Transnational Adoption of Children

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I. INTRODUCTION

Since the end of World War II, an increasing number of adoptions in the United States involve the adoption of children of foreign birth. These adoptions have increased, while the yearly number of total adoptions has leveled off and possibly even declined. Various social developments have combined to limit the availability of adoptable American-born children at the same time that social, legal, and practical restraints against transnational adoptions have receded. Once rarely contemplated, transnational adoption is now a significant and widely publicized option for prospective adoptive parents who are discouraged by the shortage of healthy adoptable infants born in the United States.

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2. Id.

3. Id. The National Committee for Adoption estimates that the number of adoptions between unrelated persons declined from 82,800 in 1971 to 50,720 in 1982. The yearly number of adoptions may have risen slightly since 1982, but much of the increase, if any, is attributable to the growing number of transnational adoptions. Id. The availability of adoptable American-born children has declined because of widespread use of contraception and abortion, and because many young unmarried mothers no longer feel stigmatized by motherhood out of wedlock. At the same time it is likely that the number of persons seeking to adopt has increased, at least in part because adoption is viewed more favorably today than in earlier times.

4. The transnational adoption alternative has received considerable publicity in newspapers and news magazines during the past few years. See, e.g., Lindsey, supra note 1; Simons, Abductions in Salvador Fill a Demand: Adoption, N.Y. Times, Dec. 17, 1985, § A, at 2, col. 3; Crossen, Adopting Abroad: Battling Illness, Bureaucracy, Expenses and Racism, Wall St. J., May 21, 1985, § 2, at
Transnational adoption also now constitutes significant immigration into this country. Since 1947, which marked the beginning of transnational adoption on a significant scale, over 130,000 children have immigrated to the United States for adoption by United States citizens or residents, or for finalization of adoption proceedings initiated abroad. Like so many other immigrants, immigrant children admitted into the United States for the purpose of adoption have often come to this country because of war, catastrophe, poverty, or intolerance in their birth lands. The flow of children immigrating to the United States for the purpose of adoption has occurred in a series of waves, generated by crises and social conditions throughout the world. Once, immigrant adoptive children were almost exclusively European in origin. Today, most are from Asia and Latin America. Over the past forty years every continent and nearly every nation has contributed to the pool of immigrant children arriving in the United States for adoption. In 1985 alone, children who immigrated for the purpose of adoption represented over sixty different nations.

Because transnational adoption involves both a federal concern and responsibility over immigration matters, as well as a state concern and responsibility for the placement and adoption of children, coordination


The number of transnational adoptions may be slightly understated by the Immigration and Naturalization Service (the Service) because one type of transnational adoption, in which the adoptee arrives in the U.S. after having been adopted abroad at least two years earlier, is not included in the Service's count of immigrant adoptees.

Alien Adopted Children, supra, at 31 (statement of John Dewitt, Deputy Administrator of the Bureau of Security and Consular Affairs, Dept. of State). The Service's figures also do not include immigrant adoptive children entering the United States in a "nonpreference" status, although the number of such immigrant adoptees is probably very small. Id. at 45. See also infra note 163.


8. See generally Simons, supra note 4; Kuntz, supra note 4.

9. Detail Run 401, supra note 5.

10. See id.

11. As a form of immigration, the process of transnational adoption is under the control of the
of federal and state law, and cooperation between federal and state authorities, is necessary to complete the process of a transnational adoption. Generally, a state court can only grant an adoption petition for a child present within the state. Of course, the child can be present in the state only after having been admitted into the United States by federal immigration officials. However, federal immigration officials can permit the child to enter the United States only if they are able to determine that (1) the child is free to be adopted, and (2) the prospective adoptive parents are qualified to adopt. In making these determinations, federal immigration officials seek to satisfy federal standards of adoptability and parental qualifications, but they must also be concerned with state standards, because a state court ultimately will decide whether the adoption should be granted under state law. If immigration officials are satisfied that the child is adoptable, and that the prospective adoptive parents are qualified, they may allow the child to immigrate to the United States.

Lawful entry into the United States is no guarantee that the child can or will be adopted. The finalization of an adoption depends not only on the approval of federal officials for the child’s immigration, but also on the requirements of state law. Because state courts exercise their

United States Immigration and Naturalization Service (the Service) and the consular offices of the Department of State. However, as a consequence of the traditional and constitutional predominance of the states over domestic relations, including adoptions, the states have remained ultimately in control of the finalization of the transnational adoption process. See In re Burrus, 136 U.S. 586 (1890), a case involving a dispute over the custody of a child, where the Court stated:

The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States. As to the right to the control and possession of this child, . . . it is one in regard to which neither the Congress of the United States nor any authority of the United States has any special jurisdiction.

Id. at 593-94. While this description of the federal role in domestic relations is often cited as authoritative, in retrospect it is an overstatement. From time to time there has been a need for federal involvement when a matter of domestic relations touches some established federal interest. Federal involvement in transnational adoption, which affects immigration policy, is one example. Another example is federal regulation of the placement of Indian children under the Indian Child Welfare Act, 25 U.S.C. § 1901 (1978).

14. Id. See Jones, supra note 7; As Adoptions Get More Difficult, supra note 4.
15. Jones, supra note 7, at 117.
16. The term “adoptable” may have different meanings depending on whether it is used in a legal, medical, or sociological sense. As used in this article, “adoptable” means legally free for adoption.
17. Jones, supra note 7, at 117.
18. In most cases, a child whose immigration is approved will be successfully adopted under state law without controversy. Immigration officials will have successfully predicted that a state court would grant the adoption, and they may have been aided in this regard by state officials.
jurisdiction over adoptions independently of federal immigration officials, a state court may disagree that an immigrant child is adoptable. If it does, it will deny the petition for adoption despite the child's lawful immigration to the United States for the purpose of adoption.

An added complication in a transnational adoption is that the child ordinarily has been freed or relinquished for adoption in a foreign land under foreign law. Foreign relinquishment is an essential step in the transnational adoption process, for if the child has never been properly relinquished, the child is not adoptable. A state court becomes involved in the process only after the child's relinquishment and immigration, and it therefore exercises no control over the relinquishment process. If a state court disapproves of the manner by which the child was relinquished, it can only deny the petition for adoption.

Despite the interdependence of the foreign relinquishment, United States immigration, and state adoption processes, each is governed by entirely separate bodies of law. State adoption laws are generally quite highly developed, yet devoid of any specific recognition or acknowledgement of transnational adoption. Federal lawmakers and regulators, on the other hand, have developed a body of immigration law which addresses transnational adoption specifically, but which focuses primarily on the immigration aspects. The foreign law regulating relinquishment may be based on totally different concepts than those embodied in United States common law. As a result, the law and process of transnational adoption remains disjointed. Most transnational adoptions succeed despite the lack of forthright law, but the failure of lawmakers to provide a clear process creates unnecessary risks and uncertainties.

Legislative reform at the federal level is one solution to the deficiencies in the existing transnational adoption process. However, to adequately analyze potential legislation, one must first understand the history of transnational adoption and of the federal legislative reforms and social phenomena that have encouraged transnational adoption on an increasingly significant scale. Also necessary is a clear picture of the

19. See In re Burrus, 136 U.S. 586 (1890); Jones, supra note 7, at 117.
20. See As Adoptions Get More Difficult, supra note 4.
21. See generally Crossen, supra note 4; As Adoptions Get More Difficult, supra note 4.
22. See generally Crossen, supra note 4; As Adoptions Get More Difficult, supra note 4.
23. Even where state legislation recognizes transnational adoption, it often fails to address all the potential problems of transnational adoption.
24. Federal lawmakers traditionally have abstained from the regulation of adoptions, and even in the case of transnational adoptions, their treatment of fundamental adoption issues has been superficial.
existing transnational adoption process, beginning with a child's relinquishment for adoption in a foreign land, continuing with the child's immigration to the United States, and ending with the child's adoption in a state court proceeding. Finally, one must analyze the specific shortcomings of the existing system created by the shared and often conflicting foreign, federal, and state authority over transnational adoptions.

II. THE HISTORY OF TRANSNATIONAL ADOPTION

A. The Development of Federal Policy

Federal immigration law concerning adoption has evolved as a result of major shifts in the sources and causes of transnational adoption. Like other forms of immigration, transnational adoption has occurred in a series of waves, often generated by foreign wars or catastrophes. Also, following the pattern of other forms of immigration, immigration by transnational adoption periodically has shifted in origin from one region of the world to another. Transnational adoptions by United States citizens were apparently quite rare prior to World War II, but the popularization of transnational adoption after World War II created a major transition in American attitudes toward adoption during the last century.

1. Pre World War II

Before the twentieth century, adoption was a novel legal process.

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25. Jones, supra note 7, at 115. Statistics compiled by the Service do not show what number, if any, of immigrants arriving in the United States before 1948 were adoptable children being brought to this country for placement with American families. In fact, until 1948 there were no special adoption provisions in federal immigration statutes and no statistical category for prospective adoptive children in the records maintained by the Service. Special legislation was not needed until after World War II, because until that time transnational adoption was very rare. Prior to World War II and during the course of the war the Service reported one category of immigrants described as persons "under 16 years of age, unaccompanied by parent." Only a trickle of immigrants entered the United States under this category. For example, from 1935 through 1945 an average of 14 immigrants per year were counted in this category. U.S. DEPT. OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, ANNUAL REPORT Table 20 (1947); IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEPT. OF JUSTICE, ANNUAL REPORT Table 20 (1944). The number of immigrants "under 16 years of age, unaccompanied by parent" was measured by the Service because of statutory provisions disqualifying such persons from immigrating except at the discretion of the Service. The primary concern of the Service in exercising this discretion appears to have been to prevent the admission of children likely to become public charges. See F. AUERBACH, IMMIGRATION LAWS OF THE UNITED STATES 6-7 (3d ed. 1975). Persons admitted under this category may have been "unaccompanied by parent" at the time of their entry into the United States for any of a number of reasons. They were not necessarily immigrating for the purpose of being adopted in the United States.

26. See generally Rule, supra note 4.
As a means of creating a parent-child relationship for all purposes under the law, adoption was alien to the common law tradition of most states. However, providers for orphans did not see adoption as the ultimate goal in arranging for an orphan’s care and upbringing. An orphan was more likely to be apprenticed in the service of a paternalistic employer or left in an institution. Furthermore, adoption was not a widely-accepted solution for childless couples. Social conventions placed great value in a true “blood line” to such an extent that an adoptive child was not a “solution” to childlessness but a burden accepted as an act of charity. An orphan might be placed in the custody of a family; however, without a legal process for adoption or a motivation to adopt, the foster parents were caretakers only and not the legal equivalent of the child’s parents.

State government initiated the creation of a legal process for adoption and regulation of adoption practices due to the state’s role as parens patriae. Adoption law fits naturally within the sphere of traditional state concerns, because adoption is one means of providing care, supervision, and education of minors. In addition, like marriage and divorce law, adoption law gives legal recognition to the power of the state to dissolve one family and create another. Adoption law also interacts with state property law to determine who is an “heir” or a “child” for purposes of the distribution and descent of property.

By the middle of the twentieth century, adoption laws were enacted

27. Howe, Adoption Practice, Issues, and Laws 1958-1983, 17 FAM L. Q. 173, 175 (1983); Ex parte Clark, 87 Cal. 638 (1891). In some states, early adoption served a limited purpose of perpetuating heirship, but generally did not endow the adoptive children and parents with all the other legal attributes of a birth family. Brosnan, The Law of Adoption, 22 COLUM. L. REV. 332, 341 (1922). See, e.g., Eckford v. Knox, 67 Tex. 200, 204, 2 S.W. 372, 374 (1886) (Texas statute “gives to the adopted party the position of a child only so far as to make him the heir of his adopter, but does not constitute him a member of the latter’s family, with such duties and privileges as that relation would imply”). See also Adoption and Foster Placement of Children: Report of the Expert Group Meeting on Adoption and Foster Placement of Children, U.N. DOC. ST/ESA/99, 2 (1980).

28. See Howe, supra note 27, at 176. An early American solution for homeless children was “putting out” the children for service and apprenticeship. Kawashima, Adoption in Early America 20 J. FAM. L. 677, 680-81, 682, 685-86 (1981-82). Local courts were often authorized by law to assign orphans or impoverished children to apprenticeships. See, e.g., Manual v. Beck, 70 Misc. 357, 127 N.Y.S. 266 (1910). In the mid-nineteenth century, children’s aid societies collected thousands of homeless children from the streets of eastern cities and sent them westward to work on farms. Howe, supra note 27, at 176.

29. R. SIMON & H. ALSTEIN, TRANSRACIAL ADOPTION 9 (1977); Kawashima, supra note 28, at 682.

30. Parens patriae is a guardian of minors and other legally disabled persons within the state’s jurisdiction. See Arnold v. Arnold, 246 Ala. 86, 18 So. 2d 730, 734 (1944); Wentzel v. Montgomery General Hospital, 293 Md. 68, 447 A.2d 1244 (1982).

31. See generally Kawashima, supra note 28; Brosnan, supra note 27.
with regard to American born children, but were unnecessary with regard to foreign born children. Adoption of foreign-born children was neither necessary nor favored. Adoptable American-born children were available in abundance without extended waiting periods and for little or no adoption fee. In addition, the concept that adoption should “mirror biology” predominated in adoption law and in the practices of adoption agencies and adoptive parents. The focus of this view was to match adoptive parents with children who, by outward appearance, could have been birth children. Adoption of an immigrant child born to parents of a different culture, and especially adoption of an immigrant child of a different race, would have been the antithesis of an adoption mirroring biology.

Aside from the public’s lack of interest in adoption of foreign born children, transnational adoption also was impeded by restrictive immigration laws that limited the eligibility of adoptable children for immigration. Early restrictive immigration legislation did not address the subject of adoption, but would have discouraged transnational adoption. For example, under legislation enacted in 1907, children “unaccompanied by their parents” could be excluded at the discretion of

32. The first American adoption statute was enacted in Massachusetts in 1851. See Howe, supra note 29, at 175-76. By 1931, most states had provided some legal process for adoption. See Brosnan, supra note 27, at 335; Simon & Alstein, supra note 29, at 18.


33. Perlman & Weiner, supra note 32, at 336. Adoption generally involved no “adoption fee,” aside from court and attorney fees, until the post war era when private adoption agencies became increasingly involved in the process of matching adoptive children and parents. In 1950, it was reported that agencies in New York were “experimenting” with fees ranging from $100 to $1200. Comment, supra note 29, at 736 n.110.

34. The match took account of traits such as age, race, and physical resemblances between the adoptive parents, the adoptive child, and birth parents. See Katz, Rewriting the Adoption Story, 5 Fam. Advoc. 9, 9 (1982); R. Simon & H. Alstein, supra note 29, at 10, 12-17; I. Ellman, P. Kurtz & A. Stanton, Family Law 1254-62 (1986); C. Foote, R. Levy & F. Sander, Cases & Materials on Family Law 367-97 (3d ed. 1985). Frequently the effort to create seemingly homogeneous adoptive families went far beyond these criteria. Adoption statutes not only prohibited interracial adoption, but often prohibited or discouraged matching adoptive parents of one religion with a child whose birth parents were of another religion. R. Simon & H. Alstein, supra note 29, at 13-14. Many adoption agencies attempted to match adoptive parents with children whose birth parents were of similar education, intelligence, cultural background, and even geographic residence. Id.; C. Foote, R. Levy & A. Sander, supra, at 367-397.


36. The reason the early legislation had little actual effect on transnational adoptions is simply that few transnational adoptions were taking place. The first impetus for transnational adoption on
immigration officials.\textsuperscript{37}

Immigration law became increasingly restrictive with the introduction of the “quota” system in 1921, so that an important factor in any alien, foreign-born child’s eligibility for immigration was his country of origin and the quota assigned to that country.\textsuperscript{38} Foreign-born natural children of United States citizens were not subject to this quota system, and were admitted to the United States without numerical limits.\textsuperscript{39} Adopted children, however, were denied “nonquota status.”\textsuperscript{40} A system of “preferences” setting priorities for various classes of persons seeking to immigrate existed within each quota to which an adopted or adoptable child would have been assigned.\textsuperscript{41} Therefore, a child adopted overseas or arriving in the United States for the purpose of being adopted, would have been relegated to “fourth preference” status, which often was tantamount to exclusion.\textsuperscript{42}

2. Post World War II

The restrictions of immigration law on transnational adoption were of little consequence as long as prospective adoptive parents did not contemplate transnational adoption. When significant numbers of Americans began to attempt transnational adoptions, however, the initial and most obvious obstacle was federal immigration law. As a result, the first

\footnotesize{a noteworthy scale was public sympathy toward the victims of war. After World War I, the American armed forces and various private groups organized relief efforts for European “war orphans.” Most of these relief efforts were designed to support European orphanages and did not result in transnational adoptions, but at least one private relief agency acted to bring war orphans to the United States. As a result of that organization’s successful appeal to immigration officials, at least fifty children immigrated to the United States to be adopted by American citizens. 37. Act of Feb. 20, 1907, Pub. L. No. 59-96, § 2, 34 Stat. 898, 899 (1907). This restriction was by no means an absolute bar to transnational adoption, but few children were admitted to the United States under this provision. See supra note 25. Ship Brings 50 Jewish Orphans, N.Y. Times, Dec. 2, 1921, at 14, col. 2; Plea for Jewish Orphans, N.Y. Times, Sept. 26, 1919, at 11, col. 2. 38. The First Quota Law, Act of May 22, 1918, Pub. L. No. 65-154, 40 Stat. 559 (1921), was the first of a series of immigration quotas. The law limited the number of immigrants from any particular nation to a percentage of foreign born persons of that nationality living in the United States in 1910. Id. Later quotas were based on the number of foreign born persons of each nationality living in the United States in 1890. See Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 (1924). Immigrants from independent nations of the western hemisphere were not subject to numerical limitations until 1968. See Act of October 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965). 39. Immigration Act of 1924, Pub. L. No. 68-139, § 4, 43 Stat. 155 (1924). 40. Id., § 28(m), 43 Stat. at 169. A “child” of an American citizen, entitled to admission on a nonquota basis, was defined so as to exclude children by adoption unless the adoption took place before January 1, 1924. Id. 41. See F. AUERBACH, supra note 25, at 132-34. 42. H.R. REP. NO. 1199, 85th Cong., Ist Sess. 2, reprinted in 1957 U.S. CODE CONG. & ADMIN. NEWS 2016, 2017.}
important legislative measures for transnational adoption were at the federal level.\textsuperscript{43}

After World War II, two developments stirred widespread interest in transnational adoption and led to a series of immigration law amendments designed to facilitate transnational adoption. The first of these developments was public concern for victims of the war. The second development was the increased demand for adoptable children, which grew faster than the supply of adoptable American-born children.

The initial impetus for federal transnational adoption legislation was public concern for the victims of World War II. The war and the subsequent political division of Europe inflicted civilian casualties and dislocations on an unprecedented scale, leaving millions of refugees, including many thousands of children whose parents were missing, deceased, or unable to provide adequate care.\textsuperscript{44} European nations struggling to recover from the war were unable to place thousands of adoptable children, and institutional facilities for the care of such children were modest at best.\textsuperscript{45} During the first three years after the end of hostilities, many United States armed services personnel, struck by the plight of these children, adopted children while overseas and returned with them to the United States.\textsuperscript{46} Immigration laws, however, still served to impede the immigration of children adopted overseas or brought to the United States for the purpose of adoption.\textsuperscript{47}

In 1948, Congress enacted the Displaced Persons Act\textsuperscript{48} to allow for expedited immigration of over 200,000 European refugees from regions of Germany, Austria, and Italy. The Act contained a provision for the immigration of 3,000 "displaced orphans," who would be admitted regardless of whether the quotas for their national origin had already been filled, and without being charged to the quotas.\textsuperscript{49} Insofar as its concern for transnational adoption, however, the Displaced Persons Act was of

\textsuperscript{43} See Jones, supra note 7, at 118; Simon, supra note 29, at 17-18.
\textsuperscript{44} See Samuels, supra note 35.
\textsuperscript{45} Id.
\textsuperscript{47} Moreover, there did not yet exist any private or public institutions designed to facilitate transnational adoption by parents who were not stationed overseas and were not able to travel for the purpose of adopting overseas.
\textsuperscript{49} The Displaced Persons Act was only incidentally concerned with the immigration of orphaned children, and then only as a humanitarian gesture to relieve a European problem rather than to increase the availability of adoptable children for Americans. Id. §§ 2(e), 3(b), 62 Stat. at 1010. The Congressional debates leading to the passage of the Displaced Persons Act focused on the larger
limited vision. Its purpose was not to facilitate transnational adoption for the benefit of United States citizens or for orphan children generally, but to relieve an emergency refugee problem.\(^5\) To invoke the benefits of the orphan provision, a potential sponsor need not assert that a child had been or would be adopted, but only that the child, if admitted, would be "cared for properly."\(^6\) Reflecting the law's purpose to address a specific, temporary, and emergency condition, the non-quota provisions of the Act expired automatically after two years.\(^7\)

The orphan provisions of the Displaced Persons Act were the first of a series of temporary, one to three year measures that provided a continuous statutory basis for limited transnational adoption over the next decade. Each amendment or extension provided for several thousand nonquota visas for adoptable European children.\(^8\) Eventually, the definition of "displaced orphan" was broadened to include children of other regions and other circumstances. In part, this loosening of the orphan provisions occurred because as European refugees were gradually placed or resettled, crises in other corners of the world created new refugee problems.\(^9\)

While public concern for war victims was having an effect on federal policy, the second development, an increased demand for adoptable children, also began to propel the reform of immigration laws restricting transnational adoption. Although the immediate post-war years had seen increased numbers of available adoptable children,\(^10\) by the early fifties the balance was shifting, and it became increasingly difficult to

\(^{5}\) See generally F. Auerbach, supra note 7.

\(^{6}\) See generally R. Simon & H. Alstein, supra note 29.

\(^{7}\) The increased availability of adoptable children was due to the "baby boom" and a rise in the number of homes broken by death, divorce, and desertion. In addition, social welfare agencies had come to view adoption as a goal for institutionalized orphans, and they actively promoted the adoption of children in their charge. Perlman & Wiener, supra note 32, at 336.
adopt American-born children. The number of applications for adoption was growing rapidly, without a corresponding growth in the number of adoptable children. Adoption agencies in some areas began to charge service fees for the first time. Also, publicity increased concerning “black market” sales of babies for exorbitant prices. As the adoption of American-born children became more difficult and expensive, increasing numbers of prospective adoptive parents filed applications with international adoption agencies formed after enactment of the Displaced Persons Act.

In 1950, Congress amended the Displaced Persons Act to provide additional allotments of visas for displaced orphans for the next two years. At the same time, Congress expanded the list of nations from which an immigrant orphan might originate. Displaced orphan visas became available to qualified children from every nation of western Europe except Spain. Congress also broadened the definition of “displaced orphan” to include children who had been abandoned, or had one remaining parent who was incapable of caring for the child and had agreed to relinquish the child for emigration and adoption or guardianship.

56. See Barclay, Foreign Adoptions to be Made Easier, N.Y. Times, Apr. 5, 1952, at 18, col. 1.
57. See id.; Comment, supra note 32, at 716, 720. An important factor in the declining availability of adoptable children at this time was the decline in the adult mortality rate. In earlier years, adult mortality had left great numbers of children without parents. In 1920, orphans were 16.3 percent of the total population. By 1953, this figure had been reduced to 5.4 percent. Simpson, No Euphemisms: Call Them ‘Orphans,” N.Y. Times, May 1, 1987, § A, at 35, col. 2. At first, however, “baby shortages” were likely to have been localized and not widespread, as there was no consensus that a general shortage existed until the 1970’s. Howe, supra note 27, at 180.
58. Comment, supra note 32, at 736 n.110. By 1960, most agencies charged fees ranging from $50 to $2,000. C. Foote, R. Levy & F. Sander, supra note 34, at 356.
59. See, e.g., Black Market Ban on Babies Expected, N.Y. Times, Jan. 16, 1948, at 24, col. 1; Baby-Selling Ring Found, N.Y. Times, May 22, 1948, at 4, col. 6; Comment, supra note 32; Foreign Adoptions, 28 Brooklyn L. Rev. 324, 324 (1962); 103 Cong. Rec. 482 (1957) (statement of Sen. Kefauver). As early as 1948, an “international” baby-selling ring was broken up by Canadian police in New Brunswick after it had sold at least fifty infants chiefly in New York, New Jersey, and Delaware for prices of up to $1,500. Baby-Selling Ring Found, supra. See also the description of an indictment of a New York attorney who had arranged “proxy” adoptions of Greek children by Americans, in Foreign Adoptions, supra note 59, at 324.
60. Adopting Child From Overseas Found Difficult, N.Y. Times, May 10, 1955, at 26, col. 2; see generally Barclay, supra note 56.
61. Act of June 16, 1950, Pub. L. No. 555, § 3, 4, 64 Stat. 219, 221-22 (1950). The 1950 Amendment increased the original allotment for children in areas of Germany, Italy, and Austria from 3,000 to 5,000, and extended the period during which the allotted visas could be issued into 1951. In addition, the Amendment allotted 5,000 more visas to be issued for eligible children until 1952. Id.
62. Id. 64 Stat. at 220.
63. Id. The Franco regime of Spain, which had sympathized with the Axis powers during World War II and had received substantial support from the Axis powers before the war, was not recognized by the United States at the time of the 1953 Amendment.
3. The Korean Conflict

Eight days after Congress enacted the 1950 Amendment, war broke out in Korea. As in Europe after World War II, many American military personnel stationed in Korea during the next few years were moved by the tragedy of Korean war orphans and sought to adopt Korean children. Immigration quotas, however, impeded the adoption and immigration of Korean children,\textsuperscript{64} and the special nonquota visas provided by the Displaced Persons Act were unavailable to non-European children. In response to the pleas of military personnel who had adopted or were seeking to adopt Korean children, Congress enacted emergency legislation in July, 1953. This legislation allotted up to 500 special nonquota visas to be issued for orphans adopted or to be adopted by United States citizens stationed abroad as members of the armed services or employees of the United States government.\textsuperscript{65}

While this allocation was relatively small and could be used only by United States military and government personnel, it was significant for two reasons. For the first time, the path for immigration of adoptable children was open to children of any nation. Even more important, the 1953 emergency allocation of orphan visas marked the first legislative encouragement of transnational adoptions that were usually interracial in character. The subsequent influx of Korean adoptive children was a contributing factor in the gradual weakening of legal and societal taboos against interracial adoption.

Within a month after the emergency allocation of the 500 nonquota visas, Congress moved to restore earlier post-war refugee relief legislation in the substantially new form of the Refugee Relief Act of 1953.\textsuperscript{66} Like the predecessor refugee relief acts, the Act of 1953 was only secondarily concerned with the immigration of adoptable children, being chiefly addressed to a new European refugee crisis caused by the flight of hundreds of thousands of East Europeans from Communist rule.\textsuperscript{67} Nevertheless, the Act of 1953 was a milestone toward the development of a nonrestrictive transnational adoption policy, because it removed once and for all the national origin restrictions of earlier displaced orphan legislation.\textsuperscript{68}

\textsuperscript{64} See F. AUERBACH, supra note 25, at 25-6.
\textsuperscript{67} See F. AUERBACH, supra note 25, at 25. The Refugee Relief Act permitted the issuance of 214,000 nonquota visas for certain refugees, and 205,000 of these visas were set aside for refugees or escapees from Communist nations. Id.
\textsuperscript{68} See supra note 66 and accompanying text.
Moreover, unlike the emergency legislation of a month before, the orphan provisions of the Refugee Relief Act could be invoked by adoptive parents whether or not they were employed by the United States government and stationed abroad.69

The Refugee Relief Act allotted 4,000 nonquota visas for eligible orphans to be issued over a three year period.70 Yet even the combined effect of the Refugee Relief Act and the earlier emergency legislation was insufficient to supply visas for all foreign children adopted over the course of the next three years. Over 800 children adopted or to be adopted by American citizens were stranded overseas without visas when the Act automatically expired in 1956.71 Facing the prospect of months of delay before Congressional action, the Department of Justice exercised its parole authority72 in January, 1957, to admit these children to the United States on a “temporary” basis until Congress could enact legislation lifting immigration restrictions against the orphans and granting them permanent residence.73 Congress responded later the same year with legislation that adjusted the status of the paroled Korean orphans,74 extended the nonquota visa provision for eligible orphans for another two year period, and, for the first time, lifted all numerical restrictions on the issuance of such visas.75

Beginning with the Act of 1957, Congress developed the essential scheme for today’s federal immigration policy with respect to adoptable children, but with one important exception. Even by 1957, Congress was unprepared to commit the immigration law to a permanent policy of facilitating transnational adoption. The orphan provision of the Act of

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69. 67 Stat. at 402.
70. Early drafts of the legislation, still focusing on the European problem, had allotted only 3,000 nonquota visas for orphans, but in the final version an additional 1,000 nonquota visas were allotted to provide for increasing numbers of children being adopted in Korea. H.R. REP. NO. 974, 83rd CONG., 1st Sess., reprinted in 1953 U.S. CODE CONG. & ADMIN. NEWS 2103, 2120.
75. Act of Sept. 11, 1957, Pub. L. No. 85-316, § 4, 71 Stat. 639 (1957) (current version at 8 U.S.C. § 1153 (1982 & Supp. 1986)). The 1957 Act also amended the Immigration and Nationality Act’s definition of “child” to include children who had been adopted abroad and had been in the legal custody of the adopting parent or parents for at least two years. Id. The purpose of this amendment was to aid American families that had adopted children while stationed abroad for extended periods of time before returning to the United States. The amendment was of no benefit to parents living in the United States and seeking to initiate a transnational adoption.
1957 was again a temporary law. It would expire automatically without further Congressional action. Over the next four years, two more temporary laws sustained and extended the orphan provision. Not until 1961 was the Immigration and Nationality Act amended to contain a permanent provision for the immigration of adoptable children. While the 1961 amendments largely mirrored the approach developed in 1957, the immigration of adoptable children was no longer pursuant to temporary, emergency measures, but was a permanent fixture of the immigration laws.

B. The Growth of Transnational Adoption

After 1961, transnational adoptions by United States citizens continued to increase in number, although most children involved in transnational adoptions were not "war orphans" or "displaced persons." For various reasons, even in peacetime Korea continued to lead all other nations as an origin of immigrant adoptive children. Europe ceased to be a primary source for immigrant adoptees because of its recovery from the war and return to normalcy. Indeed, as prosperity returned to Europe, it lacked sufficient numbers of adoptable children to satisfy the needs of its own adoptive parents. Latin American and Asian nations not touched

76. Id.
80. Kim & Carroll, Intercountry Adoption of South Korean Orphans: A Lawyer's Guide, 14 J. Fam. L. 223, 223-25 (1975). In 1985, well over half of all immigrant children adopted abroad or coming to the United States for adoption were from Korea. Korean children are available for adoption in abundance because of Korea's local prejudices that discourage adoption by Koreans, the establishment of Korean-American transnational adoption agencies, and the usually favorable attitude of the Korean government, which has enacted special legislation for transnational adoption. Id.; see also Alien Adopted Children, supra note 5, at 23 (statement of Friends of Children), 47 (statement of the U.S. State Dept.).
by war became important new origins of immigrant adoptees because of economic, religious, and cultural conditions that prevented the placement of many adoptable children in those nations. 82 During the Vietnamese War, and for a few years after, thousands of Vietnamese war orphans were adopted by United States citizens, and the much publicized "babylift" of children during the fall of Saigon greatly increased public awareness of transnational adoption. However, the Vietnamese surge of adoptable immigrants is largely over. 83 Over time, transnational adoption by American citizens has ceased to be a humanitarian act to "rescue" war orphans, and has become a widely accepted option for couples or even single parents seeking to create or expand families by means other than natural birth.

The importance of this option has grown as the availability of adoptable American-born children has declined. The shortage of American-born children, which persists to this day, is the product of the convergence of several social and demographic trends. First, the mortality of parents, which was once the principal cause of the availability of children for adoption, has declined drastically since the early part of this century. 84 Second, while the number of births out of wedlock has multiplied, single women are more likely to decide to keep their children. 85 Finally, increased use of birth control and abortion have reduced the number of unwanted births. 86 The consequences of the shortage of adoptable, American-born children are ever-lengthening waiting periods and soaring costs. 87

82. In 1985, children from Asia and Latin America constituted over eighty-five percent of immigrant adoptees. Detail Run 401, supra note 5.
84. See generally Samuels, They Call It 'Home', N.Y. Times, Aug. 14, 1949, § 6 (Magazine), at 38, col. 3.
85. Howe, supra note 27, at 180-81.
87. Whereas adoption of an American-born child was significantly less expensive than transnational adoption as late as the mid-1970's, transnational adoption today generally costs less than adoption of an American-born child. See generally Alien Adopted Children, supra note 5, at 84. By some accounts, the "black market" price of a healthy white infant is as high as $50,000. Why Adoptions Get Harder Every Year, supra note 86. Prospective adoptive parents are sometimes warned of ten year waiting periods for American-born children, but adoptive parents often can expect placement of a Korean-born child within a year after their application. I. Ellman, P. Kurtz, & A. Stanton, supra note 34, at 1257-58; C. Foote, R. Levy & A. Sander, supra note 34, at 397; Why Adoptions Get Harder Every Year, supra note 86; Jones, supra note 25 at 116. However, delays in the completion of a home study, which is required in all adoptions, may add to the time required for a transnational adoption in some states. Article, Law and Procedure in Intercountry Adoptions by
Were prejudice against interracial adoption not so pervasive, much of the "shortage" might be eliminated by white/black or Anglo/Hispanic adoptions of American-born children, because in truth, the "baby shortage" is primarily a shortage of healthy white infants.\textsuperscript{88} Of all the facets of the dictum that "adoption should mirror biology," the most widely held belief is that parents and children should be of the same race. But as the severity of the baby shortage increased, more and more prospective adoptive parents have questioned the dictum.\textsuperscript{89}

Sociological studies tracking interracial adoptions indicate that they have been as successful as racially homogenous adoptions.\textsuperscript{90} However, lingering institutional prejudices, local laws prohibiting interracial adoption, and a backlash by some minority groups has reversed any trend toward interracial adoption of American-born children. A few reported court decisions testing the validity of laws prohibiting interracial adoption have found government-imposed absolute bars against interracial adoption to be unconstitutional.\textsuperscript{91} Nevertheless, many race conscious adoption laws or policies remain in effect, and the spirit of the interracial adoption laws is perpetuated in the practices of private adoption agencies, which in many areas collectively exercise substantial control over the arrangement of moderately-priced adoptions.\textsuperscript{92} By express policy or more subtle means, many adoption agencies continue to adhere to a policy that an interracial adoption should not be allowed under any circumstances.\textsuperscript{93}

\textit{California Residents}, 8 U.C. \textit{Davis L. Rev.} 241, 249 (1975). The laws and bureaucracy of particular foreign nations may also slow the process depending on the national origin of the child. \textit{Id.}

\textsuperscript{88} \textit{Adoption Market: Big Demand, Tight Supply,} supra note 1, at 30; \textit{Lee, White Couples Battle Obstacles to Adoption of Nonwhite Children,} Wall St. J., Feb. 27, 1987, at 1, col. 1; \textit{R. Simon \& H. Alstein, supra} note 29, at vii.

\textsuperscript{89} By the late 1950's, the race barrier had already been cracked by the adoption of thousands of Korean children. From 1958 to 1967, more interracial adoptions were fostered by the Indian Adoption Project, which placed American Indian children born on reservations in the homes of white adoptive parents. \textit{R. Simon \& H. Alstein, supra} note 29, at 57-58; \textit{Howe, supra} note 27, at 182. Beginning in the early 1960's, increasing numbers of white couples adopted black children. \textit{R. Simon \& H. Alstein, supra} note 29, at 26; \textit{Howe, supra} note 27, at 182.


\textsuperscript{91} \textit{See, e.g., Drummond v. Fulton County Dept. of Family \& Children's Services, 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910 (1978); Compos v. McKeithen, 341 F. Supp. 264 (E.D. La. 1972); In re Gomez Adoption, 424 S.W.2d 656 (Tex. Civ. App. 1967).} Courts that have considered the questions generally have concluded that race may be a factor in granting an adoption, but that a state cannot impose an absolute bar against interracial adoption.

\textsuperscript{92} \textit{Lee, supra} note 88. In Houston, Texas, for example, child welfare authorities refer all healthy adoptable infants to private agencies, some of which refuse to countenance interracial adoption. Only hard-to-place children, such as older or handicapped children, are placed by public officials.

\textsuperscript{93} \textit{Crossen, supra} note 4; \textit{see also} correspondence with adoption agencies (available at South
For white couples open to interracial or interethnic adoption but frustrated by local adoption agency practices, adoption of a foreign-born child is one important alternative. Adoption of a foreign-born child is nearly always an interracial adoption. However, international adoption agencies that arrange such adoptions have, by their very purpose, embraced interracial adoption.

Adoptive parents may choose to adopt a foreign child because of a host of local agency restrictions regarding adoptive parent eligibility. Eligibility restrictions may require marriage, affiliation with a particular religion or with any established religion, medically determined infertility, childlessness, a minimum and maximum age, or a maximum weight. Applicants frustrated by such requirements can often qualify to adopt a foreign-born child. This is not to say that foreign nations and international agencies are without minimum requirements for adoptive parents. To the contrary, the requirements of some international agencies and foreign governments may be equally demanding or even more peculiar than those of American agencies. The diversity of international sources, however, is such that out-of-mainstream applicants may be able to locate at least one nation and one international agency for which they are qualified.

Texas College of Law). This institutional prejudice against interracial adoption has been fed since the early 1970's by the hard campaigning of the National Association of Black Social Workers, which has labeled interracial adoption "cultural and racial genocide." Lee, supra note 88; R. Simon & H. Alstein, supra note 29, at 22, 44-52; Howe, supra note 27, at 182. Similar accusations were made by Indian tribal leaders against interracial adoption of Indian children. R. Simon & H. Alstein, supra note 29, at 55-56. Today, interracial adoption of Indian children is restricted by the Indian Child Welfare Act, 25 U.S.C. § 1901 (1982). Agency rules against interracial adoption have been used not only to bar black/white adoptions, but also to bar a white couple's adoption of any "mixed" race child. See correspondence with adoption agencies (available at South Texas College of Law). In regions where Hispanic descent is popularly viewed as a "race," some agencies adhering to the interracial adoption bar will not place Hispanic or part-Hispanic children with non-Hispanic white couples. Id.

94. Correspondence, supra note 93; see also R. Simon & H. Alstein, supra note 29, at 16-17. Each agency has its own constellation of requirements. In theory, the requirements are designed to protect "the best interests of the child," but in an era in which applicants vastly outnumber available adoptable children, such requirements may also be used as one easy method of reducing the applicant pool. C. Foote, R. Levy & A. Sander, supra note 34, at 367.

95. Poland requires that at least one parent be of Polish ancestry. U.S. Couple Fight for Polish Child: Adoption Saga, L.A. Times, Aug. 21, 1983, at 1, col. 1. The Republic of South Vietnam requires that the adoptive parents have been married for at least ten years, that they be childless, and that one of them be at least thirty-five years of age. Law and Procedure in Intercountry Adoptions by California Residents, supra note 87, at 247 n.45. Pakistan prefers placement with a Pakistani Muslim family, unless the birth family is Christian and requests placement with a Christian family. Adoption and Foster Placement of Children, supra note 27, at 22.

96. For example, single parents are often disqualified or discouraged from adopting through local United States agencies. In some other nations, there are enough adoptable children in need of
By one estimate, transnational adoptions now constitute nearly sixteen percent of all adoptions between unrelated persons.97 If current trends continue, transnational adoptions could claim an even larger percentage of adoptions in the future.98 The principal restraint against further increases in the number of transnational adoptions is likely to be the reluctance of foreign governments to allow foreigners to adopt their children.99 However, wars or other world crises will also create new sources of adoptable children.

Transnational adoption could not occur on its present scale without a federal immigration policy which encourages transnational adoption. By lifting restrictions preventing or delaying the immigration of adoptable children, the federal government has endorsed transnational adoption as a means of satisfying the needs of its own citizens, as well as the needs of homeless children in foreign lands. However, state law is also important because transnational adoption is not only an immigration matter, but is also a family matter. The tradition of state control over family matters has persisted even with respect to transnational adoptions, so that the states ultimately control whether a transnational adoption will be granted.100 While federal immigration policy is designed to facilitate

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98. See supra notes 3, 5.
99. R. SIMON & H. ALSTEIN, supra note 29, at 64-65. Professors Simon and Alstein predicted in 1977 that intercountry adoption would not succeed as a "viable alternative for childless couples seeking to adopt. The originating countries jealously guard their children as vital national resources, no matter how poor their situations are or how intolerable Americans would consider their living conditions." Id. at 67. There may have been ample grounds for this prediction when it was made, because an end was then in sight for the immigration of Indochinese orphans, and other nations had begun to restrict transnational adoptions. Today, a number of countries forbid or discourage adoption by foreigners. Alien Adopted Children, supra note 5, at 50; Adoption and Foster Placement of Children, supra note 27, at 27-29. See also J. ERICHSEN & H. ERICHSEN, GANNINES: HOW TO ADOPT FROM LATIN AMERICA 145 (1981) (describing debate in Colombia over the relinquishment of Colombian children for adoption by United States citizens). Even Korea, which has been the recent mainstay of sources for transnational adoption, has occasionally sought to stem the flow of adoptable children by limiting adoptions by foreigners and encouraging more adoptions by Koreans.

100. See generally In re Burrus, 136 U.S. 586 (1890).
transnational adoption, that policy has not usurped any aspect of state control over the granting of adoptions.

Combined with the difficulties of accommodating foreign and state law, the division of power between federal and state governments creates risks of delay or failure in the completion of a transnational adoption. An examination of the current steps involved in transnational adoption illustrates the disjointed nature of the process.

III. THE PROCESS OF TRANSNATIONAL ADOPTION

A. The Foreign Relinquishment of a Child for Emigration and Adoption

The process of transnational adoption begins with a birth parent’s or foreign official’s relinquishment of a child, and ends with a state court’s issuance of a final adoption decree. The child becomes available for adoption by foreign relinquishment. A relinquishment may consist of a formal judicial or administrative proceeding, or a private transaction in the nation of the child’s birth. Federal immigration officials require that the process comply with United States immigration laws before a child is granted a visa to immigrate to the United States. Thus, immigration officials exercise some control over the relinquishment of a child destined for adoption in the United States.

However, the importance of the foreign relinquishment and the risks of an improper and invalid relinquishment can be fully understood only in the context of state adoption law. State courts have no control over the relinquishment process. They are involved only in the final adoption proceeding in the United States after the child has already immigrated, and has become a permanent resident. Nevertheless, state requirements are important throughout the transnational adoption process because state law will ultimately determine whether the adoption should be consummated. Although the relinquishment was pursuant to foreign law and occurred in a foreign land, a state court might also insist that the relinquishment be judged under the state’s standards.

Although state adoption law is very diverse, one basic generalization is possible: a child is not adoptable unless the parental rights of its birth parents have been properly terminated. In general terms, the birth parents’ rights over the child may have ceased for any of three reasons.

101. See, e.g., Lee v. Superior Court, 25 Ariz. App. 55, 540 P.2d 1274 (1975). The parent-child relationship is the most fundamental of human relationships. Once formed, whether by birth or by operation of law, it is not lightly severed. Furthermore, the law will recognize only one family for a
The birth parents may have surrendered their rights, the parents may have died, or the parental rights may have been terminated through the judicial process.

A child may become adoptable because one or both birth parents have voluntarily relinquished the child for adoption and surrendered their parental rights. The relinquishment may be in favor of particular adoptive parents or it may be granted to an agency or institution to place the child for adoption. A parent's voluntary relinquishment of a child for adoption terminates fundamental legal rights of the parent over the child and has far reaching and eventually irreversible consequences for both parent and child.

Not surprisingly, state laws typically impose stringent safeguards against a hasty, coerced, or otherwise improperly influenced parental relinquishment of a child for adoption. Most state laws require that a voluntary relinquishment be in writing and witnessed in some fashion, and a few states require that the relinquishment be made in court. State law may require that the relinquishment be executed only after birth, and it may prescribe a particular form of relinquishment that clearly and plainly alerts a birth parent to the effect of the relinquishment. A relinquishment often must be absolutely or conditionally revocable for at least a brief period of time after its execution. If the child was born out of wedlock but the birth father is known, state law may require his consent or provide him with an opportunity to object to the adoption. If a necessary relinquishment is omitted or is defective, the child is not adoptable. Furthermore, any adoption granted without a necessary legal safeguard in the child's best interest is not entitled to the benefits of that adoption.


See, e.g., ALASKA STAT. § 25.23.180(b) (1962); ARIZ. REV. STAT. ANN. § 8-117 (1974).


See, e.g., TENN. CODE ANN. § 36-1-114(d) (1984).

See, e.g., ALASKA STAT. § 25.23.070(b) (1962); GA. CODE ANN. § 19-8-4 (1982).


See, e.g., Ex parte Sullivan, 407 So.2d 559 (Ala. 1981) (relinquishment signed before birth and not notarized in birth mother's presence, invalid); In re Cheryl E., 161 Cal. App.3d 587, 207 Cal. Rptr. 728 (1984) (undue influence and fraud by social worker who obtained relinquishment); Tyson v. Dept. of Human Resources, 165 Ga. App. 414, 301 S.E.2d 485 (1983) (birth mother executed statutory form for consent to adoption by relative; consent invalid because adoptive parent named in the form was not a relative); Peeters v. Chicago Dist. Council of Carpenters Welfare Fund,
relinquishment may be void and subject to challenge by parties seeking custody of the child.\textsuperscript{109}

Even though the birth parents' legal rights over a child may have terminated because the birth parents are deceased,\textsuperscript{110} the death of the birth parents does not necessarily mean that the child is adoptable. The child might first become the legal responsibility of a guardian appointed by the birth parent's will, by a state court, or by operation of law. Such placement with a guardian may continue for the duration of the child's minority, or it may be only a temporary phase until the child can be placed for adoption. Generally, the guardian must relinquish the child for adoption in a manner similar to, but less exacting than, that of a birth parent's relinquishment. In some states, certain relatives of a child whose parents are deceased may be entitled to notice of an adoption proceeding, and they may be in a good position to oppose the adoption if they want to adopt the child themselves.\textsuperscript{111}

Finally, a child may become adoptable because a court intervened to terminate the parental rights of the birth parents.\textsuperscript{112} The birth parents' parental rights might be terminated involuntarily in an adoption proceeding brought by the adoptive parents, or they might be terminated in a proceeding separate from and in advance of the adoption proceeding. In either case, involuntary termination of a living birth parent's rights is an extreme measure reserved for cases of egregious abuse, abandonment, desertion, neglect, or inability to support.\textsuperscript{113} Even more than in the case of voluntary termination of parental rights, involuntary termination requires the highest safeguards and the full panoply of substantive and procedural due process rights.\textsuperscript{114} The belief that a child would be better off if raised by others is not a sufficient ground for terminating parental rights. Neither is the belief that termination is, in a general way, in the


\textsuperscript{109} See, e.g., People ex rel. Marabottini v. Ferr, 186 Misc. 811, 33 N.Y.S.2d 690 (1942).

\textsuperscript{110} See, e.g., CAL. CIVIL CODE § 224.1 (Deering 1982); CONN. GEN. STAT. ANN. § 45-61j (West 1958).

\textsuperscript{111} See, e.g., Ala. CODE § 26-10-3 (1975); Ga. CODE ANN. § 19-8-10 (Harrison 1982).

\textsuperscript{112} See, e.g., Ohio REV. CODE ANN. § 3107.07 (Baldwin 1983); PA. CONS. STAT. ANN. § 2521 (Purdon 1955).


\textsuperscript{114} Id.
child's "best interests." 115 Preservation of the integrity of the family requires that involuntary termination must not be allowed without proof of substantial danger and harm to the child. 116 If the birth parents' rights over the child are terminated involuntarily, their consent to the adoption of the child is not necessary, but other relatives may still be entitled to notice and an opportunity to oppose an adoption. 117

A child who has been legally separated from its birth parents for any of these reasons may pass through the custody of several guardians before the child is placed for adoption. Each guardian along the way may have acquired rights and responsibilities with respect to the child's future and availability for adoption. 118 American courts have typically shown great concern for the "chain of guardianship" of the child, in order to establish that the child has been irrevocably relinquished for adoption by each person who has held the power of guardianship over the child. 119

However, foreign standards for determining whether a child is adoptable may not resemble American legal standards. In some countries, there is no law of adoption, and hence no legal concept of adoptability. 120 Children whose birth parents are deceased or unable to provide support may be taken in by relatives, friends, or neighbors according to tradition, religious practice, or private agreement. 121 Even in nations with modern adoption laws, local custom, ignorance, or disregard for Western-style laws may be more potent. 122 Although the passage of parental rights from birth parents to newly appointed guardians may comport with local custom and tradition, the event may not be officially

115. Id. at 779.
117. See, e.g., ALA. CODE § 26-10-3 (1975).
120. R. SIMON & H. ALSTEIN, supra note 29, at 67. Ecuador, for example, has a law of adoption, but apparently has no clear legal definition of adoptability. Note, supra note 96, at 386. See also In re Rehman, 15 L.&N. Dec. 512 (BIA 1975) (Pakistan); In re Fakalata, 18 L.&N. Dec. 213 (BIA 1982) (Tonga).
121. Adoption and Foster Placement of Children, supra note 27, at 22-24; Baade, Interstate and Foreign Adoptions in North Carolina, 40 N.C.L. REV. 691, 710 (1962); In re Fakalata, 18 L.&N. Dec. 213 (BIA 1982). In some Latin American countries, a child may be adopted simply by entering the names of the adoptive parents as the child's birth certificate. The Service, however, would not necessarily recognize such an adoption. Letter from Jean Eriksen, Supervisor of Social Work, Los Ninos Int'l Adoption Center (Sept. 3, 1987).
122. In formerly British-ruled Kenya, for example, only twenty-six children were legally adopted from 1933-63 despite the presence of an adoption law. Adoption and Foster Placement of Children, supra note 27, at 22-24; see also LIBRARY OF CONGRESS LAW LIBRARY, MYA SAW SHIN
documented.\textsuperscript{123}

In countries where modern adoption laws are in effect, the procedures for determining and documenting a child’s adoptability and the procedures for effecting a relinquishment for adoption may not correspond to the requirements of American law. In some countries, such as South Korea, relatively modern and sophisticated laws exist to facilitate not only the adoption of children, but also the emigration of children for the purpose of adoption.\textsuperscript{124} Korea is currently the primary origin of children immigrating to the United States for the purpose of adoption. However, even Korean procedures for establishing the adoptability of a child do not necessarily conform to American standards of due process or to the technical requirements of state adoption law. Thus, a Korean birth mother who has relinquished a child for adoption may not have received the same procedural and substantive protection to which she would be entitled in an American jurisdiction.\textsuperscript{125}

For example, while many states prescribe specific requirements for the form and execution of a voluntary relinquishment, Korean documentation is not likely to fulfill these requirements.\textsuperscript{126} A Korean birth mother may have relinquished the child to an orphanage without a written relinquishment.\textsuperscript{127} Aside from the fact that nearly all states require a written relinquishment, the failure to put a relinquishment in writing may make proof of a child’s availability for adoption very difficult when the matter is presented to a state court thousands of miles away from the child’s birthplace and many months after the relinquishment. Even if the birth mother or a subsequent guardian executed a written relinquishment, the relinquishment is not likely to follow the form prescribed by the most exacting state statutes.

Because of the frequent absence of a written parental relinquishment, American adoptions of Korean children typically are premised on

\begin{itemize}
\item \textsuperscript{123} \textbf{Phuong-Khanh Nguyen, Laws and Policies of Certain Southeast Asian Countries Regarding Sending Orphans Abroad for Adoption} 7 (1975).
\item \textsuperscript{124} For example, in South Vietnam (before its annexation by North Vietnam), if birth parents placed a child in an orphanage the child was often regarded as “abandoned,” hence adoptable, whether or not the birth parents signed a relinquishment. However, it appears that Vietnamese parents sometimes used orphanages as temporary refuges for their children, without any intention of relinquishing their children for adoption. See Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1197 (9th Cir. 1975); Comment, Immigration Laws. Procedures and Impediments Pertaining to Intercountry Adoptions, 4 DEN. J. INT’L LAW & POLICY 257, 266-67 n.52 (1974).
\item \textsuperscript{125} Kim & Carroll, supra note 80.
\item \textsuperscript{126} Id.
\item \textsuperscript{127} Id.
\end{itemize}
the relinquishment of the child's last Korean guardian. However, without an accompanying relinquishment by the birth parents or a judicial decree terminating the birth parents' rights, there may be, from the perspective of American law, a gap in the chain of guardianship. American law would insist on proof that a guardian obtained his authority by virtue of a parental relinquishment or a judicial decree. In Korea, however, the right of guardianship automatically vests in whoever receives physical custody of a child. There is no need for an express parental relinquishment or court decree to give the power of guardianship to an orphanage to which a birth mother has entrusted her child. Thus, while there may be a guardian's relinquishment for a child, there will be no evidence (satisfying American standards) that the guardian lawfully acquired the power to place the child.

Even more difficult problems arise with respect to children who are refugees from areas reduced by war to near anarchy, or from nations with whom United States relations are unfriendly. Documenting the origin of child refugees after World War II was often difficult, but later wars in Third World countries have created even greater complications. During the mass exodus of refugees from Vietnam after the fall of Saigon in 1975, many children were orphaned or abandoned and then transported to the United States under circumstances that made it impossible to reconstruct a child's origin or adoptability. After thousands of Vietnamese "orphans" were flown to Western nations in the "babylift," it was discovered that many of the children were not orphans at all, but had been left at orphanages on a temporary basis by living parents. The nonexistence of written relinquishments or other records, the chaotic conditions under which the children were placed on planes, and the acrimonious relations between the United States and the Hanoi government made it extremely difficult to sort out the history and status of each child.

Vietnamese children who were part of the "boat people" refugees after the fall of Saigon experienced similar difficulties. In some cases, desperate parents entrusted children to escaping friends or relatives without any official action in the hope that the child would arrive safely in the

128. Id.
129. Id. at 226-30.
130. See Samuels, They Call It 'Home', N.Y. Times, Aug. 14, 1949, § 6 (Magazine), at 38, col. 3.
131. See Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1197 (9th Cir. 1975).
132. Id.
United States. Even when the parents intended to accompany their children in the escape, confusion or panic sometimes caused families to be separated onto different boats. Some parents purposely scattered the family onto several boats to increase the probability that some members safely would reach refugee camps. When very young children arrived in refugee camps unaccompanied by parents, the reason and purpose of their separation from parents was often uncertain. Determining whether their parents were still living in Vietnam was especially difficult because of political conditions in that country. A letter to a Vietnamese friend or relative still living in Vietnam would be certain to alert local authorities that the addressee was associated with an emigre, and might even raise suspicion of a conspiracy.

In some cases, a child is not only relinquished under foreign law but is also adopted under foreign law in a foreign judicial proceeding. However, adoption overseas does not necessarily avoid the difficulty of obtaining a state court’s acceptance of a foreign relinquishment. It is prudent, if not absolutely necessary, to readopt a child under state law after the child’s immigration. The readoption proceeding before a state court may require a reexamination of the circumstances and validity of the child’s adoptability. In that event, the incompatibility of a foreign relinquishment process and state adoption law may be as serious an issue as in the case of a child who is being adopted for the first time.

In sum, the character and form of a child’s foreign relinquishment for adoption may be of infinite variety and of little or no formality or documentation, in contrast with the relatively standardized, carefully documented, and judicially supervised relinquishments commonly required under American law. Even if the relinquishment of the foreign-born child’s last guardian fulfills the requirements of state law, it may suffer from a gap in the chain of guardianship. Whether a strict state adoption law is fully able to cope with the vagaries of a foreign relinquishment may depend largely on whether the law includes a special enabling provision for transnational adoptions. Some states have ignored

134. Id.
135. Id. at 545.
136. This practice was typical under the post-war refugee relief laws when many European children were adopted by American citizens stationed abroad. Adoption overseas is also common in the transnational adoption of Latin American children because of national laws requiring adoption in a local court before a child’s emigration. Comment, supra note 123, at 257, 261.
137. Id.
138. Id. at 262.
the problem, others have taken a variety of approaches in recognizing and dealing with foreign relinquishments. The state process of adoption will be considered more fully below, but first the intermediate stage, federal approval of immigration for purposes of adoption, must be explored.

B. The Immigration Process

After the foreign relinquishment of a child for adoption, and before the issuance of a state court order of adoption, federal immigration officials must grant the child admission to the United States as an immigrant for the purpose of adoption.\textsuperscript{139} Federal officials have no authority to grant an adoption, but in granting admission to a child they must make an administrative determination that the child can be adopted and that the petitioners for the child's adoption are qualified to be adoptive parents.\textsuperscript{140} In making such determinations, federal officials duplicate determinations that later must be made by a state court in the adoption proceeding, but the only necessary consequence of a favorable decision by federal immigration officials is that the child is eligible to immigrate to the United States.\textsuperscript{141}

1. Methods of Approval

Under the current orphan provisions of the Immigration and Nationality Act, there are three principal paths by which an adoptable child may be approved for immigration.\textsuperscript{142} The first and most often used method is available for petitioners who have recently adopted a child overseas, or who intend to adopt the child after the child's immigration.\textsuperscript{143} The adoptive or prospective adoptive parents petition to have the child declared an "immediate relative" pursuant to the Immigration and Nationality Act § 101(b)(1)(F).\textsuperscript{144} If the child qualifies as an "orphan," and if the petitioners have fulfilled certain other requirements, the child will be classified as an immediate relative exempt from the numerical limitations applicable to most other immigrants.\textsuperscript{145}

A second method is available primarily for adoptive parents who have resided overseas for an extended period of time during which they

\textsuperscript{139} Id.
\textsuperscript{140} Id. at 262-63.
\textsuperscript{141} Id.
\textsuperscript{142} 8 U.S.C. § 1101 (1982).
\textsuperscript{143} Id.
\textsuperscript{145} Id.
adopted a foreign born child in a foreign proceeding.\textsuperscript{146} When the parents return to the United States and seek to bring their child with them, they may petition to have the child declared an “immediate relative” pursuant to the Immigration and Nationality Act § 101(b)(1)(E).\textsuperscript{147} Subparagraph (E) is less used than subparagraph (F), because it is applicable only to a child who has already been adopted and who has been in the legal custody of and who has resided with an adoptive parent for at least two years.\textsuperscript{148} Apart from the two year legal custody and residence requirement which renders Subparagraph (E) unavailable for most adoptive or prospective adoptive parents, the provision is procedurally less demanding than Subparagraph (F).\textsuperscript{149}

A third method for transnational adoption involves the Attorney General’s exercise of his discretionary parole authority under the Immigration and Nationality Act.\textsuperscript{150} In an emergency situation, the Attorney General may admit alien paralees who would not otherwise have qualified for admission or who must be admitted immediately for extraordinary reasons.\textsuperscript{151} However, the parole status is only temporary.

\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id. § 1182(d)(5) (1982). It is the policy of the Service not to rely on the parole provision in routine transnational adoption cases. \textit{Alien Adopted Children}, supra note 5. The parole power has been exercised on a large scale with respect to alien orphans on two occasions. First, several hundred Korean orphans were paroled in 1957 when the number of nonquota visas for that year was exhausted. Second, hundreds of orphans carried from Vietnam in the “babylift” operations were paroled because of the imminent collapse of the South Vietnamese government. \textit{See} Nguyen Da Yen v. Kissinger, 528 F.2d 1194 (9th Cir. 1975).
Eventually it becomes necessary to seek an adjustment of an orphan parolee’s status from parolee to permanent resident.\textsuperscript{152} For an orphan parolee, eligibility for an adjustment in status would be based on the same standards that are used in the classification of a prospective adoptive child as an immediate relative under Section 1101(b)(1).\textsuperscript{153}

Whether an adoptive or prospective adoptive child enters the United States as a parolee on an emergency basis, or as an immigrant “immediate relative,” the orphan provisions of the immigration laws accord such a child a high priority among immigrants.\textsuperscript{154} Special treatment is necessary for such children because delays that are commonly experienced by other immigrants might make transnational adoption impractical. For parents seeking to adopt an infant, a delay of more than several months might negate one of their primary aims. If the child is in a region of war, civil disorder, or extreme poverty, a delay of several months might be risky to child’s well-being. For children placed with adoptive parents overseas, delayed immigration and possible separation from the adoptive family may be a great emotional hardship.

Adoptive or prospective adoptive children enjoy certain advantages over other immigrants. The immigration laws eliminate one major cause of delay, the wait for a numerically restricted visa, by categorizing adoptive and prospective adoptive children as “immediate relatives” of United States citizens or residents, thereby circumventing numerical restrictions applicable to other immigrants.\textsuperscript{155} In addition, the Service has developed expedited procedures for the processing of immigration petitions for adoptive or prospective adoptive children.\textsuperscript{156} For example, the petitioning prospective parents for a child immigrant may file the petition and the Service may begin to process the petition even before a child has been selected or matched with the parents.\textsuperscript{157} In this way, preliminary matters such as the qualifications of the petitioners can be determined in

\textsuperscript{152} A petition to have the child classified as an immediate relative would be inappropriate, because such a petition may be entertained only with respect to a person not yet admitted to the United States. See \textit{In re Handley}, 17 I\&N. Dec. 269 (Reg. Com. 1978); DEPT. OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, OPERATIONS INSTRUCTIONS, \$ 204.3(d).

\textsuperscript{153} 8 C.F.R. \$ 204.1(b)(2). See generally Nguyen Da Yen v. Kissinger, 528 F.2d 1194 (9th Cir. 1975).

\textsuperscript{154} \textit{Id}.

\textsuperscript{155} Strickler, \textit{Adapted and Prospective Adoptive Children}, 30 INS REP. 8 (Spring, 1982).

\textsuperscript{156} \textit{Id}; U.S. DEPT. OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, THE IMMIGRATION OF ADOPTED AND PROSPECTIVE ADOPTIVE CHILDREN 21-22 (1984); U.S. DEPT. OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, OPERATIONS INSTRUCTIONS \$ 204.3.

\textsuperscript{157} Strickler, \textit{supra} note 155.
advance while they or their agency are locating a child. Also bureaucr
cratic entanglements are more easily resolved for such children because the petitioning prospective parents, who are most often United States citizens and voters, can seek and are likely to obtain the intervention of sympathetic Congressmen.

2. Convergence of Federal and State Law

Federal policy favoring the expedited immigration of adoptive and prospective adoptive children is undoubtedly a constitutional prerogative of the federal government. The federal government exercises plenary and exclusive authority to regulate the admission of aliens into the United States. 158 However, when federal officials grant admission to an adoptive or prospective adoptive child, they are not only exercising traditional federal authority over immigration, they are also making judgments that bear a strong resemblance to state family court decrees. If the child is to be admitted, there must be a determination that the child is adoptable and will be adopted if not already lawfully adopted. To make such findings, federal officials must necessarily range into the territory of parent-child relations; it is here that federal immigration policy overlaps with both foreign and state law.

a. Qualification of Adoptive Parents

In the usual case, immigration officials first determine whether the petitioners are qualified to adopt, even before any particular child has been identified as the beneficiary of the petition. 159 The determination of whether the petitioners are qualified involves a mixture of federal and state law. First, federal officials must determine the petitioners' qualifications under state law, and must predict that a state court would approve the petitioners as adoptive parents. 160 Naturally, this prediction must take account of the law of the state in which the petitioners will seek to adopt. To this extent, the federal standard for adoptive parents relies on

159. 8 C.F.R. § 204.2 (1982).
160. The federal interest in determining whether the petitioners are qualified to be adoptive parents involves an excursion into family law that is unusual for the federal government, but can be justified on practical grounds. The purpose of the orphan immigrant provisions is to permit a child to immigrate for the purpose of adoption, but this purpose would be frustrated if the petitioners were unable to obtain an adoption decree by a state court. If the adoption fails, agency or local government officials would place the child with new applicants. The child's immigration would not be for nought, but the wasted time and resulting delay in the child's placement in a permanent family environment could be detrimental to the child's well-being.
state law. Federal immigration law requires the petitioners to show that they have satisfied the "preadoption" requirements of state law. Immigration officials work closely with state officials to ensure complete and correct application of state requirements.

Most state adoption laws also direct a court to consider subjective qualifications of prospective adoptive parents, such as financial, physical, mental, and moral suitability. For some petitioners, a prediction of success based on these criteria would be speculative. As a practical matter, however, the eligibility of the petitioners will be determined by the state's own process before federal officials act on the immigration petition. State adoption laws generally require a professional home study of the prospective parents as a preadoption requirement. Consequently, in order to prove compliance with all state preadoption requirements, the petitioners must provide federal officials with a favorable home study by a state licensed social worker. If state law does not provide for a professional home study, federal immigration law independently requires a favorable home study. Although a home study is not necessarily binding on state courts, they routinely accept the recommendations of professional home studies. A reexamination of the prospective parents' qualifications by a court is likely only when new and troubling background evidence has come to light or when the prospective parents and child have not adapted well during a trial custody period.

While the importance of predicting the success of state adoption proceedings would certainly justify federal application of state parental qualifications, immigration law does not stop at incorporating state parental qualifications; it also establishes separate federal standards of eligibility. For example, regardless of state marital or age requirements,

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161. 8 U.S.C. § 1101(b)(1)(F)(1982). See generally Alien Adopted Children, supra note 5, at 66. Immigration officials may require a petitioner to provide a statement from a state welfare department setting out requirements for adoption in the state. Id. at 35, 42, 61-63; Article, supra note 87, at 248. Immigration officials also obtain a report from the appropriate state welfare department regarding the qualifications of the prospective adoptive parents under state law. Alien Adopted Children, supra note 5, at 58-59. If the child already has been adopted overseas and has lived with the adoptive parents for two years, it is unnecessary, for purposes of immigration law, to establish that preadoption requirements are satisfied. 8 U.S.C. § 1101(b)(1)(E) (1982). However, if the petitioners are not qualified to adopt under state law, a question may arise as to whether it is possible for the petitioners to "readopt" the child to obtain all the benefits of an adoption under state law.

162. 8 C.F.R. § 204.3(f) (1987).

163. 8 U.S.C. § 1154(d) (1982). A home study is not required by federal law if the child was adopted overseas and has lived with the adoptive parents for two years before the child's immigration, but a state court may demand a home study if the petitioners attempt to "readopt" the child to obtain all the benefits of an adoption under state law.

federal law requires that single prospective adoptive parents must be at least twenty-five years of age.\footnote{8 U.S.C. § 1101(b)(1)(F) (1982).} Federal law also authorizes immigration officials to decide for themselves the financial, mental, and moral suitability of the petitioners by requiring that immigration officials be satisfied that "proper care will be furnished the child if admitted to the United States."\footnote{Id.} Federal officials generally accept the home study recommendations of state licensed social workers, but they could disagree and reject a petition by prospective parents otherwise qualified under state law.\footnote{See, e.g., In re Russell, 11 I&N. Dec. 302 (Deputy Assoc. Comm'r 1965). See generally Alien Adopted Children, supra note 5, at 37-38. Apparently, immigration officials rarely disapprove parents who have a favorable state agency report. Id. at 38. H.R. REP. No. 1301, 95th Cong., 2d Sess. 2, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 2301, 2302.} The provision for an independent federal review of the petitioners' suitability as parents appears to be an extension of the long standing immigration policy that aliens who are likely to become public charges should be excluded from the United States.\footnote{In the past, the Service has required home studies for nonpreference immigrant orphans (orphans immigrating other than as "immediate relatives"), even though there is no express statutory home study requirement for such immigrants, because of a statutory exclusion for persons likely to become public charges. Alien Adopted Children, supra note 5, at 30; see also U.S. DEPT. OF STATE, 9 FOREIGN AFFAIRS MANUAL pt. III § 5.}

b. Adoptability of Child

If the petitioners are deemed to be qualified, immigration officials must also determine the adoptability of the child named in the petition. The issue of adoptability is usually more difficult and is the most frequent reason for the denial of a petition.\footnote{Alien Adopted Children, supra note 5, at 68.} Again, the adoptability issue requires federal officials to make a decision that traditionally has been within the province of state courts. In contrast with the issue of parental qualifications, however, the issue of adoptability is decided under a purely federal standard for purposes of immigration law. Immigration officials do not predict whether a child will be regarded as adoptable under state law; they determine only that the child is adoptable under the standard of federal immigration law. In many respects, the federal standard resembles the standard of adoptability commonly found in state adoption laws, and ideally, compliance with the federal standard would also constitute compliance with the relevant state standard. In some respects, however, the federal standard is different from most state standards. The federal definition of an adoptable child is a child under

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\textsuperscript{166} Id.


\textsuperscript{168} In the past, the Service has required home studies for nonpreference immigrant orphans (orphans immigrating other than as "immediate relatives"), even though there is no express statutory home study requirement for such immigrants, because of a statutory exclusion for persons likely to become public charges. Alien Adopted Children, supra note 5, at 30; see also U.S. DEPT. OF STATE, 9 FOREIGN AFFAIRS MANUAL pt. III § 5.
sixteen who "is an orphan because of the death or disappearance of, 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 and has in writing irrevocably released the child for emigration and adoption. . ." 170 This standard of adoptability is at once both unusually restrictive and unusually broad.

Regarding a child whose birth parents are deceased, federal law follows state law in treating the child as adoptable. 171 As for a child whose living birth parents have executed a voluntary relinquishment, however, federal law may preclude immigration even if the child is adoptable under state law. Federal law allows for the voluntary relinquishment of a foreign child for adoption in the United States only if the child has one living parent. 172 Thus, a child with two living parents cannot be voluntarily relinquished to immigrate to the United States as a prospective adoptive child. This aspect of the standard may be a result of a presumption by federal lawmakers that only a single parent could be justified in relinquishing his or her child for adoption. As a consequence, desperately poor, two-parent families cannot voluntarily relinquish a child for adoption in the United States. 173

Federal law is also more restrictive than state law with respect to voluntary relinquishments in requiring proof that the sole parent "is incapable of providing the proper care" for the child. 174 On the other hand, if a child is abandoned, it is unnecessary to obtain a relinquishment or to prove the child has but one parent who is unable to support the child. 175 Thus, the federal definition of adoptability may encourage parents to abandon children under circumstances that are demeaning and dangerous for the child. If large numbers of children were to be abandoned for this reason, it might become even more difficult to distinguish truly abandoned children from those temporarily lost or separated from parents.

The federal standard with respect to voluntarily relinquished children is also sufficiently nonrestrictive to allow the immigration of a child for adoption even though the child is not adoptable under state adoption

171. Id.
172. Id.
173. Jones, supra note 7, at 118. A child with two living birth parents may be treated as having only one parent, a mother, if the child is illegitimate and has not acquired a stepfather. 8 C.F.R. § 204.2(d)(1)(i) (1987).
law. For example, with respect to the form of a relinquishment, federal law states only that the relinquishment must be in writing and irrevocable.\textsuperscript{176} State laws, however, often prescribe stringent procedural safeguards for such a relinquishment.\textsuperscript{177} Therefore, a child's relinquishment for emigration and adoption may comply with foreign law and may satisfy the federal requirement of an irrevocable written relinquishment, and yet the relinquishment may fail to satisfy the requirements of state law.

The federal standard is also less restrictive than state law with respect to children who may be adoptable because of a termination of parental rights without a voluntary relinquishment. Under state law, birth parents may involuntarily lose their rights over a child by order of a court in an adoption proceeding or in a proceeding separate from and in advance of the adoption proceeding. Proper grounds for involuntary termination of parental rights might include "abandonment" or "desertion," but state laws often provide very specific definitions of these terms.\textsuperscript{178} A state judicial determination of abandonment or desertion can be made only after a minimum effort to notify the birth parent of proceedings that could lead to such a determination, only after the birth parent has been afforded an opportunity to participate in the proceedings, and only if the proceedings comport with American standards of due process.\textsuperscript{179} Federal immigration law and regulations, in contrast, do not require a judicial decree of abandonment. If a foreign court has not terminated the rights of the birth parents, immigration officials may conduct their own investigation and make their own determination of abandonment. While this determination may be reasonably well supported, it


\textsuperscript{177} State law may require that the relinquishment must be in writing and in a prescribed form, that it must be executed under circumstances conducive to a knowing, intelligent and uncoerced decision of the birth parent, and that it must provide for at least a brief period of revocability. In some states the relinquishment must be executed before a court.

\textsuperscript{178} Many state statutes provide that a presumption that a child has been "abandoned" does not arise until the passage of a stated period of time. See, e.g., ARK. STAT. ANN. § 56-202(7) (Supp. 1985) (rebuttable presumption of abandonment arises when parent has failed to support or maintain regular contact with a child without just cause for one year); DEL. CODE ANN. tit. 13, § 1101(1) (1974) (abandonment occurs when parent has not provided regular and reasonable financial support and has not initiated substantial contacts for period of six months or for period of ninety days in the case of a newborn infant).

\textsuperscript{179} See, e.g., N.M. STAT. ANN. § 40-7-36 (1978), providing for certain time periods of separation or abandonment serving as basis for "implied consent or relinquishment," but "[a] court shall not imply consent or relinquishment under this section unless the parents . . . have been served with notice setting forth the time and place of the hearing at which the consent or relinquishment may be implied."
will not necessarily be made in accordance with state procedural or substantive requirements. For example, the efforts of immigration officials to locate or communicate with the birth parents may not satisfy the notice requirements of state law. Immigration officials may also find a child to be abandoned without the passage of any particular length of time, while state law generally would require or encourage a specific waiting period for the birth parents to come forward to accept and to fulfill their responsibilities. In some cases, the birth parents’ rights will have been terminated by foreign administrative or judicial action. If so, it is still possible that many of the American statutory or due process safeguards will not have been observed.

Finally, federal immigration law includes among adoptable children those who are without their parents “because of . . . separation or loss. . . .” The scope of these bases of adoptability is uncertain. They appear to be in response to a problem experienced under the refugee relief acts with respect to children whose parents had disappeared in the chaos of war and to children of eastern Europe seized by the Nazis to be reared in Germany. For some children, it was simply impossible to reconstruct an origin. There are cogent reasons for regarding such children as adoptable after some point. When reasonable efforts to reunify a family have failed and there is little prospect that a child’s origin can be determined or that its parents are still living, it is in the child’s best interests to begin a new family. Undoubtedly, today there are children in the United States and abroad whose origin is similarly obscured. Some provision for the adoption of such children is clearly desirable. However, neither Congress nor the Service has developed any guidelines for determining when a child lost or separated from parents

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180. A routine investigation by immigration officials consists of interviewing the representatives of a participating adoption agency and interviewing any known birth parents. Alien Adopted Children, supra note 5, at 35. While immigration officials have the authority to conduct a more thorough investigation, they are unlikely to do so unless they are presented with evidence of fraud. Id. at 121. Immigration officials may be hampered in performing even a routine investigation of public records with respect to the child because of the inadequacy of public record-keeping in some developing countries. Id. See also FOREIGN AFFAIRS MANUAL, supra note 168, § 5.2.


183. Many of the children adopted under the Displaced Persons Act of 1948 were slavic children taken from their homes by German officials during World War II to be raised in Germany. See, e.g., N.Y. Times, Apr. 22, 1949, at 8, col. 5.

184. Samuels, supra note 130.

185. More recent examples of the enormous difficulties of reconstructing the origin and family status of war-refugee children can be found in the “babylift” of hundreds of allegedly orphaned Vietnamese children after the fall of Saigon and in the escape of thousands of “boat people,” including children and infants, from South Vietnam.
should be regarded as adoptable. The absence of guidelines could result in premature placement of a child for adoption. The absence of guidelines could also cause immigration officials to be indecisive, and could cause unnecessary delay in the child's placement for adoption.

Because there are no federal standards for determining whether a child is lost or separated, there can be no assurance that a federal determination that a child is lost or separated would satisfy state law. A state court confronted with the issue of adoptability of a "lost" child would be expected to exercise extra caution before it terminates the rights of the birth parents and grants an adoption. In particular, a court may inquire whether there has been an adequate search for the parents, whether there has been a judicial finding that family reunification is beyond reasonable hope, and whether circumstances have reached a point at which the goal of family reunification should be abandoned in favor of placing the child for adoption. A state court might require a minimum waiting period, as in the case of an alleged abandonment. 186

The potential for conflict between federal immigration law and state adoption law is important because the decision of immigration officials does not finally settle the issue of adoptability. The act of immigration officials in finding that the petitioners are eligible to adopt and that the prospective adoptive child is eligible for adoption accomplishes only a necessary step for bringing the child into the United States. Immigration officials make those findings for purposes of federal immigration law, so that the child can be deemed an "immediate relative" and may lawfully immigrate to the United States. The child will also ordinarily be in the custody of the petitioners or will be placed in their custody upon his arrival, but the child does not thereby become the lawful adoptive child of the petitioners. The last and most important step, a final adoption order, is controlled by a state court and is subject to state adoption law.

C. State Adoption Proceedings

1. The Adoption Process

The final step and ultimate goal in a transnational adoption is the issuance of an adoption decree in a state court proceeding. Immigration officials may grant the child lawful residence in the United States, but only a state court grants an adoption decree which makes the child the petitioners' child for all purposes under the law. Before the state court

may enter the decree, however, it must decide two basic issues previously
decided by federal immigration officials: whether the petitioners are
eligible to adopt and whether the child is adoptable. Even though immigra-
tion officials have decided those issues in favor of the petitioners, and
have granted the child "immediate relative" status for purposes of immi-
gration, there is no guarantee that a state court will find the petitioners
eligible and the child adoptable. Immigration law places no constraints
upon the independence of a state court in granting adoptions, and a state
court may be guided by different standards — especially with respect to
adoptability.

Many immigrant children admitted to the United States under the
orphan provisions have already been adopted by American citizens under
foreign law, but a foreign adoption decree does not necessarily relieve the
family of the necessity of obtaining a state court adoption decree or of the
risk that a decree will be denied. There may be some question whether
the foreign decree of adoption would be recognized by an American
court for purposes of the descent and distribution of property, survivor's
benefits, or child support.187 Readoption in a state court would guaran-
tee full recognition of the adoptive family for all purposes under the
law.188 As a practical matter, a state adoption decree may also be needed
to obtain a state-issued birth certificate for the child.189 Finally, a state
adoption decree would fortify the adoptive family against later challenges
to the validity of the adoption.190 Without readoption, a foreign decree
might not be recognized in a future custody dispute, or the decree, by its
nature, may be subject to modification or abrogation pursuant to the law
under which it was issued.191 In contrast, a final state court decree
would not only assure recognition of the adoptive family but, under
many state laws, would become absolutely unassailable after a certain
passage of time.192 A state court decree would also be entitled to full

Wash. 2d 510, 364 P.2d 444 (1961). Some states have enacted statutes that would give a foreign
adoption decree the same finality as a decree issued by an American state court. See infra note 226.
Even under these statutes, a foreign decree might still be subject to attack on public policy grounds.
See infra note 227. Moreover, an adoptive family residing in a state that has enacted such a comity
statute may later move to a state without a comity statute.

188. See International Adoption, supra note 81, at 240.

189. Id.; Alien Adopted Children, supra note 5, at 10.

190. See International Adoption, supra note 81, at 240.

191. Breckenridge, Non-Recognition of Foreign Abandonment Decrees in United States Adoption

192. See, e.g., ALASKA STAT. § 25.23.140(b) (1983), which provides:
Subject to the disposition of an appeal, upon the expiration of one year after an adoption
decree is issued, the decree may not be questioned by any person including the petitioner,
faith and credit in other states, an advantage not available to decrees of foreign nations.\textsuperscript{193}

Most adoptions are granted with no more controversy than a civil wedding, but the stakes in an adoption proceeding can be very high. The denial of the petition could be a great emotional and psychological blow to the petitioners and the child. In many cases, the parties not only hope to be an adoptive family; they are, by the end of the proceeding, a psychological or de facto family because a final decision may not come until after the petitioners and child have had many months in which to bond as a family.

The likelihood of preadoption bonding is increased by built-in delays in the adoption process. In many cases, a final decision by the court is delayed by law or by the requirements of an adoption agency for up to a year after the placement of the child or the filing of an adoption petition, in order that the petitioners and child will have a "trial" custody period.\textsuperscript{194} The purpose of the trial period is to provide social workers and the court an opportunity to test the compatibility of the petitioners and the child. Even though a home study will have likely been completed before the trial period begins, the trial period may reveal previously undetected flaws in the petitioners' ability to be parents to the child. If a court granted an adoption decree without a trial period, and the family's incompatibility became apparent in the months that followed, it would be much more difficult to terminate the adoptive parents' custody of the child, because the adoptive parents would be entitled to all the rights of birth parents. If, after a trial period, the court doubts that adoption by the petitioners would be in the general best interests of the child, it can simply deny the petition and return custody of the child to the agency involved in the adoption. While the trial custody period provides the basis for a better evaluation of parental qualifications, it also postpones a final determination as to other issues, such as the adoptability of the child, because a hearing on the petition is not likely until the

\textsuperscript{193}Id. Like birth parents, the adoptive parents may still be subject to state intervention to terminate their parental rights for gross neglect or abuse.

\textsuperscript{194}See, e.g., ARIZ. REV. STAT. ANN. § 8-113(c) (Supp. 1987); 22 CAL. ADM. CODE 30647 (1972).
end of the trial period. Thus, during the trial period, which may last as long as a year, the prospective adoptive family's future is uncertain, and this uncertainty may affect the development of a healthy family relationship.

The delayed resolution of the merits of an adoption petition may be a problem whether the prospective child is foreign-born or American-born. However, transnational adoption differs from adoption of an American-born child in one important respect that compounds the risk of a denial of the decree. The relinquishment of a foreign-born child for adoption occurs under foreign law, and more often than not, foreign law is in conflict with state law regarding the process by which a child is relinquished and becomes adoptable. In many states, adoption statutes take no cognizance of transnational adoptions. Supporting a petition for adoption may then require reliance on complicated international law arguments of questionable effectiveness. Furthermore, if facts are in dispute and further evidence is needed, it may be difficult or impossible to obtain witnesses or documents concerning the child's birth in another nation thousands of miles away.

2. State Court Reconsideration of Adoptability

Notwithstanding the numerous questions that could arise in a state court in a transnational adoption, the number of cases in which an issue as to adoptability has arisen is relatively small, perhaps no more than two percent of all transnational adoptions. There are several possible reasons why so few transnational adoptions lead to any controversy about adoptability.

First and foremost, transnational adoption proceedings are rarely contested. If an issue of adoptability is to be raised, it usually must be raised sua sponte by the court. Judges, however, are likely to find an uncontested adoption proceeding to be a pleasurable respite from a docket filled with divorces, custody disputes, and more serious civil and

195. A few states provide for "interlocutory decrees" in which issues such as adoptability are decided before or at the beginning of the trial custody period. See, e.g., Va. Code Ann. § 63.1-226 (1987). However, an interlocutory decree generally may be revoked for any "good cause" until a final decree is entered. See, e.g., Va. Code Ann. § 63.1-227 (1987).
196. See infra, notes 198-201 and accompanying text.
197. Most estimates are in the one to two percent range. See, e.g., Alien Adopted Children, supra note 5, at 63; Telephone interview with Glenn Noteboom, Director of Social Services, Holt International (July 2, 1987). In particular states the problem may be much more severe. For example, courts in some parts of Texas frequently question or resist transnational adoptions. Telephone interview with Donna Detjam, Los Ninos International Adoption Center, Austin, Texas (Aug. 11, 1987).
criminal matters. Where the papers appear to be in good order and the petition is supported by an established adoption agency, the judge is not likely to raise controversial issues. Judges will rarely press uncontested legal issues to challenge the legal viability of a bonded, successful adoptive family.

A second reason that a child’s adoptability is rarely questioned in an adoption proceeding is that state courts routinely defer to the expertise of any licensed adoption agency or public welfare department that supports the petition. Modern adoption law places great reliance on the judgment of public or licensed private social workers in effecting a child’s relinquishment for adoption, selecting suitable adoptive parents, and performing a home study. Most transnational adoptions are arranged by licensed agencies, and in some states, an adoption must be arranged by a licensed agency. The function of an agency is to assign a child to adoptive parents, collect and review pertinent documentation about the child’s adoptability, and guide the adoptive parents through the immigration and adoption process. In every state, the agency or a licensed social worker also makes recommendations to the court concerning the qualifications of the adoptive parents. A court may routinely presume that the agency has covered all the bases and that there is no reason to question the expert recommendations of the agency. The agency is not necessarily a legal expert, but a court may fail to make this distinction. Out of a habit of deferring to the agency, the court may decline to scrutinize the petition or the law. If the agency is aware of a question whether state law allows transnational adoption without fulfillment of all state requirements, it could hardly be expected to raise the issue at the risk of complicating an adoption that it arranged.

Finally, in some areas petitioners are able to avoid “problem” venues and judges known for scrutinizing transnational adoptions. Agencies that handle large numbers of transnational adoptions are usually familiar with judges or venues in which trouble is most likely. Local rules may allow the petitioners to file their petition in the county where the agency is located, rather than where the petitioners reside. If the petitioners reside in a “problem” jurisdiction, they may choose to file where the agency is located even though that choice of venue results in added cost and inconvenience.

While most transnational adoptions are not delayed or obstructed
by issues concerning a child's adoptability, such issues may arise in several ways. First, a birth parent may challenge the legitimacy of an alleged termination of parental rights, or a birth relative may object to the adoption and claim a superior right to the child. Such challenges are uncommon because the birth family, if it has a change of heart, is not likely to possess the resources or know of the means to timely challenge an adoption proceeding in another country. Nevertheless, such challenges have occurred, particularly by Vietnamese refugees who arrived in the United States not long after the "babylift" immigration of their children.

Second, a court may question the relinquishment *sua sponte*. In most cases, an adoption proceeding is uncontested, but a judge may scrutinize the petition and supporting documents in the interest of safeguarding the rights of the unrepresented child and the absent birth parents. A judge may also raise issues *sua sponte* in order to assure that the proposed adoption decree will not be subject to challenge. While there are good reasons why a judge may raise the issue of adoptability in an uncontested case, it is also possible that some judges who raise the issue are hostile to interracial adoptions. Some social workers involved in transnational adoptions report that they have experienced the greatest judicial resistance in conservative, rural areas where prejudice against interracial adoption might be expected to be greatest.

Finally, the issue of a child's adoptability may arise in a collateral proceeding long after the adoption. In a subsequent dispute over the distribution of property, competing claimants may challenge the child's status as an adoptive child. The risk of such a challenge is greatest when the child was adopted abroad and not readopted under American law. Even if the child was adopted or readopted under American law, the adoption decree may still be subject to attack in jurisdictions where the

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199. See, e.g., *Nguyen Da Yen*, 528 F.2d 1194.
 omission of a necessary relinquishment is a jurisdictional defect that cannot be cured by the passage of time.

If a child's adoptability becomes an issue, it is possible that the court will conclude that there is insufficient evidence of compliance with state law. There are a multitude of reasons why a foreign relinquishment might not comply with state law, especially where the law is particularly rigorous in its protection of birth parents. Frequently in a transnational adoption, there is a relinquishment by an intermediate guardian but no written relinquishment by a birth parent, nor any affidavit or other proof of an unwritten parental relinquishment. Judges rarely scrutinize a transnational adoption petition in this respect, but if the question is raised, it may become apparent that the omission of a parental relinquishment under the circumstances is incompatible with state law. In Georgia for example, adoptions of Korean-born children were routinely approved by most courts until 1985, when a superior court judge requested the State Attorney General's opinion as to the permissibility of an adoption without the relinquishment of the birth mother or putative father. The Attorney General issued an "unofficial opinion" that, without proof of a written parental relinquishment or other safeguards of parental rights, the court was required to deny the petition.200 The Attorney General's opinion not only made future transnational adoptions in Georgia doubtful, but also called into question the validity of many transnational adoptions already granted.201

Even when a written relinquishment supports the petition, a court may question whether the form of the relinquishment or the procedure by which it was obtained complies with state law. While some states require judicial supervision of a parental relinquishment, it is unlikely that a foreign relinquishment will have been executed before a court. The foreign relinquishment may fail to reflect that it was obtained after birth or that it was revocable for any length of time. The relinquishment also may omit the cautionary language that state law requires to be inserted in the relinquishment.

If the petition alleges that the child is abandoned by or lost from the birth parents, and that a parental relinquishment is unnecessary, the court may disagree that there is sufficient proof, or that there has been a sufficient investigation of the child's origin and status. Indeed, the court

201. The Georgia legislature subsequently amended its adoption law in GA. CODE ANN. § 74-416 (Supp. 1987) to provide that a foreign-born child should be deemed adoptable if it has been relinquished by its foreign guardian.
may be presented with no evidence other than the determination of the Service that the child is lost or abandoned and has been relinquished by the child’s foreign guardian. The notice requirements or the waiting period prescribed by state law for abandoned children will not necessarily have been observed by immigration officials.

3. Arguments Against Reconsideration of Adoptability

a. The Act of State Doctrine

When a court does question a child’s adoptability, and state adoption law lacks special provisions to facilitate transnational adoption, the petitioners may raise a number of arguments against reexamination of the Service’s or foreign court’s determination that the child is adoptable. One possible argument is based on the act of state doctrine. That doctrine requires a court to “refrain from examining the validity of an act of a foreign state by which that state has exercised its jurisdiction to give effect to its public interests.” The purpose of the doctrine is to prevent a court from taking actions that might interfere with the federal executive branch in its foreign relations. The doctrine is frequently invoked to prevent an American court from questioning the validity of a foreign government’s expropriation of property located within that government’s territory. In at least one case, In re McElroy’s Adoption, the petitioners in a transnational adoption invoked the doctrine in an attempt to prevent a Tennessee court’s reexamination of a child’s adoptability. However, as McElroy illustrates, the act of state doctrine is of limited usefulness in the context of a transnational adoption.

The prospective adoptive child in McElroy was the birth daughter of an unmarried Korean woman and an American serviceman who had lived together during the serviceman’s assignment in Korea. The father was reassigned to the United States before the child was born, but when the child was about eight months old, the father returned to Korea to marry the mother and legitimatize his daughter. He married the mother and obtained an American passport for his daughter, but because of a delay in the issuance of a passport for his new wife he was forced to

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203. Id. at comment c.
206. Id. at 346.
207. Id.
return alone to the United States, where he awaited the arrival of the rest of his family.208

His wife soon lost interest in going to the United States. She apparently abandoned her daughter and then disappeared without a trace.209 The father did not learn of this unfortunate turn of events until several months later, when acquaintances in Korea informed him that his daughter was about to be placed for adoption.210 Before the father could arrange for his daughter’s transportation to the United States, a Korean orphanage relinquished the child to an American adoption agency, which placed the child with a prospective adoptive family in Chattanooga, Tennessee.211 With the assistance of the United States Department of State, the father finally located his daughter and intervened in the adoption proceeding.212 The trial court denied the petition for adoption on the grounds that the father’s parental rights had not been properly terminated, and it awarded the father custody of his daughter.213

On appeal, the petitioners argued that the act of state doctrine precluded the court’s questioning of the child’s adoptability, because municipal authorities of Seoul, Korea had determined that the child was suitable for adoption.214 The Tennessee Court of Appeals affirmed the lower court and tersely rejected the act of state argument.215 The court asserted that the doctrine was applicable only to actions of a “sovereign nation” and not to the actions of a political subdivision of a nation.216 Since the decision that the child was suitable for adoption was made by municipal authorities of the city of Seoul, rather than the central government of Korea, there was no “act of state,” and the trial court was free to decide for itself the child’s adoptability.217

The court’s invocation of a “subdivision” exception to the act of state doctrine has been severely criticized elsewhere,218 but there are other reasons why the act of state doctrine should not have been applied in McElroy and why the doctrine would be of little or no usefulness in a transnational adoption proceeding. First, the McElroy court was nearly

208. Id. at 346-47.
209. Id. at 347.
210. Id.
211. Id.
212. Id. at 348.
213. Id.
214. Id. at 349.
215. Id.
216. Id.
217. Id.
218. See Breckenridge, supra note 191.
correct in stating that the doctrine does not preclude review of "subdivisions" of nations. It is generally accepted that the doctrine does not apply to acts of all foreign officials or institutions.\(^\text{219}\) For example, courts applying the doctrine have usually drawn a line at executive, administrative, and legislative acts, excluding judicial acts.\(^\text{220}\) The reasoning behind this distinction is that a judicial act is seldom an act of a sovereign state in its own public interests. Instead it is more likely to involve a resolution of competing interests of private litigants.\(^\text{221}\)

In nations with a lesser tradition of separation of powers, this sort of line-drawing can be especially difficult. In some nations, the process by which a child is made available for adoption may resemble administrative or executive action because of the involvement of executive or administrative officials.\(^\text{222}\) However, as a fact finding process leading to the adjustment of individual status, the process by which a child becomes adoptable is better characterized as judicial, regardless of the official title or position of the decision maker. Thus, the act of state doctrine would not necessarily be applicable to a foreign state's termination of parental rights or to a foreign state's adoption decree. Of course, the doctrine certainly would not require recognition of a "private" relinquishment not given force by any government act.

There are other equally forceful arguments against application of the act of state doctrine in a transnational adoption. For example, application of the doctrine presumes that, under principles of choice of law, the foreign state's law would normally govern the matter.\(^\text{223}\) However, it is not at all certain that foreign law still governs the adoptability of a child after the child has become a United States resident.\(^\text{224}\)

\(b.\) Comity

Another argument that has been raised against a state court's reexamination of a child's adoptability is that a foreign decree freeing the child for adoption should be accepted by an American court as a matter

\(^{219}\) See, e.g., id. at 142.

\(^{220}\) Id. at 143; Restatement (Second) of Foreign Relations Law of the United States § 41 comment d (1965); Kim & Carroll, supra note 80, at 244-46.

\(^{221}\) Restatement (Second) of Foreign Relations Law of the United States § 41 comment d (1965).

\(^{222}\) Kim & Carroll, supra note 80, at 244-46.

\(^{223}\) Breckenridge, supra note 191, at 144-45.

\(^{224}\) See supra notes 187-96 and accompanying text.
The doctrine of comity, however, is a partial solution at best. Under both the common law and most statutory versions of the doctrine, a state court is required to accept a foreign decree as a matter of comity unless the foreign proceeding was inconsistent with basic American notions of fairness or with the public policies of the forum American state. Yet many of the objections that might be raised against a foreign decree of adoptability do involve notions of fairness and public policy. Many states view their requirements for a parental relinquishment to be an important matter of public policy; therefore the omission of a relinquishment would be unacceptable. A state court may also insist that basic fairness requires proof of attempted notice to birth parents in the case of an “abandoned” or “lost” child. For transnational adoption in which no foreign decree of adoption or termination of parental rights exists, the doctrine of comity is of no use.


228. See, e.g., 85 Op. At't'y Gen No. U85-34 (Aug. 27, 1985) (Ga. unofficial opinion); Doulgeris v. Bambacus, 203 Va. 670, 127 S.E.2d 145 (1962). In Doulgeris, an adoptive sister claimed an interest in the estate of her deceased adoptive brother based on an adoption decree issued by a Greek court. 127 S.E.2d at 147. The Virginia court held that the Greek adoption decree should not be recognized for purposes of Virginia property law. Id. at 150. Under Greek law, a child was adoptable if relinquished by the father, even without the consent of the mother. Id. at 147. There was no evidence of the birth mother’s consent in the Doulgeris case, but Virginia law insisted upon such consent. Id. at 149. The court concluded that it would be contrary to the public policy of Virginia to recognize the adoption decree. Id.

Under current immigration laws, an adoptive or prospective adoptive child cannot immigrate as an immediate relative without the consent of a living birth mother unless the child is admitted pursuant to 8 U.S.C. § 1101(b)(1)(B) (1982), which requires that the child has been in the custody of the petitioners for at least two years. However, an adoptive child can immigrate as an immediate relative without any notice to or consent by a putative father. 8 C.F.R. § 204.2(d)(1) (1987). See also In re McElroy’s Adoption, 322 S.W.2d 345 (Tenn. Ct. App. 1975) cert. denied, 423 U.S. 1024 (1975).

c. Choice of Law Principles and the Child's Best Interests

With or without a foreign decree of adoption or adoptability, it might be argued that the validity of a child's relinquishment for adoption should be governed by the law of the nation in which the relinquishment occurred. The applicable choice of law principles, however, are ambiguous with respect to transnational adoptions.\(^{230}\) The few international treaties and conventions that address the matter are unclear and, in any event, are not binding on the United States.\(^{231}\) Under generally accepted American rules of choice of law, a court is to apply the law of the forum state in determining whether to grant an adoption.\(^{232}\) This rule appears to be designed primarily with interstate adoptions in mind,\(^{233}\) but the few courts that have considered the question have also applied this rule in transnational adoptions and have tested the validity of relinquishment (or omission of a relinquishment) under American law.\(^{234}\) A state court's concern over an immigrant child's adoptability is not necessarily misplaced. The child is a domiciliary of the state at the time of the adoption proceeding, and the state has a keen interest in the child's welfare. Nevertheless, the traditional rule applied in interstate adoptions may be out of place in a transnational adoption, where the burden of satisfying local law may be much greater.

Putting to one side the traditional rule for interstate adoptions but retaining due regard for the special characteristics of transnational adoptions, the formative principles of choice of law may provide a basis for the strongest argument against a state court's reexamination of a foreign born child's adoptability. Factors so often considered in developing choice of law rules, such as the needs of the international system, the interests of the nation from which the child emigrated, the protection of


\(^{231}\) See, e.g., Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, May 24, 1984, Art. 3, 24 I.L.M. 460; Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions, Oct. 28, 1964, Arts. 3, 4, 5, 4 I.L.M. 338. Each of these conventions provides that issues relating to a child's adoptability are to be determined by the law of the child's nationality or "habitual residence." This rule could be interpreted to support the application of United States law, because a state court does not decide whether to grant an adoption until the child has immigrated and become a resident of the United States. See Levi, 586 F.2d at 629-30.


\(^{233}\) See, e.g., id. comments.

the parties, the justified expectations, and the need for certainty, predict-
ability and uniformity of result,235 would support a rule that adoptability
is determined by the law of the child’s origin. As a practical matter, the
validity of a relinquishment is best governed by the law of the nation in
which the relinquishment was granted. Persons involved in effecting the
relinquishment may have little understanding of American law, and may
not even know what state or nation will become the child’s future home.
At the time parental rights are terminated, the nation in which the termi-
nation occurs is still exclusively responsible for the child’s welfare and
for the security and integrity of the child’s birth family. That nation may
be pursuing an important social policy by promoting or allowing emigra-
tion of adoptable children who cannot otherwise be supported or placed.

The nation or state to which the child immigrates does not become
responsible for the child’s welfare until the child arrives. While that state
may still have some interest in the circumstances under which the child
came to be available for adoption, relinquishment rules are not the only
means a court has of satisfying that interest. A court may also grant or
refuse a petition for adoption on the basis of a more general standard:
the child’s “best interests.”236 Limiting a state court’s inquiry to deter-
ing a child’s “best interests” could prevent the court’s insistence on com-
pliance with state law in a routine, uncontested case, but would still leave
an opening for consideration of the fairness of a child’s relinquishment in
a rare contested case.

Doan Thi Hoang Anh v. Nelson237 illustrates the relationship be-
tween a child’s best interests and the fairness of a foreign termination of a
birth parent’s rights. The plaintiff was a Vietnamese widow and mother
who had taken her seven children to an American run orphanage during
the last days before the collapse of the Saigon government.238 She took
the children to the orphanage because she believed they would be killed
by the Communists, and she left instructions that the children were to be
taken out of the country.239 According to her subsequent testimony, she
did not consent to the adoption of her children, and she positively re-
fused to sign a relinquishment for their adoption.240 Before she left the
orphanage, she obtained the organization’s American address so that she

235. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1969); Kim & Carroll, supra
note 80, at 239.
236. See, e.g., Doan Thi Hoang Anh, 245 N.W.2d at 517.
237. Id. at 513.
238. Id.
239. Id.
240. Id.
would be able to retrieve her children if she was able to escape to the United States.\textsuperscript{241} Shortly thereafter, the plaintiff did escape with other “boat people” aboard a fishing vessel.\textsuperscript{242} When she arrived in the United States, she immediately contacted the Red Cross for assistance in tracking down her children, who by then had been separated into four different homes.\textsuperscript{243} The plaintiff succeeded in locating all seven children, but the prospective adoptive parents of one child had grown very attached to the child and refused voluntarily to relinquish custody.\textsuperscript{244} The plaintiff then brought a habeas corpus proceeding against the prospective adoptive parents and succeeded in regaining custody.\textsuperscript{245}

Neither party in \textit{Doan Thi Hoang Anh} argued in favor of application of Vietnamese law, and therefore, no choice of law problem was presented. The court applied Iowa law and held that the child was not adoptable because the birth mother had not executed a relinquishment in compliance with statutorily prescribed procedures.\textsuperscript{246} The defendants argued that they should be allowed to retain custody notwithstanding the omission of a relinquishment, because the child’s best interests would be violated by his removal from the family with which he had lived and bonded for many months.\textsuperscript{247} The court agreed that the child’s best interests were relevant,\textsuperscript{248} but it turned the best interests argument against the defendants. The court began with a presumption that a child’s best interests are with his birth mother.\textsuperscript{249} The circumstances of the plaintiff’s alleged relinquishment did not rebut this presumption. Instead, the record showed the birth mother “to be a woman of extraordinary . . . perseverance and full compassion for her child.”\textsuperscript{250} The court considered that the child had lived with the defendants for four months when the plaintiff arrived in the United States and began to relocate her children, but it found that four months was not substantial “in this instance.”\textsuperscript{251}

Had the court looked to Vietnamese law, and assuming it had found

\begin{itemize}
  \item \textsuperscript{241} Id.
  \item \textsuperscript{242} Id.
  \item \textsuperscript{243} Id.
  \item \textsuperscript{244} Id. at 514.
  \item \textsuperscript{245} Id.
  \item \textsuperscript{246} Id. at 516-18.
  \item \textsuperscript{247} Id. at 517-18.
  \item \textsuperscript{248} Id. at 517.
  \item \textsuperscript{249} Id.
  \item \textsuperscript{250} Id. at 518. The court also considered evidence that the child had begun “rejecting his cultural and racial roots” and found this to be a factor in favor of awarding custody to the plaintiff birth mother. Id.
  \item \textsuperscript{251} Id.
\end{itemize}
that the child was relinquished for adoption under Vietnamese law, the proper result would still have been the same. Regardless of whether there has been a valid relinquishment and termination of parental rights, a court must still decide the more general question whether a child's best interests favor adoption.\textsuperscript{252} When a birth mother contests the adoption and seeks custody, the circumstances of her relinquishment of the child may be relevant to the question of the child's best interests. In \textit{Doan Thi Hoang Anh}, in view of the circumstances of the relinquishment, the mother's effort to regain custody, and the court's finding that the child had not resided with the prospective adoptive family for a substantial period of time, it was in the child's best interests to be returned to his birth mother.

\textit{d. The Child's Best Interests Preempting Review of Adoptability}

It has been argued, as it was by the prospective adoptive parents in \textit{Doan Thi Hoang Anh}, that the "best interests" doctrine should \textit{preclude} a state court's reexamination of a foreign relinquishment or termination of parental rights, because the court is not likely to address the issue of adoptability until after the petitioners and child have become a psychological family.\textsuperscript{253} This argument has much appeal in a routine, uncontested case, but it suffers from two limitations. First, a court has no reason or authority to decide a child's "best interests" unless it has some reason to find that the birth parents' rights are, or ought to be, terminated.\textsuperscript{254} If the birth parent has not relinquished the child, and is not shown to be unfit or incapable, a court cannot reach the best interests question, for it lacks any power to grant an adoption of a child who is not adoptable.\textsuperscript{255} Adoption law has subordinated the "best interests" of the child to protection of the family as an institution. A child's best interests presumptively are with his birth family, unless there are compelling

\textsuperscript{252} See, e.g., Kim & Carroll, \textit{supra} note 80, at 243.
\textsuperscript{253} See \textit{id}. The authors argue as follows:

\textit{In the overall proceeding the court is faced with a simple choice. That choice is between selecting as parents for the child either a couple who has gone to great emotional and economic expense in their desire to provide a home for the child, or a person who has previously demonstrated his lack of interest in the child by abandoning it. On public policy grounds the best interests of the child should be found with the adoptive couple."

\textit{Id. Cf. In re} Juan P.H.C., 130 Misc.2d 387, 496 N.Y.S.2d 630, 633 (N.Y. Sur. Ct. 1985) (granting preadoption certificate for El Salvadoran child despite evidence of illegal baby marketing scheme, where the "petitioner sincerely views the particular child . . . as one already having a kinship to her").
\textsuperscript{255} \textit{id}. 

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grounds for terminating parental rights of the birth parents. Thus, raising the “best interests” argument will not necessarily divert the court from questioning the child’s adoptability.

The other limitation of the “bests interests” argument against state court reexamination of adoptability, is that consideration of a child’s best interest may require inquiry into the circumstances of the child’s relinquishment, at least in a contested case such as in Doan Thi Hoang Anh. As noted earlier, any gross unfairness in a relinquishment or termination of parental rights may be relevant to a determination of a child’s best interests. A court must then balance its concern for the integrity of the birth family against the trauma the child would experience if he were separated from his prospective adoptive family.

4. State Statutes Facilitating Transnational Adoption

Each of the doctrinal arguments against reexamination of a child’s adoptability has one fault: none contributes to the development of a simple process with predictable results. If a court rejects the act of state doctrine, rejects comity, and rejects the applicability of foreign law, the court has no option but to examine the issue independently, and it may find the child unadoptable under local law. Even if the court is persuaded to recognize the foreign relinquishment under one of the doctrines, it may still require persuasive proof of the substance of foreign law or of compliance with foreign law and fundamental fairness. Proof of foreign law and the factual circumstances of the relinquishment may then be an unexpected and substantial burden to the prospective parents. If the court ultimately grants the adoption, the petitioners will still have experienced delay, expense, and uncertainty in a preferably routine ceremony.

Statutes which preclude reexamination of adoptability are one way of settling the adoptability issue quickly and with less risk of controversy. Such statutes recognize that federal immigration officials or foreign officials are in the best position to determine a child’s adoptability, and to a varying extent, the statutes remove that issue from a state court’s domain in a transnational adoption. Transnational adoption statutes achieve this effect in several different ways. One statutory approach validates any

256. Doan Thi Hoang Anh v. Nelson, 245 N.W.2d 511, 517-18 (Iowa 1976). The court in Doan Thi Hoang Anh characterized the best interests issue as “dispositive.” Id. at 517. However, that case was not an adoption proceeding but a habeas corpus proceeding in which only the custody of a child was at stake. One factor bearing on the best interests of the child was that, absent a lawful relinquishment, the prospective adoptive parents would not be able to adopt the child. Id.
foreign relinquishment or termination of parental rights approved by immigration officials. Illustrative of this approach is a New Jersey statute which states as follows: "[i]f the United States Immigration and Naturalization Service has determined that the child has been approved for adoptive placement, that finding shall be presumptive and no notice as to the availability of the child for adoption shall be served."257 Similar statutes have been enacted by Ohio,258 Colorado,259 and New York.260 The New York statute adopts the federal standard of adoptability for most transnational adoptions, but reserves to the state courts the authority to decide whether that standard has been satisfied.261

An alternative method of simplifying transnational adoptions provides that the validity of a relinquishment or termination of parental rights should be governed by the law of the country in which it was granted. A Connecticut statute follows this approach:

A minor child shall be considered free for adoption . . . if any of the following have occurred: . . . (d)(1) in the case of any child from outside the United States, its territories or the Commonwealth of Puerto Rico placed for adoption by the commissioner of children and youth services or by any child-placing agency, the petitioner has filed an affidavit that the child has no living parents or that the child is free for adoption and that the rights of all parties in connection with the child have been properly terminated under the laws of the jurisdiction in which the child was domiciled before being removed to the state of Connecticut . . . .262

Similar statutes have been enacted by Delaware,263 Pennsylvania,264

258. Ohio Rev. Code Ann. § 3107.07(H) (Baldwin 1987). The Ohio statute requires both that the relinquish must be approved by the Service and that it must comply with the law of the child's birthland. Id.
A child may be available for adoption only upon: . . . (h) Verification by the child placement agency, a county department of social services, or the attorney for the petitioner in any adoption proceeding that any custody obtained outside the state of Colorado was acquired by: . . . (III) Written and verified consent . . . which was executed in accord with the laws of the state where granted or in substantial conformity with the laws of this state; (l) Verification by the department of social services or its designated agent that any custody, obtained outside the state of Colorado was acquired by proceedings sanctioned by the federal immigration and naturalization service in cooperation with the department of social services whenever such cooperation is authorized or advised by federal law. Id.
Maine, Maryland, and Michigan. Application of foreign law does not avoid the necessity of determining what the foreign law is or whether it has been satisfied, but it has the virtue of directing the court, agency, and petitioners toward a particular way of accomplishing a transnational adoption.

A third type of statute facilitating transnational adoption dispenses with proof of the chain of custody or guardianship for a child relinquished for adoption by foreign agencies or organizations. Only the last foreign guardian in the chain need provide a written relinquishment, and the formal requirements for such a relinquishment may be greatly liberalized. The petition for adoption must include the guardian’s relinquishment and proof of the guardian’s authority, such as a court order appointing the guardian, but need not include a relinquishment by the birth parents. Oregon law follows this approach:

An agency or other organization, public or private, located entirely outside of this state, or an authorized officer or executive thereof, acting in loco parentis, may consent to the adoption of a child under the custody, control or guardianship of such agency or organization or officer or executive thereof, if such agency or organization or officer or executive thereof is licensed or otherwise has authority in the jurisdiction in which such agency or other organization is located to consent to adoptions in loco parentis. When consent is given under this section, no other consent is required. The license or other authority to consent to adoption in loco parentis shall be conclusively presumed upon the filing with the court of a duly certified statement from an appropriate governmental agency of such other state that such agency or organization or officer or executive is licensed or otherwise has authority in such state to consent to adoptions in loco parentis.

Similar statutes have been enacted by Georgia and Nebraska.

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If the parental rights of the parent or parents with respect to the child have not been legally terminated, the consent shall be given as follows:

e. By the appropriate organization, agency or court in another country which acquired the right to consent to an adoption in accordance with the laws of that country.

Id.

264. PA. STAT. ANN. tit. 23, § 2711(c) (Purdon Supp. 1987) provides: "Any consent given outside this Commonwealth shall be valid for purposes of this section if it was given in accordance with the laws of the jurisdiction where it was executed." Id.


267. MICH. COMP. LAWS ANN. § 710.44(4) (WEST SUPP. 1987).


269. GA. CODE ANN. § 19-8-17 (Supp. 1987).

270. NEB. REV. STAT. § 43-104.07 (1984). The Nebraska statute requires only that a court, official department, or government agency of the country of origin must supply a document stating...
Finally, Iowa\textsuperscript{271} and Wisconsin\textsuperscript{272} have adopted statutes that combine one or more of the above approaches by directing that a designated administrative agency review documents supporting a transnational adoption petition and determine whether the child is adoptable. Under the Wisconsin statute, for example, the petitioners must file either an order of a foreign court “freeing the child for adoption,” or an “instrument” (such as a written parental relinquishment) that frees the child for adoption according to the law under which the instrument was issued.\textsuperscript{273} If an order is filed, the order is sufficient evidence of the child’s adoptability.\textsuperscript{274} If an instrument is filed, it will be reviewed by officials of the state child welfare agency, and the agency may make a recommendation to the court as to whether the instrument is valid.\textsuperscript{275} The court retains the authority to decide whether the instrument is valid, but must presume that the instrument is valid unless it bears “substantial irregularities” on its face or unless the state agency shows good cause for believing that the instrument does not free the child for adoption.\textsuperscript{276}

Transnational adoption statutes such as these serve to eliminate some of the uncertainties surrounding transnational adoption. They set out a particular process which a state court must follow in a transnational adoption. By varying degrees, these statutes also relieve the state courts of some of the responsibility for determining whether a child is adoptable. At one extreme, a state court may be required to accept the Service’s determination as to adoptability without further questioning. However, under most of the statutes, the states have not fully abdicated their authority to decide whether a child is adoptable.\textsuperscript{277} A state court or agency may be required to determine whether the federal standard of adoptability has been satisfied, or it may be required to determine and

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\textsuperscript{271} Iowa Code Ann. \textsection{} 600.15 (West 1981). \\
\textsuperscript{273} Id. \textsection{} 48.839(2)(a). \\
\textsuperscript{274} Id. \textsection{} 48.839(3)(e). \\
\textsuperscript{275} Id. \textsection{} 48.839(3)(c). \\
\textsuperscript{276} Id. \textsection{} 48.839(3)(d). \\
\textsuperscript{277} See In re Adoption of Pyung B., 83 Misc. 2d 794, 371 N.Y.S.2d 993 (N.Y. Fam. Ct. 1975), where the court held that a child might not be adoptable under New York’s transnational adoption statute even though the child qualified for an orphan visa: \\
To hold that \textsection{} 115-a was enacted solely for purposes of the issuance of a visa and not to benefit and protect the foreign child and adoptive parents as well, would require this Court to abdicate its supervision of adoptions to the Immigration and Naturalization Service. This the Court cannot do. Adoption is exclusively a State responsibility. Immigration is exclusively a federal responsibility. The two procedures should not be intermixed. \\
Id. at \textsuperscript{--}, 371 N.Y.S.2d at 996.
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apply foreign law with respect to the validity of a relinquishment or the authority of a guardian. It is also possible that a court would hold that a statutory preference for foreign law, like other rules of choice of law, is subject to the state’s public policies and notions of basic fairness.

Only a handful of states have enacted such statutes, and there are at least two possible reasons why other states have not followed suit. First, some of the transnational adoption statutes were enacted only after local crises when questions were raised regarding the lawfulness of transnational adoptions. The Georgia statute, for example, was enacted in response to the Georgia Attorney General’s opinion that transnational adoption was not viable without strict compliance with Georgia’s stringent relinquishment requirements. In other states, the legal issues surrounding transnational adoption may remain dormant until a judge or other official presses for proof of a child’s adoptability. Only then will parties having a substantial interest in transnational adoption appeal to the legislature.

Another possible reason that so many states have no transnational adoption statutes is that they are reluctant to cede to federal or foreign authorities the power to determine a child’s adoptability. Even those states that have enacted transnational adoption statutes usually have reserved some of this power for their own courts. As noted earlier, federal and foreign standards of adoptability may be quite different from those of a state, and legislators may be unprepared to sanction the adoption of a child who, if born in that state, would not be adoptable. State legislators may also lack confidence in the thoroughness of a foreign or federal official’s investigation of a child’s adoptability. Widespread publicity concerning alleged international black market baby-selling schemes may contribute to the states’ reluctance to relinquish their authority to decide a child’s adoptability.

280. See, e.g., 85 Op. Att’y Gen. No. U85-34 (Aug. 27, 1985) (Ga. unofficial opinion) at 2-3 (state court must apply state rules regarding termination of parental rights, because “[t]o hold otherwise would condone the practice of the sale or kidnapping of foreign children for ultimate adoption in this state.”); In re Jose L., 126 Misc. 2d 612, —, 483 N.Y.S.2d 929, 931 (N.Y. Fam. Ct. 1984) (denying a preadoption certificate because “the court cannot conclude that the transactions underlying the instant application have not resulted in financial gain to one or more persons and do not violate this State’s strong public policy against ‘trafficking’ in children”).

International black markets for children for adoption have received widespread publicity. See, e.g., J. Erichsen & H. Erichsen, supra note 93, at 143; Relief and Rehabilitation of War Victims in Indochina, supra note 198, at 18; Jones, supra note 7, at 118; Kennedy, Why Adoptions Get Harder
Even the involvement of federal immigration officials in determining which children are eligible to immigrate may not be sufficient to allay state concerns. It is a widely held opinion among social workers involved in transnational adoption that United States immigration officials perform their investigation of a child's adoptability very diligently. On the other hand, defense of the Service's process of determining adoptability is greatly undermined by its failure to develop carefully considered guidelines governing the circumstances under which a parental relinquishment may be accepted or under which a child may be regarded as abandoned, lost, or separated from its parents. Thus, a state may be justified in its hesitancy to rely on federal legal standards or federal investigative authorities.

IV. CRITICISMS OF THE EXISTING TRANSNATIONAL ADOPTION PROCESS AND PROPOSAL FOR REFORM

The greatest flaw in the existing system of transnational adoption is its division of authority between state and federal authorities in determining a child's adoptability. In any transnational adoption, state courts may question or disagree that a child is adoptable, even though federal immigration officials are satisfied that the child is adoptable and may immigrate as an "immediate relative." Thus, an ordinarily routine and ceremonial proceeding risks becoming protracted and controversial. This threat of controversy may seem at first blush a trivial concern in a litigious society. The magnitude of the problem is better understood with some appreciation of the special qualities and purposes of the adoption process.

While adoption fulfills certain needs of adoptive parents, the interests of adoptive children are foremost in modern adoption law. A theme running throughout adoption law and other areas of family law is that a court should seek to serve the best interests of the child. Adoption is a way of providing a homeless or disadvantaged child with a stable, supportive, and nurturing family. Adoption was the preferred solution for such children even before the baby shortage; a stable family is undoubtedly superior to institutionalization or transient foster home care. The

Every Year, U.S. News & World Rep., Sept. 20, 1982, at 54; Rule, supra note 4; Simons, supra note 4.

283. See generally id. at 22-26, 32-35.
adoption process, therefore, ought to be designed with the best interests of the child as its chief purpose. With this purpose in mind, three characteristics become important to an effective transnational adoption process.

First, the transnational adoption process should be designed so that children are not unnecessarily or carelessly removed from their families and homelands. American law insists that a child can be adopted only if its birth parents' rights have been properly terminated. If a child's parents are living, willing, and able to care for the child, the child's best interests are not served by removing the child to another family. The risks and potential trauma of a child's unnecessary removal to another family is reason enough to insist that a child must not be adopted unless its birth parents are deceased, have voluntarily relinquished any legal right in the child, or have been deprived of their rights by judicial action on grounds such as abandonment or gross neglect. Beyond the best interests of any particular child, the integrity and stability of families and the well-being of children in general demand a restrictive standard of adoptability.

Second, the transnational adoption process should be designed so that a final determination of adoptability is made at the outset of the process, before the child's immigration, by federal officials stationed in the child's birth land. An investigation of the child's adoptability is best conducted where witnesses or documents concerning the child's origin are likely to be conveniently accessible, and in most cases this will be the country from which the child will be emigrating. Federal officials stationed overseas are more likely than state court judges to be familiar with the local language, customs, and legal system. This familiarity is undoubtedly useful in conducting an investigation and reviewing evidence of a child's origin and availability for adoption. A satisfactory investigation of a child's adoptability usually could not be conducted months after the child's relinquishment and immigration to the United States. A state court thousands of miles from the child's origin, examining the circumstances of a child's relinquishment for adoption many months after the fact, likely will have no convenient or practical access to relevant documents beyond those supplied by the agency or petitioners in support of the petition. Witnesses, if known, will be difficult to locate and impossible or extraordinarily expensive to examine. To the extent that foreign

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law is relevant or applicable under choice of law principles, neither the parties nor the state court is likely to have a reasonable understanding of foreign law or to have convenient access to foreign legal materials, foreign lawyers, or foreign legal scholars.

Third, the transnational adoption process should be designed so that an early determination of a child's adoptability is granted the same finality to which a United States court's determination would ordinarily be entitled. If the initial determination is reached by a reasonably reliable process, the child's best interests are not served by allowing state courts to reconsider freely whether the child is adoptable months after the child's immigration and placement with its prospective adoptive family. Within that time, the petitioners and child may have bonded as strongly as any birth family. In that event, the child's later removal from the petitioners' custody would be severely traumatic for the child and the family, and would postpone the child's settlement in a permanent family. Even if the court grants the decree, the very threat of such a removal may have retarded the development of a healthy family relationship. The prospective parents and child may postpone bonding, withholding affection while a risk remains that the family will be separated.\(^{285}\) If the controversy is not quickly resolved, it may continue to interfere with normal family life for months or even years while the state court system struggles to deal with the complexities of transnational adoption.

The existing process of transnational adoption achieves these goals only in part. At the outset of the process, the child's adoptability may be decided by a foreign official or tribunal, but there is no guarantee that its decision will accord with even the most basic values of American adoption law.\(^{286}\) Immigration officials conduct a further investigation to determine the adoptability of a child, but neither the Service nor Congress has ever carefully considered what standards should be followed in determining that a child has been relinquished for adoption or has been abandoned, lost, or separated from its parents.

Even if the determination made by the Service were reasonably reliable, that determination is not final.\(^{287}\) Its only legal effect is to overcome one obstacle to the issuance of an immigrant visa. The determination may be challenged or questioned months later and thousands of miles from a child's origin when a state court decides


\(^{286}\) See generally id.

\(^{287}\) See supra notes 260 & 278 and accompanying text.
whether to grant a petition for adoption. Yet a sufficient examination of a foreign child's adoptability by a state court is exceedingly difficult, and may be impossible. Permitting a state court to freely reexamine the issue of adoptability also injects uncertainty and controversy into the proceeding and may significantly delay the legal and emotional security of an adoption decree.

No comprehensive solution to the difficulties of transnational adoption is possible except at the federal level. A state court's reexamination of adoptability might be prevented by arguments based on comity, choice of law, or the act of state doctrine, but the very fact that petitioners must rely on such arguments contributes to delay and uncertainty in the process. A few states have facilitated the process with special transnational adoption legislation, but such laws are not widespread, and state legislation alone cannot be sufficient to address all the problems of transnational adoption. Many of these state statutes require a state court to defer to foreign law or foreign officials, but state courts and agencies are not likely to possess the resources to interpret, confirm, and apply foreign law and foreign orders or decrees.

Moreover, state legislation legitimizing a foreign relinquishment or applying foreign law is a one-sided solution. To accept foreign laws and decrees without question is to forsake the system of values that has evolved in American adoption law. Existing federal immigration law provides some limitation against the immigration of children who are not adoptable, but federal law is too vague to act as a reliable safeguard. Until the process by which federal officials make their investigation and determination is scrutinized and held to some agreeable standard, the states may be understandably unwilling to surrender any part of their responsibility for granting or denying adoptions.

A comprehensive solution would have two parts: first, the development of federal substantive and procedural standards for investigating and determining adoptability; and second, legislation giving a measure of finality to the determination of immigration officials. The first part would assure sufficient investigation and determination; the second part would provide a final determination at the earliest stage of the transnational adoption process.

Federal standards for adoptability might take existing immigration standards and widely accepted state standards as a starting point. However, the existing immigration standards are ill-defined, and the state standards are often too rigorous for transnational adoption. An over-
abundance of caution may also be deleterious to the best interests of a child. In many corners of the world, there is simply no way to document every child’s origin. Under conditions of war, civil disorder, or severe poverty, overindulgence in American standards of proof and procedure may only serve to expose a child to prolonged risk in a dangerous environment. Relaxed procedures and standards may be appropriate in times of great urgency. However, the need for greater flexibility and justifiable liberality does not require abandonment of standards or fair procedure.

Federal standards of adoptability would also have to take account of the myriad differences in circumstances from one country to another and of the various causes of adoptability. It may be necessary to require immigration officials assigned to each country to develop separate plans based on the state of public record keeping, local customs, and the sufficiency and availability of each nation’s own administrative or judicial process for determining adoptability. The involvement of approved adoption agencies in some countries might be necessary to curtail the possibility of black marketing.

One may ask whether the American officials involved in transnational adoption should be concerned with the issue of adoptability at all if a foreign nation has, by law, custom, or some official action, acknowledged the child’s availability for emigration and adoption in a foreign land. The answer is that the integrity of the adoptive family would be ill-served by leaving significant questions about a child’s origin unresolved. Moreover, transnational adoption might cease as an option for prospective adoptive parents if the process fails to contain adequate safeguards to prevent the emigration of unadoptable children. Nations that are significant sources of children for American adoptive parents generally have cooperated only reluctantly and out of need. These nations remain sensitive about the emigration of their children and would likely impose greater restrictions on adoptions by foreigners if it were practical to do so. If United States officials were indifferent to the issue of adoptability, many nations from which children now emigrate might eventually prohibit emigration for the purpose of adoption by foreigners, or they may prefer parents of nations other than the United States.  

288. During the Vietnam War, the infant mortality rate in Vietnamese orphanages was as high as ninety percent. Relief and Rehabilitation of War Victims in Indochina, supra note 198, at 86.

289. Fears that children were being improperly removed to the U.S. for adoption have caused some nations to attempt to restrict transnational adoption of their children. See generally id.
The second part of this proposal, giving the initial Service determination of adoptability limited finality, would preclude a state court's unwarranted reconsideration of adoptability. State courts would remain chiefly responsible for determining parental qualifications and family compatability, but the issue of the validity of a relinquishment would be removed from their domain. The Service's determination in itself would serve as irrebuttable proof of a child's adoptability, regardless of a state's own standards of adoptability for children born in the United States. While the Service's determination would not have the effect of an adoption decree, it would settle the adoptability issue on which an adoption hinges.

Possibly, a birth parent may oppose a petition on substantial grounds such as fraud, mistake, or undue influence in the granting of a relinquishment. Even the most carefully designed process cannot guarantee that there will be no error. However, granting finality to the Service's decision that the child is "adoptable" would not necessarily foreclose a court from hearing evidence concerning the circumstances of a relinquishment. State courts should not be required to shut their doors to a truly aggrieved birth parent. While the child may be "adoptable," a court still must determine whether the requested adoption is in the child's best interests, and the circumstances by which the child became adoptable may be relevant to the child's best interests.290 A state court's power to decide a child's best interests would permit the court to hear the birth parent's challenge and, if necessary, deny the petition and return the child to the custody of the birth parent.

V. CONCLUSION

Transnational adoption is an increasingly important facet of immigration and adoption in the United States. However, transnational adoption has received surprisingly little attention from lawmakers and legal scholars. Congress has enacted legislation facilitating the immigration of prospective adoptive children, but has not endeavored any substantial regulation of the adoption process. A few states have enacted special legislation dealing with transnational adoptions, but the great majority continue to rely on the same legislation that was enacted primarily for adoption of locally born children. The adoption of a foreign-born child, however, can raise difficult legal problems that are rare or unknown in the adoption of American-born children. These problems arise partly

290. See supra notes 280-81 and accompanying text.
from the difficulty of reconciling foreign and domestic law, and partly from the failure of American lawmakers to develop a rational allocation of authority among foreign, federal, and state officials.

Despite the early views of Congress that large-scale transnational adoption was a temporary phenomena, transnational adoption has not only grown over the past forty years, but is likely to continue for the foreseeable future. Transnational adoption is both an important solution to the shortage of adoptable children in the United States and the shortage of adoptive parents in many developing nations. Greater attention must now be focused on the unique problems of transnational adoption in order that the process will not be jeopardized by poorly formed rules and standards at the immigration phase, and overly-restrictive rules at the state adoption phase.

Legislative reform at the federal level could solve many of the problems inherent in transnational adoptions. Such reform should focus on three goals. First, the transnational adoption process should require a restrictive definition of "adoptability" so that the birth family's rights are protected. Second, the process also should be designed so that the immigration officials' finding of adoptability is made at the very beginning of the process in the land where the child is born. Finally, the federal officials' finding of adoptability should be given the same finality accorded a judicial determination. These reforms, while sketched only in general terms, would greatly improve the transnational adoption process.