively seeks to adopt, messages such as "we are not accepting applications at this time," or "perhaps in 3 years," or you are too old, not healthy enough, or whatever, can wear a family down, and fast.

More significantly, the comment that "the United States now has too many of its own children in need of adoptive parents" is an honorable sentiment, but misrepresents the degree to which other children in fact are legally available for adoption. As already outlined, casual phrases like "waiting children" may include children who most of us might consider to be waiting for adoption but who in fact may not be legally available for adoption. For example, public child welfare agencies in the Baltimore–Washington area, contacted for this dissertation, consistently reported that about 75 percent of their resources are dedicated to "crisis intervention," i.e., for children who require temporary or long–term care but who are not and never will be in the adoption stream.

Further, as already shown, adoption data is abysmal. No authoritative estimates exist on even the most basic questions, such as how many adoptions take place each year, let alone much higher levels of discrimination, like the number of "waiting children." Estimates of the number of waiting children often are little more than seat–of–the–pants creations to support policy preferences.

The data is too poor to estimate the number of waiting children even closely enough to provide a useful sense of scale; the information simply is not there.

The motivation of intercountry parents also is frequently challenged. Comments on motivation often are entangled with notions of cultural heritage and assessments of adoptive parents' flexibility. Elizabeth Cole, of the CWLA, and Forbes magazine offer examples.

> American motives are suspect. Many have and do view the American search for placement as baby snatching and self-serving. Throughout most of the history of intercountry adoption, the children have always come from countries just devastated by war or underpriveleged. Some political opponents of this activity see it as another example of the exploitation of the 'third world' by Americans. It is difficult to rebut this self-serving argument when American efforts in intercountry adoption appear to intensify only at times of shortage of readily placeable youngsters within our own country. 404/

> In expressing its concern over the situation, the CWLA has taken the position that countries should be helped to develop their own child welfare services. It is not appropriate only to look for children to adopt and bring here without some real commitment to improving the situation in their homeland. 405/

> Many governments view Americans adopting their children as imperialistic. They would prefer that the United States government give them the funds and the help to place youngsters in their own country. 406/

The implicit assumption that intercountry adoption is uniquely "American" makes the point that those who comment on intercountry adoption have an inappropriately narrow perspective on the subject. In addition, many

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404/ Cole, Elizabeth; "Adoption Problems & Strategies: 1975-1985"; prepared by CWLA for Childrens' Bureau, HEW; 2/1/76) (pp 91-91; para 215).

405/ Ibid, para 219.

406/ Forbes, "The Foreign Connection"; December 31, 1984, p. 128.

countries indeed object to the idea of foreigners adopting their children, and they object strenuously. Such objections are entirely reasonable; a sovereign country is hardly unreasonable when it decides that it does not want foreigners adopting its young nationals. Those countries can (and do) effectively discourage the practice.

Comments like those offered by Cole also assume that the countries from which most of the children come lack extensive child care systems. That simply is not the case. This dissertation has shown that countries such as Korea, Colombia, Costa Rica, Chile, El Salvador, etc., have effective national child care systems and that those countries do not treat intercountry adoption lightly. The suggestion that the United States should help such countries establish their own systems of placing adoptive children, misses the point that they already have such systems, includes its own cultural chauvanism.

For example, this dissertation has noted that countries like Brazil, Chile, and Costa Rica have long-standing traditions of adoption. Adoption resources, per se, are not the problem in those countries as much as worldwide trade policies, national debt structures, national monetary policies, currency exchange rates, etc. In fact, the adoptive families of third-world children may be among the most willing Americans from which to obtain active support for more basic efforts like these. Those families, of which there are now some 120,000 in the United States, already have "some real commitment to improving the situation in their (children's) homeland." This commitment comes from the emotional bond that any parent has with his or her child. Most intercountry parents develop a real sense of connection to their children's homelands. An adoptive American parent of a child from Central America will respond to American policies in that region with a sense of immediate, personal connection that is denied most Americans.

Other writers take a more clinical approach, but their message is similar. For example, Feigelman and Silverman report that, of 46 Colombian-American adoptions they surveyed, 87 percent of the families said that they went to Colombia because no "suitable" American children were available. The authors also cite similar findings from Resnick and Munoz. 407/ Again, the point seems to be "why didn't these people adopt their own?" Feigelman and Silverman add that 27 of the 46 Colombian children designated themselves as "white." The authors interpret this as evidence that Colombian-American adoptive parents seek "acceptable" children, i.e., children who may pass as "their own." This is also said to indicate that adoptive parents fail to give their children a proper degree of cultural awareness and pride toward their native countries. 408/ Resnick and Munoz state explicitly that Colombian-American adoptive parents are inflexible, shy away from cultural ties to the child's native country and seek children with "white features". Feigelman and Silverman go on to note that

> when asked if they could have considered adopting a black child, a much older child or a special needs child when they adopted their Colombian-born child, most parents said they could not have done so. (Half said no to a retarded child and 74 percent said no to a child over 8 years old.) 409/

Feigelman and Silverman are more positive toward Korean-American adoptive parents. They found those parents to be "more open to older, black and special-needs children." They also found that, of all transcultural and transracial adoptions, white/black families enjoyed the least amount of community support

407/ Feigelman and Silverman, p. 123.

408/ Ibid, pp 127-128.

409/ Ibid, p. 128.

and acceptance, while the degree of support and acceptance enjoyed by Korean-American families was characterized as "intermediary." Colombian-American parents were found "to encounter the least prejudice or discrimination." 410/

Today, of course, Colombia is no longer synonymous with Latin American adoptions, as was the case in the period studied by Feigelman and Silverman and by Resnick and Munoz. Today, their points should be read as applying to Latin American placements, not just Colombian placements. In any event, their findings deserve some comment. First, where one seeks to adopt a child depends on so many factors, many of which are determined by pure chance, that conclusions about why a whole class adopts from one region of the world instead of another cannot be attributed to singular or even dual causation.

Secondly, any notion that adoptive American parents are looking to Latin America for children with "white features" or children who "look like them" just does not hold up very well. Though Latin America has an ethnic mix as complex as that of North America, with large communities of Northern European groups, these typically are not the children in the intercountry adoption stream. Most of the children will have varying degrees of Indian ancestry, with varying shades of browned skin and brown to stunningly black hair and eyes. If "white features" is meant to indicate fair-skinned, light-haired children of Northern European ancestry, Latin America is not the place a family should look. Most of the children will never be mistaken for the biological children of most Americans.

Feigelman and Silverman go on to note, however, that adoption professionals mistakingly overlook Colombian-American (i.e., US-Latin American) parents as adoptive resources for hard-to-place American children. The authors

410/ Ibid, pp 129-131.

find that Colombian-American parents are not as inflexible as some researchers might suggest. Rather, these authors conclude that those families are more open than most to hard-to-place children once the family has completed its first (intercountry) adoption. 411/

In any event, motives for adopting abroad may be considerably less complex than those identified above would suggest. That is, the personal drive to have and raise children is rather common throughout industrialized countries. Secondly, the availability of adoptable children in the United States cannot match the number of families seeking to adopt. To look abroad, therefore, suggests neither Samaritan motives nor narrow, quasi-racist motives. Some questions in life are, indeed, simple, and this may be one of them.

Altstein outlines the common arguments for and against intercountry adoption. He notes that the respective arguments closely mirror those for and against interracial adoption, a banner under which virtually all intercountry adoptions now also qualify if we define them loosely enough to include intercultural adoptions.

> ... it is better for both the children and the adoptive parents if the (children) are raised in a family situation than if they remain either in an institution or in foster care. Opponents of intercountry adoption argue just as vehemently that to transplant a child from his or her own culture is to court possible personal and societal rejection. 412/

411/ Ibid, p. 144.

412/ Altstein, p. 11.

Each argument is common but neither is terribly profound. The argument to support intercountry (or interracial-intercultural) adoption is common, but a bit transparent in its suggestion of mutual benefit. Though the mutual benefit may indeed be there, the motive for a parent to adopt a child is much more self-fulfilling than this notion would allow. Further, not all institutions in foreign countries should be assumed to be so grim as this argument would imply. Children in foreign institutions can obtain an important degree of stability in their lives as well as the chance to develop a bond with an adult in the institution. Still, a missionary-like purpose is often identified as a major motivation for American parents to adopt abroad. Once again, Elizabeth Cole offers a good example.

> Clearly, many of the groups operating in intercountry adoption, particularly parent or self-help groups, are motivated primarily by their desire to obtain children. They believe strongly that they are also rescuing the child from deprivation and in some cases, death. Some wish to give the children a 'new better American life.' 413/

The notion of a broadly-based humanitarian motive has been expressed in various forums. In hearings by the House of Representatives in 1977, Representative Milicent Fenwick made the following observation regarding the Vietnam Babylift.

> There is a tremendous shortage (of adoptable children in the United States). But this question of adopting a foreign child comes from another source, in my opinion. That is a very interesting psychological difference. There was a whole association, as you know, of people who adopted Vietnamese children. There is one type of pressure that comes from a family that has no child, and longs to have a child ....

413/ Cole, para 91-92 and 215.

> There is the other type of pressure that has other, you might say, world-wide humanitarian impulses that result in their desire to help a Korean child who is half black and half Korean. It is (the) other kind of motivation which I think we are addressing here. 414/

As a comment on immigration policy, Representative Fenwick's opinion has its place. That is, Congress reasonably may, or may not, choose to base an element of the nation's immigration policy on consciously humanitarian considerations. However, Representative Fenwick's remarks went beyond that point and spoke to individual motivation for parenting. She made it sound more complex and more noble than she needed. The Intercountry Adoption Guidelines from HEW include a similar comment. Again, note that this document represents something of a consensus among adoption professionals.

> Set in perspective, the intercountry adoption movement reflects a basic desire on the part of American families to respond to the needs of orphaned children in other countries by providing them with permanent, loving homes. 415/

While such comments might, on their face, flatter intercountry parents, they are not very convincing. The notion of missionary-like motivation among intercountry adoptive parents falls victim to much the same problem as do many of the more sensationally negative portrayals of intercountry adoption. That is, motivation and general behavior too often are assessed with moralistic overtones. Whether positive or negative in tone, to imply a moral judgement on a family's motivation for adopting is simply out of place. The desire to adopt a child

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414/ Comments by Representative Milicent Fenwick, House Judiciary Committee Document 118, 1977.

415/ Intercountry Adoption Guidelines, p. 1.

perhaps is best characterized by the Supreme Court when it speaks of the right to have offspring. This is as far as anyone need go; additional speculation on parental motivation only clutters the more germane policy issues.

Barbara Joe makes a comparable point in her description of why adoptive parents would consider Latin America, Korea, India, or a cross-ethnic/racial adoption in the United states.

> Adoptive families have cast aside the conventional notions of blood ties... Most of us ... have entered into a 'complex' adoptive relationship. Complex adoption ignores conventional distinctions and founds kinship on reciprocal need, caring and affinity.... The North American experiment with complex adoption, virtually unique in world history, has matured to the point of being a proven phenomenon. 416/

Less than profound as a -missionary-styled supporting argument may be, the negative argument that Altstein accurately outlines is based on assumptions that are both culture-bound and romanticized. The argument speaks of cultural and societal rejection after adoption and, like Cole, Feigelman, Munoz, et. al., alludes to denying the foreign-born adoptee of his or her native culture. The argument implies a guarantee of full social integration if the intercountry child were left in his or her native country, while suggesting that this natural guarantee is forfeited with adoption by an American (or Canadian or European) family. Such a notion is noble enough in its intent, but it ignores the socio-economic origins of most of the children, as well as a severe social rejection that would await most of them in their native countries due to their socio-economic and ethnic origins.

Korea, from which over half the intercountry children come, offers the most powerful example. Cultural values in Korea generally restrict adoption to

416/ Barbara Joe, pp 21-22.

boys who are related to the adopting family. Generally, only blood-related boys are adopted, largely to provid a son to carry on the family name. 417/

Kim and Carroll, attorneys who work regularly with Korean-American adoptions, comment at length about the state of adoption in Korea. As a Korean attorney who handles the Korean side of these placements, Kim is particularly familiar with requirements and the general situation in Korea. As part of their guide for American attorneys who may work in intercountry adoption, Kim and Carroll make the following comments about domestic adoption in Korea.

> Illegitimate orphans are virtually unadoptable within Korean society because of certain Korean cultural and moral factors. First, Koreans traditionally have upheld the ideal of ethnic homogeneity. Korea is one of the few nations in the world without ethnic minorities of any significance, and Koreans have spurned admixture with other races and nations, even in the midst of foreign occupation. Because the manifestation of mixed-blood characteristics is ethnically disfavored, children (from) a 'mixed-blood' relationship are not culturally acceptable. Second, the Confucian ethic, which has long pervaded the morals of the Korean people, strongly disapproves promiscuous sexual relationships and, over the years, Korea has promulagated much legislation discriminating against those classified as illegitimate. Consequently, Korean couples are still reluctant to accept such social outcasts into their families. 418/ 419/

In testimony before the U.S. House of Representatives' Subcommittee on Immigration and Citizenship in 1977, Friends of Children testified that the adoption of a girl, including girls who have relatives, "is almost unheard of," while "it is rare for Koreans to adopt a 'stranger.'" 420/ Note that this is supported by

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417/ Kim, and Carroll, Journal of Family Law; 1975, Vol. 14, p. 222.

418/ Ibid, pp 223-24.

419/ Most States in the U. S. had similar statutes until the Supreme Court voided them in the 1960's (see Chapter 4).

420/ House Judiciary Committee Document 118, 1974.

the findings on the sex of the children from the questionnaire in Chapter Six (72 percent of Korean children were girls) and by Krichefsky in 1959/1960, when two-thirds of the Korean children were girls. The cited testimony added:

> To Koreans, the idea of adoption is basically a foreign concept. It is not uncommon for a family to 'take in' or adopt the son of a brother or sister or sister-in-law, primarily for the purpose of carrying on the family name, but it is rare for Koreans to adopt a 'stranger.'
>
> Korea is a country with a strong sense of family and heredity. The child with no family belongs to a class apart from the rest of society. They are an ostracized group. Because public school is not free in Korea, most of these children (remain) uneducated, and as they grow up, they find it difficult to find decent employment. 421

Unless they are incredibly lucky, these children are consigned to a permanent underclass. For an interracial child, particularly one who is orphaned, the social rejection is even more severe. Notwithstanding our own racial biases, the interracial child throughout Asia faces more severe social rejection than most Westerners can comprehend. As noted by Kim and Friends of Children, Korea (probably correctly) believes itself to be the most "racially pure" country in the world. Ethnic purity is valued, and to weaken it is utterly unacceptable. However, given the large-scale presence of the American military for two generations in Asia, more than a few interracial children are in Asia. Many of the bi-racial children who are not immediately orphaned wind up orphaned because the social pressure on the mother is so severe.

Kim also notes that Korea's Special Law on Adoption of Orphans, which has been incorporated into the Korean Civil Code, includes an entire chapter that

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421/ Ibid.

explicitly addresses adoption by foreigners. For a country to accommodate adoption by foreigners in its civil code is extraordinary. The government of Korea has recognized the strength of social norms within Korea that act against adoption, particularly the adoption of an illegitimate child. By accommodating adoption by foreigners, the Korean government hopes to alleviate "the problem of caring for illegitimate and mixed-blood orphans." 422/

India and Latin America offer other counterpoints. As in Korea, India's relatively strict morality severely rejects both the unmarried mother and the illegitimate child. In Latin America, the children tend to come from the poorest socio-economic groups. Predominatly of Indian ancestry, the Latin American children also would face cultural and economic discrimination. Whether in Latin America or India, less than romantic poverty would await most of the children.

This emphatically does not mean that intercountry parents are doing "good," because if the families involved did not adopt the children, another American, Canadian, European or Austr alian family would be happy to take their place. However, it does mean that the stark poverty, underclass status and social rejection awaiting the overwhelming majority of the children demand few apologies from adoptive parents for "robbing" their children of some romanticized notion of cultural heritage as perceived from an affluent and distant looking glass. If protecting cultural heritage were taken to an extreme, we might define the adoption of a child from the poorest region of Appalachia by a family in Nassau County as "intercultural." Should the family in Nassau County attempt to raise the child as though he or she were still living in Appalachia? If not, does the family in Nassau County rob the child of his or her cultural heritage?

422/ Kim, p. 234.

More to our point here, however, the very young age of the children involved would indicate that, with a median age of just 5 months upon entering the United States (see Chapter Six), the cultural adjustment required of the children varies from negligible to zero. Yes, the children face a brief period of adjusting to new foods, new sounds, new sights, etc., and in fact many of the children will face some degree of discrimination in the United States at one time or another. Nevertheless, the very young ages of the children suggest that cultural disruption is not a major problem.

The limited evidence shows that the success of intercountry adoption in the United States, Canada and Western Europe is not "substantially different from placing American or European children born in their own country." 423/ This finding is consistent with the Congressional testimony, cited earlier, in which the State Department attributed the increase in adoptions from Colombia in the mid-1970's to "the extraordinary effectiveness of word-of-mouth 'advertizing'" by American families who had completed adoptions there.

In 1982, Clark and Hanisee tested 25 children from Southeast Asia who had been adopted by caucasian American families. All 25 children were of pre-school age and all were identified as having suffered some degree of "pre-adoptive deprivation," with 10 of the 25 children identified as having been "severely deprived." Yet, results from 2 standardized tests (the Peabody Picture Vocabulary Test and the Vineland Social Maturity Test) showed all 25 children to have exceeded the national norm in performance. 424/

423/ Benet, p. 129.

424/ Clark, Audrey E. and Jeanette Henissee; "Intellectual and Adaptive Performance of Asian Children in an Adoptive American Setting"; Developmental Psychology; July, 1982.

Citing this type of evidence can communicate the wrong message (that an adopted child must excel for the adoption to be deemed a success). That of course is not the point. Rather, this evidence suggests that the children of intercountry adoption are not left in an inherently severe cultural disadvantage. The Feigelman and Silverman are worth repeating: adjustment by Colombian children to their American adoptive families simply was not a problem, while many of the children adopted from Korea showed more positive adjustments than did American-born children adopted in the United States. 425/

Summary

This chapter has asked whether a case could be made to establish either a compelling governmental interest or the appropriate level of reasonable governmental interest with which to justify the pre-emptive State role in intercountry adoption. Preceding chapters have established that States typically lack the administrative capacity and/or the expertise in foreign family law that is available through the INS and on-site State Department Consular officers, that INS has had unequalled experience in adoption and in applying foreign family law to determine personal status. Federal courts have shown a long-standing willingness to entertain substantive questions about family status and the child's best interests. Other chapters also have shown that Congress has the authority to establish a legal adoptive status for children entering the United States under IR-3 and IR-4 visas. Finally, a case can be made that Congress already has extended a de facto adoptive status that merits full legal recognition anywhere in

425/ Feigelman and Silverman, p. 144.

the United States. In short, the States are not the only source of effective regulation of intercountry adoption, nor the only jurisdictions well equipped to protect the best interests of a child.

Because the States are in no position to match or add meaningfully to the current Federal and foreign regulatory systems already in place, the remaining area in which a case might be made for a pre-emptive State role lies with pre-placement services. The question becomes whether pre-placement services alone advance compelling or reasonable interests that justify restrictive State policies in intercountry adoption, often through a second-hand delegation of the State role to private adoption agencies.

The benefits of agency participation often assumed with restriction simply cannot be established. As an extension of a State's regulatory arm, agencies do not necessarily offer any more "protection" than placements made directly by foreign agencies or placements made with the assistance of no agency at all. Agencies have had difficulties of their own, as illustrated in the Vietnam Babylift, in re McElroy (Tennessee), Elizabeth Cole's allusion to a case of misrepresenting documents in a Wisconsin Court, the religious discrimination case in California, etc. These examples in fact are the very rare exception to agency placements, virtually all of which are completely free of any difficulty. However, this still makes the point that agencies are not immune from the problems they are presumed to be able to prevent.

Similarly, when addressing pre-placement services, efforts to increase the role of adoption agencies by statute or regulation are based on a premise that simply cannot be defended. The literature conclusively shows that the participation of an adoption agency is utterly irrelevant to the success of an

adoption; it neither weakens nor strengthens the process. Further, despite a number of strongly stated assertions, nowhere does the literature provide any evidence to support the notion that agency participation can strengthen marital relationships, expand couples' parenting capabilities, etc.

Necessary assumptions about administrative capacity further weaken any arguments to increase the role of American agencies in intercountry adoption. The image offered by advocates of such a requirement is that of a large, permanent, stable staff, who offers institutional continuity, expertise and a fair degree of wisdom. That image seldom fits in practice. Adoption workers commonly are hired on a part-time contractual basis; many will be under contract with two or more agencies at the same time, and the rate of turnover is high.

In sum, no compelling case can be made for delegating pre-placement regulations in intercountry adoption to the States and, thereby, primarily to private organizations. Further, the available findings from the literature cast serious doubt on whether a rational connection to reasonable governmental interests could be sustained.

In the end, public policymakers need to be very cautious about the degree to which adoption of any kind is restricted, based on highly questionable assumptions about cause and effect relationships. This is no small point here, given the impressive capabilities that are attributed to pre-placement services and the home study. Most of those capabilities require a great deal more wisdom and circumspection than they do professional "knowledge" that somehow is "related to professional methods and skill," enabling one to remain 'objective." No profession or discipline has yet mastered the art of passing along those rare

qualities to its members. Further, a more modest attitude might suggest a less elaborate (and less costly) system of screening prospective adoptive parents.

For policymakers in the field of intercountry adoption, the point here is to be cautious about automatically accepting basic assumptions that establish by statute or regulation that which agencies have not been able to establish on their own merits. With agency participation already around 80 percent in all intercountry adoptions (counting foreign agencies), the system has no need to be made even more cumbersome, restrictive and costly than it is already.

Some constitutional modesty also is in order. The current language in Section 101(b)(1)(F) invites private organizations as well as State governments to introduce into Federal immigration policy their own policy preferences, complete with notions about cultural heritage and unfounded prejudices about parental motivation. Table 15 indicated some implicit assumptions about rather impressive quasi-governmental powers being delegated to adoption professionals. That table, plus other comments from influential sources in the field, indicate an unnerving, cavalier approach to some fundamental constitutional norms.

PART FOUR: CONCLUSIONS AND RECOMMENDATIONS

This dissertation has made a case for a specific change in public policy in intercountry adoption. The proposed change would amend Sections 101 (b)(1)(E) and (b)(1)(F) of the Immigration and Nationality Act to eliminate any pre-emptive or after-the-fact role for the States. Instead, all questions regarding the immigration of these children and questions regarding their legal adoptive status should be treated exclusively as Federal resaponsiblities. The recommendation is based on two basic approaches: constitutional values and policy issues.

The first task faced by this dissertation was to establish that the topic, intercountry adoption, is significant. The Introduction and, at more length, Chapter Six established just that. Intercountry adoption now accounts for one of every five non-relative adoptions in the United States. This represents a revolution in the nature of American adoption and American family building. Special orphan visas (IR-3 and IR-4) increased by an average annual rate of 11.3 percent from 1968 through 1985 and is approaching 10,000 per year, and all trends indicate that intercountry adoptions will continue to increase rapidly at least for the next decade or so. In short, the topic is significant to American citizens who wish to adopt and is significant to any governmental policies that seek to encourage family life.

The dissertation also tried to disabuse us of a number of misconceptions and stereotypes. For example, the children were shown to be healthy and very young. Their good health is no surprise to the American families involved, but it flatly contradicts widely accepted misinformation. Similarly, the parents were shown to be something other than "the rich" and procedures were detailed to

show that any notion about Americans "shopping" for children is sheer nonsense. In short, the system was shown to be well regulated, to enjoy legal and ethical integrity, and to be safe.

The dissertation argued that the system in fact is overregulated. Adopting American parents must contend with all sorts of institutions. They must contend with INS and the State Department, which regulate all immigration for the Federal Government. American parents also must contend with foreign national governments, through their national child welfare agencies and their emigration procedures, plus foreign adoption agencies, foreign courts and, frequently, foreign state and municipal governments.

In addition, most American families, because they are unable to obtain final orders of adoption abroad, also must contend with their State governments prior to bringing their children home. All adoptive American parents must contend with their State governments after bringing home their foreign children, even a family who adopts a child while living abroad and whose child is clearly a bona fide member of the family upon entering the United States. Regulation by the States also frequently requires that families contend with private U.S. adoption agencies, regardless of the circumstances of the adoption.

Section One: Constitutional Values

Constitutional values were described much like "regime" values, which are those basic values that the vast majority of our people have shared over a long period of time. These are the limited number of fundamental values that hold us together and that we seek to protect as we govern ourselves. Precise definitions

of those values may be elusive, but certain values survive generation after generation, such as notions of freedom, equality and property.

The dissertation looked to the Supreme Court as the primary legitimate source of insight for understanding our contitutional values. Those values were then used to evaluate current policies in intercountry adoption. That approach found the following. First, the pre-emptive role of the States in the immigration of IR-4 children (no final foreign decree) is constitutionally unique. No other class of petitioners for immigration as permanent residents of the United States is subject to a pre-emptive veto by the States.

Secondly, the Federal power to regulate immigration is plenary. That is, whether or not the Federal Government acts in the field is irrelevant; no other jurisdiction may enter the field unless Congress chooses to delegate part of its plenary powers. Consequently, a number of common arguments in support of a pre-emptive State role come up short. For example, States cannot take action to counter the perceived effects of Federal immigration policies. Rather, our system of regulating immigration is to be a unitary system that is applied uniformly throughout the United States.

Third, State jurisdiction in family law, as a function of the police power, was found to be considerably less exclusive than is the Federal plenary power in immigration. The Federal Government, particularly the judiciary, has long been active in the field. Though Federal courts typically enter the field of family law to address issues under the Fourteenth Amendment, Federal courts have not been reluctant to address the substance of family issues, which are said to be the sole reserve of the States. For example, the Supreme Court has explicitly addressed the best interests of the child in divorce/custody cases and the treatment of

illegitimate children by State statute. Similarly, the Court has examined family relations to establish a criterion for determining which unwed fathers qualify as "fathers". Unwed fathers are entitled to be treated as fathers by government if they establish de facto parent-child relationships with their children. The Court has even gone so far as to say that Federal courts must address issues such as the best interests of a child, independently of State findings, in order to make a well-informed decision.

Similarly, full faith and credit is often cited as a justification for ensuring a State role. The argument is pertinent to all three classes of foreign children who are adopted by Americans, including those who live abroad with their new families for at least two years (IR-2) and those who enter the United States with final foreign decrees, but who have not lived abroad with their new American families (IR-3). The families are said to have no assurance that their adoptive relationships will be accorded legal status in the United States until and unless a State adoption decree is secured. Thereafter, the argument holds, the children and parents are guaranteed legal status throughout the United States.

However, full faith and credit was found to be considerably more pourous than this argument would indicate. First, States amend their own decrees in family law rather often. Consequently, they are quite willing to amend similar decrees from other States. In addition, the Supreme Court has held that, even where two States agree that full faith and credit should be applied, it may have no inherent authority.

In intercountry adoption, these pro-State arguments must be able to defend the notion that a State can deny and void the basis on which the Federal government has admitted a child as an immediate relative. That is, if a State

denies an adoption petition after a child has been admitted into the United States, does that child's immigration status change? Is the Federal Government then compelled to take action to force the child to leave the United States, based on the action of one of 50 States? If the State has the power to review and to deny the basis on which a child has been admitted, the logical extension of that premise would indicate that the child's immigration status indeed might change. At a minimum, is the child suddenly no longer a member of the family?

The dissertation has argued that nothing like the above could in fact be the case. In sum, the current system seems to conflict with the notion of exclusive Federal power over immigration and with the constitutional value that the system by which we govern immigration should be a unitary system, not the sum of 50 different State systems. Secondly, the constitutional bases for a strong State role (i.e., exclusive jurisdiction over family law and the power of full faith and credit) are found to be substantially overstated.

The current system also may conflict with a number of personal rights that the Court has held to demand constitutional protection, unless government can establish a compelling interest. Access to information on birth control, the use of birth control, first-trimester abortions and the sterilization of criminals all have been found to infringe on fundamental rights that cannot be regulated unless government meets the demanding test of a compelling interest. In many of these issues, the Court found the basic rights involved to include notions of "sacred marriage" and the right to have offspring. Adoption, while far from an absolute right, demands as much constitutional care as any other governmental regulatory action affecting the right to have offspring or the sacred character of marriage.

In the case of a first-trimester abortion, government cannot regulate a woman's decision to obtain an abortion. That decision belongs exclusively to her and her physician. Through the second trimester, government can act only to protect the health of the pregnant woman, such as regulating pertinent medical standards, and then can act only in reasonable ways. Government lacks the authority to insist that an individual carry a pregnancy to term. If the State lacks such power, so too does a spouse and even the parents of a minor if she can establish that she is mature enough to make her own decision or that an abortion is in her best interest. The dissertation sugests that government should be equally careful of the manner in which it treats efforts to "have offspring" via adoption.

In addition, IR-4 petitions are filed by citizens, all of whom, under the Immigration and Nationality Act, are entitled to petition the Federal Government to classify an alien as an immediate relative. Are those citizens entitled to uniform treatment of those petitions, or can their petitions be treated differently by the Federal Government based only on the location of their home within the United States? The petition to the Federal Government from a family in Brewster, New York might succeed, while the petition of an identical family in nearby Danbury, Connecticut filed on behalf of an identical child might fail, be delayed, or incur an additional $1,500 in costs, due only to variations in State requirements. Does this not violate notions of due process or even notions of a Federal guarantee of equal protection, as defined in Shapiro?

Finally, does the Federal delegation to the States invite religious discrimination in intercountry adoption and, thereby, in the Federal regulation of immigration? Religious discrimination of some significance seems hard to deny and is largely the unanticipated result of the common State practice of exercising

a regulatory option by requiring that petitioning citizen families work through private adoption agencies, most of which are affiliated with a particular religion.

Yet, the dissertation made no effort to argue that the current system was "unconstitutional." The notion of constitutional values is not intended as a legalistic tool. Rather, it provides a normative foundation to support a substantive change in public policy on the grounds that the current system violates important constitutional values, and the recommended change would vindicate solid constitutional principles.

Section Two: Policy Considerations

The constitutional base for a State role is questionable, as is the policy basis. A Federally established role for the States can satisfy neither the demanding test of a compelling State interest nor the less demanding test of a rational connection to a reasonable governmental interest. The dissertation did not treat policy questions in a section as discretely as it treated constitutional values. Part Three approached a discreet treatment of policy issues, but they were addressed throughout the dissertation. They can best be summarized by some basic questions. These questions are not profound, but are among the basic questions any policy analyst should ask, and therein lies their strength.

1. Is it a problem? The dissertation has shown that intercountry adoption is not a problem. Commonly cited problems only too often are based on badly misinformed premises. Even casual investigations into "problems" lead to sources that acted on bad information, or that accepted various stereotypes at face value.

2 If it were a problem, whose problem? In the first instance, intercountry adoption is a matter of immigration and, therefore, is exclusively a Federal issue.

3. If it were deemed a State problem, could States address it? States simply lack the administrative and legal resources to address intercountry adoption in any real way. Typically, "the State" is a single official whose staff consists of no more than shared typing support. This single official must be assumed to be capable of recognizing when a particular intercountry adoption fails to meet all statutory, regulatory and policy requirements of national governments and their political subdivisions throughout the world.

4. If a State problem, do the States have an alternative? Clearly, the States could rely on the Federal Government to regulate intercountry adoption unilaterally. INS requires the same types of documents and for much the same reasons as do the States. INS in fact has had far more experience with adoption in recent years than has any single State. From 1980 through 1985, INS approved 41,000 IR-3 and IR-4 adoptions, plus an unidentified number of IR-2 adoptions, as the basis for immigration. In 1986, IR-3 and IR-4 adoptions should exceed 10,000 and IR-2 adoptions could push the figure to 11,000 in a single year.

Secondly, no State can match the State Department's on-site capacity to know the laws, regulations, institutions and individuals involved in a particular country. If a problem were to exist in the foreign country and if an American official were to spot it, that official would be with the U.S. Consul on site in the foreign country. The likelihood that a State official would spot such a problem in the foreign country and be the first American official to do so is hard to imagine.

5. Do current State policies address the presumed problem? Current State efforts to regulate intercountry adoption rely almost entirely on private adoption agencies and the home study. While a few private agencies enjoy extensive experience and expertise in a particular country, few enjoy such experience and expertise in more than one or, at most, more than two. Most private agencies also fail to meet implicit assumptions about stable staffs, extensive expertise, or even basic knowledge of the intercountry system. More significantly, assumptions about the principal means of State regulation, the home study, have been shown to be seriously inflated. Though the characteristics that the home study porports to evaluate are desirable in any parent, adoptive or otherwise, no methodology can identify either their presence or absence.

6. What would be the effect of eliminating a State role? Elimination of a State role, plus explicit Federal recognition of a le gal adoptive status of the children of intercountry adoption, would do little more than to acknowledge that which exists in fact. That is, the Federal Government already bases its action in immigration on an "immediate relative" classification. Whether that relationship originates in an IR-2 visa, an IR-3 or an IR-4, the nature of that immediate relationship is the same: parent-and-child. By virtue of admitting the child to the United States, the Federal Government already acknowledges at least a de jure adoptive relationship and, in the case of IR-2 visas, a de facto adoptive relationship as well.

More significantly, petitioning American citizen families would be assured of consistent treatment by the Federal Government. Families would no longer be subject to the bad news that they live in "the wrong State." Procedures, time and costs could become consistent among the States.

Finally, the States would benefit from the proposed change. The States currently are placed in a no-win situation by the Congress. They are invited to regulate in an area in which they cannot hope to be effective. Yet, when the inevitable happens and an occasional adoption breaks down, if a State has not actively tried to regulate intercountry adoption, that State is open to sensational criticism. The generic problem, therefore, does not lie with State policies, per se. but with Federal policy and Federal law. Resolution lies with the Congress, not with the States.

7. What problems could this recommendation invite? The primary risk for States in fact is modest, but real, nevertheless. That is the risk of the public charge. The risk is modest for two major reasons. First, Chapters Two and Five showed that Federal law and INS also are concerned with the possibility of admitting a public charge. INS scrutinizes I-600 and I-600A petitions to assure itself that petitioning citizens are able (financially) and likely to care properly for the child before the Attorney General will grant advance approval of a visa. State concerns duplicate Federal concerns and separate action by the States is redundant. Secondly, disruption rates in the adoption of very young children, be they American-born or foreign-born, are very low. The age profile of intercountry children suggests that their "disruption rate" probably is very low and, as Barbara Joe has argued, probably lower than in domestic adoption -- not because intercountry adoption is "better," but because its adoptive group is, on the whole, much younger.

Yet, adoptions do occasionally collapse. What happens then? Federal procedure requires that petitioning citizens sign an affidavit of support, in which

they obligate themselves to pay all the costs of maintaining a child from a disruption until that child is successfully placed. Some States remain unconvinced that the Federal Government either will or can effectively enforce that affidavit.

However, two other alternatives could strengthen the Federal guarantee. First, the Federal Government could require that all citizens who file an I-600 petition obtain a bond for a uniform amount, perhaps $5,000, as some States now require. This alternative, though, has its weaknesses. In extreme cases, $5,000 may not cover the costs of picking up the pieces from a disruption. Other problems could ensue as well, such as difficulty in obtaining payment on a bond, or the cost of obtaining such a bond could vary significantly from area to area, etc.

A more attractive and less cumbersome option would be to raise the filing fee for an I-600 from $50 to, say, $80. The additional $30 per petition (or whatever fee is chosen) could be credited to a trust fund to cover the costs of any disrupted intercountry adoption after a child enters the United States. At some 10,000 petitions annually, this would generate up to $300,000 per year in trust fund receipts. Like other trust funds, the receipts would be deposited in the general fund, and an accounting procedure at the U.S. Treasury would credit the trust fund the receipts, plus interest. In the end, about $315,000 would be credited to the account each year, which would be more than enough to cover any fiscal risks to which the States could be exposed by a change in the Immigration and Nationality Act. This would also ensure an affordable, uniform fee for petitioners, and would assure the States of quick payment whenever the need were to arise.

Section Three: Conclusions

In the end, the hope is that the States and the private agencies at least acquire a greater sense of their own limitations in intercountry adoption. Some intellectual humility toward pre-placement services and requirements, plus a healthy degree of constitutional respect for the plenary powers of the Congress in matters of immigration and for the individual rights at risk would go a long way to relieve current variations, uncertainties and the frequent appearance of capricious behavior. Similarly, an effort on the part of State and Federal policymakers to disabuse themselves of stereotypes and unfounded assumptions could further relieve variations in costs, time and even success or failure.

Intercountry adoption has become a vitally important option to enough American citizens that the families involved should no longer be exposed to public policies that pointlessly restrict citizens' efforts to fulfill a basic desire, which the Supreme Court has repeatedly held to demand firm constitutional protection: the right to have offspring.

This is a regime value in our society. It needs to be treated as such. Intercountry adoption is approaching the commonplace, but the level of awareness reflected in public policy lags behind by a generation or more. The system is overregulated, and badly so. We cannot address foreign rules, statutes and regulations, but we can address the American side of the equation. The State link is the most likely starting point.

As stated in the Introduction, this recommendation runs counter to most conversations about federalism in recent years. The basic message is "let the Feds do it." However, the recommendation is perfectly consistent with political

conversations of recent years in that it argues for elimination of unproductive government regulation. Let the feds do it, not because they are the good guys, but because immigration is clearly a Federal issue. It is clearly not a State issue, no matter what the residual issues, be they adoption, child welfare, protection against public charges, or less complicated policy preferences such as encouraging the adoption of "our own."

The Federal Government clearly has first call on intercountry adoption, as a function of its plenary power over immigration, and, through INS and the State Department, it has the necessary experience and capacity to regulate intercountry adoption effectively. The State role is pointless, redundant, needlessly costly, creates delay and, ultimately, is not a positive influence in the system. Congress must explicitly recognize the Federal responsibility to the citizen parents and to the littlest immigrants that the Federal Government admits as immediate relatives of those citizens.

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APPENDIX
INTERCOUNTRY ADOPTION QUESTIONNAIRE

This questionnaire has been distributed among various parent support groups to develop a profile of the children and adoptive parents of intercountry adoption. Where applicable, please include all children in your responses (i.e., your children by birth and children adopted in the United States).

	First Child	Second Child	Third Child	Fourth Child
Date of Birth				
Country of Birth				
Sex				
When child came home:				
Child's Age				
Mother's Age				
Father's Age				
Did you own a home?				
If married, # years				
Who placed your child with you:				
Foreign Agency				
U.S. Agency				
Indep. Foreign				
Estimated Total Cost (Include travel, documents fees, etc.)				
Is child of same racial/ national group as:				
Mother				
Father				

Central City nearest to your home _____

Estimated 1983 Household Income: _____

Religion of Adopting Parents		
Mothers		Fathers
_____	Judaism	_____
_____	Catholic	_____
_____	Other Christian	_____
_____	None	_____
_____	Other	_____

Highest Level of Formal Education		
Mother		Father
_____	High School	_____
_____	2-Yr/Tech Degree?	_____
_____	4-Yr Degree??	_____
_____	Some Grad Schl?	_____
_____	Graduate Degree?	_____
_____	Ph.D./Doct./J.D.?	_____

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