Special Problems of Custody for Unaccompanied Refugee Children in the United States

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The law presumes that children are incomplete beings during the whole period of their development. It views children as needing direct, intimate, and continuous care by adults. Children's inability to maintain life without extraneous aid justifies their assignment to their biological parents, or, where this natural relationship fails, to parental substitutes designated by court proceedings. In theory, some person or institution is always in custody of a child. But in the case of unaccompanied refugee children, "the minors fall into the no man's land between U.S. immigration law and state child welfare law."

The refugee child who enters the United States with his or her parents or a similarly situated adult relative presents no problem of custody; the parents or relative assume custody without judicial intervention. But government intervention is necessary to provide an unaccompanied refugee child with a parent substitute. A judicial custodial determination for an unaccompanied refugee child poses problems that do not arise in a similar determination for an American child. For example, refugee children often gain admittance to the United States before completion of arrangements for their legal and financial responsibility. Determining who among various government and private entities is to assume the long-term financial responsibility for unaccompanied refugee children slows the legal custody procedures. Even when the delays pass and a child is successfully placed, another problem peculiar to refugees may arise. The refugee child may have natural parents and relatives living in another country who are impossible to locate or communicate with at the time the court makes a custody determination. The family may reappear at a later date and seek to assert custodial control over the child.

Part I of this note provides an overview of federal legislation regarding admissions of unaccompanied refugee children. Part II describes various

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obstacles to a smooth transition from the child’s admission into the United States to his or her placement by a state court with a permanent legal custodian who ensures that the child receives care and supervision. Problems in this area frequently result from uncertainties regarding long-term financial responsibility for the child. Also common are procedural difficulties in introducing unaccompanied refugee children into state child welfare systems. Part III then focuses on conflicts arising after the child’s placement, when the family either seeks the child’s repatriation or follows the child to the United States and attempts to regain custody.

Part IV evaluates the effect of the Refugee Act of 1980 on these issues. Because the Act explicitly assigns interim legal and financial responsibility for unaccompanied children to the director of refugee resettlement, it promises to resolve the issue of responsibility in the no-man’s land between admission and placement. The Refugee Act also solves questions of uncertain financial responsibility for unaccompanied refugee children by assuring continued federal support until the child reaches majority. The Act has little effect, however, on custodial battles involving the natural family of unaccompanied minors.

The topics discussed in this note are not the exclusive problems which must be addressed in order to provide the most effective aid to an unaccompanied refugee child. Radical cultural adjustments, loss of natural family members, and the ordeals experienced prior to or during flight from the country of origin create enormous psychological stress for these children. Exploration of living arrangements and resettlement patterns to accommodate their special psychological needs is warranted. These matters fall outside the scope of this note, which highlights but one aspect of the resettlement experience—the legal process for determining and adjusting custody. While only one problem among many facing unaccompanied refugee children, it stands out as the most crucial issue of law, and one of the most important determinants of a refugee child’s fate in the United States.

ADMISSION OF REFUGEE CHILDREN INTO THE UNITED STATES

Immigration Classification of Refugee Children Admitted Prior to the Refugee Act of 1980

Prior to the 1965 amendments to the Immigration and Nationality Act (INA), the statute limited the number of immigrants who could enter the United States during any one year and distributed the annual overall quota among various geographical areas. Out of concern for alien orphans, Congress repeatedly authorized issuance of special nonquota visas for
them thereby avoiding extended waiting periods caused by oversubscription of certain quotas. Among other reforms, the 1965 amendments abolished the national origins quota system after a transition period ending June 30, 1968. However, the total number of immigrants admitted to the United States remained subject to numerical quotas with visas allocated according to seven preference categories. After elimination of the national origins quota system, most unaccompanied refugee children were admitted to the United States either by the attorney general’s parole power, or under the seventh preference category reserved for “conditional entrants.”

The admission of a refugee by parole was strictly discretionary and under the United States attorney general’s control. The INA empowered the attorney general to waive the Act’s normal entry requirements in emergencies for reasons of the public interest. In addition, the attorney general could prescribe conditions to which the parolee’s admission was subject. While parole was not admission for permanent residence, under certain circumstances a parolee could adjust his or her status to that of an alien lawfully admitted for residence.

Parole authority under the INA has existed since 1952. It was first exercised to admit orphans in 1956. Parole soon became a customary vehicle to admit groups of refugees. The largest such groups were the Cubans and Indochinese, both of which included numerous unaccompanied children.

Besides parole, the INA provided for the conditional entry of 17,900 refugees a year under the INA seventh preference category. Because numerical and geographical limitations restricted this category, its use was less frequent than parole in admitting unaccompanied children.

A third admission category, for immediate relatives, permitted entry of orphans who were to be adopted by United States citizens. Such orphans, though not subsumed under the definition of unaccompanied refugee children used in this note, nevertheless deserve notice in this discussion. Many Vietnamese children brought to the United States prior to the fall of South Vietnam in 1975 entered under an immediate relative visa. Relatively few problems of legal responsibility arose for these orphans. American adoption agencies established in the country of origin carefully arranged for the orphan’s immigration and required adopting parents to agree to assume financial responsibility for the child. However, in the last month before the North Vietnamese takeover of Saigon, over 2,000 orphans were admitted to the United States by parole. Multiple lawsuits erupted from this evacuation; they are discussed further infra, as illustrations of suits to regain custody brought by the natural families of refugee children.
Admission Under the Refugee Act of 1980

The Refugee Act of 1980 retains the attorney general's authority to parole an alien into the United States, but Congress now clearly intends to discourage its use for admitting groups of refugees. The Act also leaves intact the section permitting entry as an immediate relative of an orphan to be adopted by a United States citizen.

A significant change lies in the elimination of the conditional entrant category and the creation of a new admission category, termed "refugees." The term refers to an alien who is outside the United States when granted admission. In contrast, an alien who is a refugee within the meaning of the Act but who is physically present in the United States, or at a land border or port of entry, may be granted asylum status. Prior to the Refugee Act, no statute explicitly permitted such a status. Federal immigration regulations, however, provided a procedure for application for asylum. In addition, an INA provision authorized withholding deportation of an alien who would be subject to persecution, and so provided a de facto form of asylum. This de facto form of asylum continues under the Refugee Act, with certain amendments.

Although a child may be granted asylum derivatively through his or her parent's asylum status, the Refugee Act also extends asylum to children who petition in their own right; "an alien," no age specified, may seek asylum.

In addition to the asylum and refugee statuses created by the Refugee Act, another related status was administratively created shortly after the Act was passed. Following an incident at the Peruvian embassy in Cuba in April 1980, 117,000 Cubans fled to the United States by boat. Rather than admit them as refugees under the emergency provisions of the Refugee Act, President Carter chose to parole these Cubans into the United States as individual applicants for political asylum. "Subsequently, the administration created a special status for these Cubans, as well as certain Haitian refugees, known as "Cuban/Haitian (status pending)."

LEGAL RESPONSIBILITY FOR REFUGEE CHILDREN:
TWO EXAMPLES OF CONFUSION AND DELAY

The legal problems facing the unaccompanied refugee child are not resolved simply by his or her admission to the United States. In the period between formal admission and the time that an individual or agency assumes legal responsibility for the child, a gap may exist during which the child has no legal custodian. The undesirability of this lapse in legal responsibility is evident, for example, when a child requires serious medi-
Without a designated custodian, authorizing and paying for medical treatment is an administrative quagmire. Confusion about who will assume financial responsibility frequently delays the child’s placement. Most unaccompanied refugee children become candidates for foster care financed directly by a local or state agency or indirectly by the federal government. The onerous financial burden of maintaining a child is a major obstacle to a smooth transition from admission to the assumption of legal responsibility under a court’s protective supervision. Neither the states (through their social service departments) nor the voluntary agencies which arrange for foster care are required by law to accept responsibility for the children. Understandably, they have been reluctant to add refugee resettlement costs to their already overburdened programs without some guarantee of federal reimbursement.

Prior to the Refugee Act, the federal government enacted numerous bills appropriating funds for the care and maintenance of refugee children. This legislation was piecemeal and always temporary. Hence the funding problem recurred with each new refugee crisis. In addition, numerous procedural problems have hampered the placement of unaccompanied refugee children. The U.S. experiences with both the Indochinese and the recent group of refugees from Cuba provide illustrations of these problems.

The Indochinese Experience

The establishment of legal responsibility for Indochinese unaccompanied minors was initially done on an ad hoc basis. The influx of Vietnamese refugees in 1975 appeared to many as a unique emergency situation for which temporary special procedures were appropriate. When the flow of Indochinese refugee children continued, the need for uniform procedures became apparent.

In April and May 1975, with South Vietnam’s fall imminent, the federal government paroled over 2,000 Vietnamese orphans into the United States at the request of adopting parents and voluntary agencies arranging for American adoptions of Vietnamese orphans. A massive airlift, dubbed “Operation Babylift,” rapidly evacuated the children. Before the children left Vietnam, voluntary agencies (volags) obtained documents releasing the children for adoption and establishing legal custody with the agencies. The children therefore had a legal custodian when they arrived. Arrangements for adoption or foster care in the United States then proceeded through these agencies.

In the summer of 1975, approximately 700 unaccompanied Indochinese refugee children arrived in the United States. They were initially detained
in four military camps set up as reception centers for Vietnamese refugees. At the outset, some of the children left the camps with unrelated sponsors without assignment of legal custody. This confusion ended when each camp established independent procedures for the release of the children. At one camp, the public welfare department of the surrounding county took responsibility for resettling the refugee children. At another camp, the county juvenile court took custody of the minors, and then transferred custody to the responsible agency or individual when the minor was resettled. After passage of authorizing legislation, the federal government bore the full costs of the child welfare services where requested. Reacting compassionately to the plight of the children, some states and foster care families declined to seek federal reimbursement.

Beginning in late 1977, a second group of unaccompanied Indochinese minors began to trickle into the United States. Most were "boat people" processed through camps in Asia. Several national religious and service organizations, most notably the United States Catholic Conference and the Lutheran Immigration and Refugee Service, contracted with the federal government to resettle the minors. After processing in the Asian camps, the children were flown directly to their destination in the United States.

Once they arrived in the United States, legal responsibility for the children became a matter of conflict between the volags and the state courts. The volags worked directly with the state child welfare agencies to place and establish legal responsibility for each child. By not transferring custody to state child welfare agencies, some juvenile and family courts attempted to burden the volags with permanent legal responsibility for the minors, although their contractual commitments were not so extensive. By the summer of 1978, the resettlement volags refused to bring any more minors into the United States until the federal government made clear who would assume responsibility for them.

In response to the stalemate, a federal policy transmittal, issued on February 6, 1979 by the Department of Health, Education and Welfare (HEW—now Health and Human Services, HHS), which was responsible for the refugee resettlement program, to the state administrators of child welfare services, stated that:

[A]rrangements [should be] made whereby the State or local public agency establishes legal responsibility for the care and maintenance of the unaccompanied minor. The purpose of establishing legal responsibility is to insure that the unaccompanied children receive the full range of assistance, care and services and to designate a legal authority to act in place of the child's unavailable parent(s). This action should follow the process normally re-
quired by State law to establish protective legal responsibility for a minor child.\textsuperscript{71}

This policy nearly always results in legal responsibility vesting in the state child welfare agency, thereby assuring that the child receives the full range of benefits.\textsuperscript{72} HHS guarantees federal reimbursement for foster care payments on a dollar for dollar basis,\textsuperscript{73} which makes states more willing to accept the children for placement.\textsuperscript{74}

Also in early 1979, the state agencies and volags began using the procedural framework of the Interstate Compact for the Placement of Children to place the Indochinese children. The Compact, a uniform law adopted in forty-six states,\textsuperscript{75} is aimed at facilitating the out-of-state placement of children over whom a state court has acquired jurisdiction.\textsuperscript{76} Although the Compact was originally adopted for strictly domestic purposes, state administrators' familiarity with its mechanisms made it suitable for refugee placement.\textsuperscript{77} Its uniform procedures greatly improve the transfer of legal responsibility from the volags (acting on behalf of the federal government) to a state or local public agency.

The Compact ensures that nationwide placement is accomplished with the same safeguards as placement within a given state. The "sending agency"\textsuperscript{78} is assured that a proper living arrangement is found and that the agency or foster parent in the receiving state is meeting its responsibilities to the child. The receiving state is assured sufficient advance information to make a suitable placement. Unless other arrangements are made, the sending agency bears the ultimate financial responsibility for meeting the child's needs.\textsuperscript{79}

Special forms and streamlined procedures have been developed to process unaccompanied refugee children. For example, ordinarily the Compact fixes financial responsibility in the sending agency. But with refugee children, the national volags (the sending agencies) are not responsible for the children after they are placed in the receiving state. Reports which would be sent to the sending agency if the child were American are instead sent to the Social Security Administration. The basic document for Interstate Compact placement has been modified to provide additional information for HHS purposes.\textsuperscript{80}

The Compact placement for refugee children can be broken down as follows:

(1) The national volag initiates a request for placement.
(2) A local affiliate agency determines whether it can accept the child for placement. This determination involves arranging for a suitable foster care facility.
(3) The Compact administrator for the prospective receiving state pro-
cesses the request for placement. Before accepting the child, the administrator assures that provisions have been made for the local court to assign custody and for care and service arrangements to be completed.

(4) After the child arrives, the local affiliate agency notifies both the Interstate Compact office in the receiving state and the national volag that the child has arrived and legal responsibility has been established. 81

After a child is placed, there is the possibility that a more suitable placement opportunity with relatives, friends, or a foster family will be identified. If the new placement is out of state, routine Compact procedures apply. Once the child has been physically placed through Compact procedures, the Office of Refugee Affairs must be notified. 82 Although normally the Compact fixes financial responsibility in the sending state, a receiving state may accept the responsibility. 83 The American Public Welfare Association, which includes the National Association of Compact Administrators, advises acceptance by the receiving state in the case of refugee children. This is preferable because: (1) the availability of 100 percent federal funding for the children means that the receiving state incurs no direct costs; (2) a child usually has no ties with the sending state; and (3) monitoring of the child is facilitated by close proximity to the court assuming legal responsibility. 84

The child is the ultimate beneficiary of the more efficient procedure provided by the Compact.Advance planning results in more suitable placement alternatives. The clarification of financial and legal responsibility assures that a child will not be deprived of any benefits an American child would receive.

The 1980 Cuban Experience

Over 700 unaccompanied minors were among the 122,000 Cuban refugees who arrived in the United States by boat in the spring and summer of 1980. 85 The suddenness of the migration precluded advance arrangements for placing the Cuban children. 86 The children, admitted by parole, 87 were initially based in temporary federal camps. For nearly five months they were victims of abuse by other refugees and federal security officials in these camps while awaiting placement. 88 Minors were detained longer than most adult refugees because of the "red tape" and confusion about transferring legal responsibility to a child welfare agency. 89 The lack of financial guarantees from the federal government also hindered the assumption of responsibility by states. 90

To deal with these problems, a new approach to placement developed.
A Presidential Directive in September 1980 directed the INS to retain legal custody of the minors.\(^9\) States, acting as agents for the INS, were to arrange for placement in foster care.\(^9\) The passage of the Fascell-Stone Amendment on October 10, 1980\(^9\) clarified the financial responsibility by bestowing on Cubans and Haitians benefits comparable to those they would have received if admitted under the 1980 Refugee Act.

The management of the Cuban and Indochinese refugees illustrates that the process for placing refugee children has not been uniform. With both groups, questions of legal responsibility for unaccompanied minors had to be dealt with as they arose. Solutions were formulated in response to existing circumstances. Questions of financial responsibility had their effect in creating reluctance on the part of both public and private agencies to accept legal responsibility. Establishing uniform procedures would eliminate the confusion and delay inherent in a system which merely responds to crisis rather than planning for it. The role that the Refugee Act will have in solving the problems encountered in delegating responsibility for unaccompanied refugee children is assessed infra.

**CUSTODY RIGHTS OF THE CHILD'S NATURAL FAMILY**

Unaccompanied youths often immigrate as part of a family plan the ultimate goal of which is eventual family reunion abroad.\(^9\) To effectuate a reunion, the after-arriving natural family must seek court review of the child’s custodial arrangements. Often the child’s substitute parents welcome and facilitate the family’s effort to transfer custody.\(^9\) However, in some instances, the child’s custodian may contest the transfer. In a reversal of the reluctant caretaker situation discussed in the last section, here the court must choose between parties competing for the responsibilities of custody.

In deciding to parole the Babylift refugee children into the United States, the INS assumed that the children were orphans. In fact, some were not.\(^9\) Suits to regain custody were brought by both parents and relatives.\(^9\) Repatriation, too, was an objective of one of the Babylift lawsuits.\(^9\) These cases illustrate three different aspects of the question of custody rights of the natural family of a refugee child: (1) May the natural parents who immigrate to the United States following their child’s admission and placement regain custody of their child? (2) May other relatives who immigrate to the United States subsequent to the child’s admission and placement gain custody of the child? (3) Do parents have the right to force repatriation of the child for the purpose of family unity?
The Natural Family's Right to Custody After Immigration

Applicable Law in Custody Disputes

Under American choice-of-law principles, the court with jurisdiction for adoption for child custody purposes applies its own domestic law. American law, as distinguished from civil law, disfavors choice-of-law principles based on nationality. However, the law of a refugee child's country of origin or former domicile is relevant to some extent. For example, a Vietnamese-born child may come before a United States court with the same documentation that is routine in domestic adoptions—a birth certificate or judgment, and a release of custody with consent to adopt. However, the documents are in compliance with Vietnamese law rather than United States law. Contrary to United States practice, Vietnamese law permits an orphanage to release a child for adoption without verification of the child's prior legal identity. To facilitate adoption of foreign-born children, one U.S. state's law provides that consent for adoption "be acknowledged or conformable to the law and procedure of" the country in which the consent is signed. Courts also have discretion to grant comity to, or recognize, foreign laws.

Of the cases arising out of the Babylift, only two raised the issue of applicability of foreign law. In Hao Thi Popp v. Richard Lucas, a Vietnamese mother who followed her children to the United States attempted to regain custody of two sons. During the Babylift, the mother had signed a document relinquishing her custodial and parental rights and releasing the children for adoption. The trial court found the document effective to terminate the mother's parental rights. After weighing the relative suitability of the parties as parents, the court awarded custody to the foster parent. On appeal, the Connecticut Supreme Court concluded that the document did not conform to the requirements of state law and rejected the argument that the document was proper and irrevocable under Vietnamese law. "Even if the relinquishment were irrevocable under Vietnamese law, we would not afford comity to it. '[C]omity is a flexible doctrine, the application of which rests in the discretion of the state where enforcement of a foreign order is sought... ''' The case was remanded to the trial court to reconsider custody without regard to the document terminating parental rights. In this instance, the court's refusal to grant comity aided the natural parent seeking custody. The tone of the court's opinion suggests that it was seeking to effect a family reunion.

Conversely, in Huynh Thi Anh v. Levi (discussed further in the following section), the court's refusal to apply Vietnamese law worked against relatives who attempted to gain custody of four Babylift children. The plaintiffs argued that they had parental rights under a Vietnamese legal
principle which vests parental rights in the extended family unit. The court opted for domestic law after exploring choice-of-law principles and noting the difficulty of ascertaining the law of South Vietnam at the time of its conquest by the North.\textsuperscript{107}

In other similar cases, the issue of applicability of foreign law was not ever raised. These cases and the two just described strongly suggest that the international aspects of the situation or the nationality of the parties will not deter courts from applying their own state law.

**Federal Jurisdiction in Custody Disputes**

Jurisdiction of child custody disputes has traditionally resided solely in state courts.\textsuperscript{108} Nevertheless, the refugee child’s admission to the United States at the sufferance of the federal government has led to assertions of federal jurisdiction in several lawsuits involving Indochinese.\textsuperscript{109}

In *Huynh Thi Anh v. Levi*,\textsuperscript{110} for example, the custody suit brought by a grandmother and uncle of four Babylift children in foster care was ultimately dismissed for lack of federal jurisdiction. Included in the four groups of defendants,\textsuperscript{111} who allegedly controlled the custody of the children, were the attorney general and various officials in the INS. The major plank in the plaintiffs’ jurisdictional argument was federal habeas corpus jurisdiction. Other bases included an assertion of a federal question\textsuperscript{112} and the Alien Tort Claims Act.\textsuperscript{113} The attempt to establish federal jurisdiction was in part motivated by a desire to circumvent Michigan’s “best interests standard”\textsuperscript{114} applicable in disputes between nonparent parties.\textsuperscript{115}

Habeas corpus, as applied to infants, is an equitable summary proceeding brought against the person with custody, which is designed to determine in whose custody the best interests of the child will be advanced.\textsuperscript{116} In general, the court is not limited to an inquiry into the legal right by which the child is held.\textsuperscript{117} However in some jurisdictions, the applicant for the writ must show a prima facie right to such custody.\textsuperscript{118} Federal courts do not have jurisdiction to make a custody determination every time it is asserted that a person’s custody is wrongful.\textsuperscript{119} Federal jurisdiction is created only pursuant to 28 U.S.C. § 2241:

\(\text{(c) The writ of habeas corpus shall not extend to a prisoner unless—}\)

\(\text{(1) He is in custody under or by color of the authority of the United States . . .}\)

\(\text{(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . }\)\textsuperscript{120}

The plaintiffs in *Huynh Thi Anh* and the parents in a similar federal case, *Le Thi Sang v. Levi*,\textsuperscript{121} argued that their children, who entered the United States as parolees, remained in the custody of the foster parents under
authority of the federal government. This argument springs from the INA provision authorizing parole:

A person on parole by the INS is not considered to be legally admitted to the country. Rather he is deemed to be in custodial status, usually without confinement, until an emergent situation ceases or until a right to enter the United States is declared. [citations omitted] In exercising his parole power the Attorney General, moreover, is authorized to attach to the granting of parole "such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest. . ." 122

Federal habeas jurisdiction based on this power to prescribe conditions of parole has not been sustained in custodial disputes where both parties reside in the United States. 123 The courts rejected the argument that by admitting the child by parole, the INS acquired a further duty, enforceable by a writ of mandamus, to require removal of the children from foster parents to ensure reunification with their relatives. They suggested instead that the purpose of the immigration authorities' continuing supervision of parolees is to ensure "prompt and safe return upon revocation of parole." 124 The prescribed conditions of parole are intended to keep the INS informed of the children's whereabouts while they remain in parole status. "Any custody of the minor child which is consistent with state law is acceptable to the Immigration and Naturalization Service, so long as the [INS] is kept apprised of the whereabouts of the minor child." 125

Another reason for rejection of federal habeas corpus jurisdiction in Huynh Thi Anh was the failure of the plaintiffs to exhaust state remedies before bringing the federal action. This ruling recognizes that state courts are better suited to adjudicate child custody disputes, because of the traditional nature of domestic relations problems and the expertise of local agencies in monitoring and resolving domestic matters. 126

The plaintiffs in Huynh Thi Anh also claimed that the defendants' continued custody violated the treaties of the United States, thus creating habeas jurisdiction and jurisdiction as a federal question. 127 Because of the generality of the language in the three international documents relied on, 128 the court concluded that they did not create private rights of action in domestic courts. 129

Yet another basis for the assertion of federal jurisdiction in Huynh Thi Anh was the Alien Tort Claims Act. 130 The Act establishes a federal cause of action for an alien for an injury committed "in violation of the law of nations." 131 The plaintiffs claimed that international law recognized a moral and biological custodial right favoring relatives over foster par-
Furthermore, the plaintiffs alleged, Vietnamese law gives natural relatives greater rights than are recognized in U.S. law, and the United States Government had a duty to prevent violation of Vietnamese law.

The Alien Tort Claims Act had been a sufficient basis for federal jurisdiction in one child custody dispute between divorced alien parents. The mother, who was not entitled to custody under the law of the parents' nationality, took the daughter from country to country under an improper passport, thereby concealing the daughter's name and nationality. Federal jurisdiction was predicated on the conclusion that misuse of a passport was a wrongful act "in violation of the law of nations," which caused injury to the daughter's father. However, in Huynh Thi Anh the court's conclusion that no violation of international law had occurred necessarily led to a rejection of federal jurisdiction under the Act. Specifically, the court rejected jurisdiction under the Act because of the lack of an international law principle which granted custody, as a matter of right, to nonparent relatives over foster parents. The allegation based on Vietnamese law was dismissed because choice-of-law principles required application of domestic law.

Federal habeas jurisdiction might arise from the government's initial detention of refugees in temporary domestic camps. Here the children clearly are in custody under authority of the federal government. Yet, federal custody litigation brought by the natural family during this stage is unlikely. Detention in camps is generally brief enough that such litigation would not have time to develop. Moreover, by INS policy, children are released to their natural parents whenever they can be located.

Standards for Determining the Natural Family's Right to Custody

State courts apply the same criteria for determining the proper custodian of a refugee child as they would in a dispute involving a native child. Although every state's child custody code differs, the general goal of all states is to make a custodial determination that serves the best interests of the child.

Most states presume that the natural parents are the best custodians for the child. However, the courts are not in agreement as to the consequence of this presumption. One view, the parental right doctrine, holds that the parent is entitled to custody over all others unless the parent is clearly unfit or has abandoned the child, or unless extraordinary circumstances require that the parent be deprived of custody. Under a second view the welfare or best interests of the child is the sole criterion for custody. The fact that a parent is a suitable custodian does not entitle him or her to custody, if the welfare of the child would be advanced by an award to some other person. The presumption that custody with the
natural parents generally serves the best interests of the child is given some weight. But under this view, there is more comparison of the relative abilities of the parties competing for custody than with strict adherence to the parental right doctrine. The conflict between the two approaches represents a difference in emphasis rather than a clash of opposing rules of law. 141

Refugee parents have generally been successful in regaining custody, but a return of custody is not automatic. Extensive litigation may result if the child’s current custodian resists the parents’ efforts. Proof that the natural parents did not intend to abandon a child or that a release for adoption was invalid is not, by itself, sufficient to restore custody to the parent. The court must also ask which custodian would best serve the child’s needs.

In In Re Hua, a Babylift child had been in legal custody of the defendant, Holt Adopting Program, Inc., and in the physical custody of foster parents for five years. The mother had obtained a writ of habeas corpus to regain custody, but the decision in her favor was reversed by the Ohio Supreme Court. The court accepted the fact that the custody relinquishment document had been signed by the mother under duress. However, it remanded the case for consideration of evidence regarding the suitability of the mother and the best interests of the child. “Where the writ is sought for the detention of the child, the weight of authority holds that the court should be concerned more with the welfare of the child than with the illegality of the detention.”

The return of custody to the natural parents is not necessarily automatic even if the parent never intended to relinquish custody. An Iowa decision, Doan Thi Hoang Anh v. Nelson, placed great importance on testimony concerning the relative merits of the natural mother and foster parents before restoring custody to the mother.

The success of refugee parents in regaining custody may depend, to some extent, on which view—the parental rights doctrine or the best interests test—the court emphasizes. Frequently in domestic child custody disputes, the language and legal theory relied on by a court are inseparable from the facts of the case. For example, if a child has been separated from the parent for a long time, custody is commonly left in the third party on the ground that this serves the child’s best interests. But if the separation is brief, the parent will prevail on the parental rights theory.

If a court places more emphasis on the best interests test than on parental rights, refugee parents may have difficulty regaining custody. Generally an American foster family will be in a superior financial position to care for the child. Furthermore, as the time between the natural parents’ last contact with the child and the attempt to regain custody increases, the child may regard the parents with which he or she resides as psychological
parents. The concept of "psychological parenting," which is gaining recognition in the courts, emphasizes the mental health of the child in applying the best interests standard. The child's lack of contact with his or her national culture may weigh against the natural parents because of the difficulties associated with adjustment from an American family setting to the former cultural setting.

Unlike parents, nonparent relatives of a refugee child do not benefit from any presumption favoring their acquisition of custody. When a relative seeks custody after following a child to the United States, courts are less likely to disturb the existing arrangements for the child than when a parent seeks custody. This may be especially harsh for a relative who was, for all practical purposes, the child's former custodian and psychological parent. For example, the grandmother in *Huynh Thi Anh* claimed that the four children in question had resided in her home in South Vietnam.

The numerous contested custody disputes resulting from the Babylift may prove to be aberrations that do not recur. Perhaps because of the Babylift experience, volags and the federal government have been careful in subsequent migrations of minors to emphasize that these children are not available for adoption. Agencies that retain legal custody may be committed to the goal of family reunification, and assist in transferring custody to parents should they immigrate.

**Repatriation**

The repatriation of a refugee child causes tension between refugee immigration principles and parental custody rights. Parental rights and family unity are paramount values, but a refugee child by definition is in danger of persecution if he or she returns to his or her country of origin or former domicile. The issue of repatriation arises in two settings. In the first, the family and child have been separated by the child's admission to the United States while the parents remain in the country of origin. Unlike the custody actions discussed in the last section, such a suit seeking repatriation has a strong basis for invoking federal jurisdiction.

*Nguyen Da Yen v. Kissinger,* a class action seeking repatriation of Indochinese children whose families remained in Vietnam, implies that courts are willing to view federal involvement differently in the repatriation context than in domestic custodial disputes. In this case, the court sustained federal habeas corpus jurisdiction predicated on a constitutional violation, the allegedly illegal physical and legal custody exercised by the foster parents and adoption agencies. While most private detentions do not rise to the level of constitutional violations, the governmental involvement in facilitating and maintaining the allegedly illegal physical
and legal custody ... presents that possibility here and habeas corpus is proper." 153

Moreover, the court indicated in dicta that the government involvement placed the children "in custody under or by color of the authority of the United States" within the meaning of the habeas corpus provision. 154 The court of appeals reasoned that the "decision that the child is admissible [had] the practical effect, absent court intervention, of precluding its return to Vietnam. . . . [T]he governmental action restricts the child's freedom to depart, and the government has the power to remedy the detention." 155 The absence of a state court remedy that would send a child out of the country necessitates federal jurisdiction if the family is to be reunited by repatriating the child. 156

It is not clear whether a refugee child may choose to remain in the United States against his or her parents' wishes. No reported cases address this issue. Policies reflected in case law and INS decisions seem to place more importance on the parents' right to control the child's destiny than the child's right to asylum or refuge. In the aftermath of the Vietnam Babylift, INS authorities stated that the agency would revoke parole of children whose parents demanded repatriation, and the children would be returned to Southeast Asia if arrangements were possible. 157

A more unusual setting in which repatriation may arise involves families located in the United States which plan to repatriate as a family unit. In three separate cases, parents who intended to return to the Soviet Union sought custody of a child who had been made a ward of the state.

In People ex. rel. Choolokian v. Mission of Immaculate Virgin, 158 the father had voluntarily relinquished custody of his American-born children when he became unable to care for them. The court denied his petition to regain custody to move his children to Soviet Armenia. The denial was based on the belief that the Soviet Union would not permit the children to leave Soviet territory when they reached the majority age. "It is unthinkable that an American court could permit this father to place his infant children in such an irretrievable position." 159

In the second child custody case involving repatriation of a Soviet family, In re Kozmin, 160 custody was restored to the parents. After the parents were released from a mental institution, they sought to regain custody of their children from the state and intended to return to the Soviet Union. In awarding them custody, the court resolved the case strictly on traditional principles. Since it found no reason to deprive the parents of custody, the presumption favoring natural parents was determinative.

A similar case arose in 1980. 161 The parents of Walter Polovchak became disenchanted with the United States and desired to return to the Soviet Union. After Walter ran away from home, the state of Illinois took custody of him under a law 162 that allows a minor to become a ward of
the state even if he is not a delinquent and even if his parents are neither abusive nor neglectful. In addition, the INS approved Walter’s petition for political asylum.

The Polovchak parents brought proceedings in state court to regain custody, challenging the constitutionality of the Illinois statute and the hearing removing Walter into custody of the state. In a separate action in a federal district court, the Polovchaks are challenging the INS asylum determination. If the state loses custody, Walter’s attorney plans to seek a federal court judgment that the asylum status preempts any state action in the matter. If this suit should be filed, the court would probably have to determine whether parental custodial rights are paramount to a child’s desire to remain in asylum in the United States. When the parents already have legal custody, a grant of asylum probably does not override the parents’ desire to repatriate their child. Under international legal principles, the right to asylum is not an individual right, but a right of a sovereign state to confer or deny asylum. On the other hand, parents’ rights to control their children are well-established in U.S. law. There is authority indicating that a parent’s right to direct his or her child’s upbringing is constitutionally protected against unwarranted state infringement.

In general, the government may initially invade or terminate the parent-child relationship only upon a showing of parents’ gross misconduct or unfitness, or other extraordinary circumstances affecting the welfare of the child. Should the grant of asylum permit a child to remain in the United States against the wishes of his parents, then it would have the practical effect of terminating the child’s relationship with his parents. Ordinarily, a parent’s right to maintain this relationship cannot be cut off without due process of law. A grant of asylum to the child by the INS would hardly meet this requirement. The INS itself denies that granting asylum should affect the parents’ rights.

More problematic is the case where the parents do not have custody and seek to acquire it from a state agency. In this instance, there has already been government interference in the parent-child relationship quite apart from the interference arising from a grant of asylum. In determining whether the parents’ resumption of custody is warranted, the court makes the child’s welfare the paramount consideration. Attention to the best interests of the child would seem to require consideration of whether a parent would place the child in a position in which the child would potentially be subject to persecution.
THE EFFECT OF THE REFUGEE ACT OF 1980

Federal Responsibility for Care and Maintenance of Unaccompanied Refugee Children Under the Refugee Act

An important element of the Refugee Act of 1980\textsuperscript{171} is its authorization of federal funding of child welfare services for unaccompanied minor refugees.\textsuperscript{172} Such permanent legislation should allay the financial fears of state governments and voluntary agencies, and reduce placement delays. The Act also deals with procedural matters. When an unaccompanied child is in transit to the United States, or within the United States but as yet unplaced, "the Director (of Refugee Resettlement) shall assume legal responsibility (including financial responsibility) for the child."\textsuperscript{173} The director is authorized to make necessary decisions to provide for the child's immediate care.\textsuperscript{174} This provision fills the gap in legal responsibility that sometimes occurred in prior practice and ensures that someone is always responsible for making decisions which affect the child's welfare.

The Act's effect on the procedures for transferring legal responsibility from the director to state child welfare agencies is unclear. The Interstate Compact procedure has been working so well that federal administrators hesitate to upset that system.\textsuperscript{175} Although the federal government is not included within the Compact's definition of a "sending agency," this technical problem can be avoided if the federal government, as has been its practice, contracts with a volag to effect placement. A volag is clearly a "sending agency"\textsuperscript{176} and the Refugee Act specifically authorizes the director to contract with appropriate public or private nonprofit agencies in order to carry out his or her legal responsibilities.\textsuperscript{177} In effect, the Act may simply serve to codify the practices of the recent resettlement of Indochinese children.

The inadequacy of the Act in placing children who are admitted under any status other than "refugee" is illustrated by the experience of the Cuban children in 1980. Whether the Act should be amended to extend federal benefits to an unaccompanied child admitted by parole depends on the likelihood of a similar massive influx of immigrants. Clearly Congress wishes to discourage the use of parole to admit aliens, although prior to the passage of the Refugee Act, the executive branch regarded the use of parole as the most effective means of admitting refugees in emergency situations. Should child welfare benefits be extended to children admitted under parole or a similar category created by the executive branch, the financial burden would be negligible if the exercise of the executive's discretionary power fell into relative disuse, while the benefit to individual children would be great. If admissions by discretionary authority continue apace, then the financial obligations of the federal government would
exceed the expectations of Congress in enacting the Refugee Act. But past experience indicates that, in any case, it will be the federal government that ultimately pays for children admitted by executive fiat. Thus, federal responsibility for unaccompanied children should be extended to cover unaccompanied children admitted by parole. Alternatively, the executive branch should be more sensitive to the practical effects of admission under a nonrefugee status.  

The Effect of the Refugee Act on Rights of the Natural Family

The Refugee Act specifies that placement of unaccompanied children will proceed under the laws of the states. Because the legal relationships between unaccompanied children and their natural family were shaped by state law prior to its enactment, the Refugee Act will have almost no effect in this area. The only apparent change is in the interim period during which the director of refugee resettlement is responsible for unaccompanied refugee children. Should a custody challenge develop in the interim period, the federal government would be an appropriate defendant. However, custody suits by maternal family members who follow the child to the United States seem unlikely, since federal policy has been to release children from federal custody to parents or relatives whenever they are located in the United States. The federal government, which cannot develop the emotional ties foster parent custodians experience, will not contribute to custody contests. Possibly, though, the government would put up more of a fight to retain custody if parents left behind attempt to have the children repatriated. Still, the more probable development is that the natural family will attempt to immigrate to the United States at a later date.

CONCLUSION

To a degree matched by no other group of refugees, unaccompanied children rely on Americans for economic, social, and emotional support as well as legal protection. Recognizing the need of any child to be guided and provided for by an adult, United States law foresees a continuity of custodians until a child’s majority. Because of improved procedures under the Interstate Compact for Children and federal responsibility under the Refugee Act of 1980, custody of unaccompanied refugee children admitted as refugees under the Act now mirrors this legal norm of continuous custody.

Once an unaccompanied refugee child has been placed in legal custody, state courts apply a standard elevating the child’s interests above other considerations when determining whether custody should revert to the
natural family members who later immigrate. This test may result in a harsh outcome for the natural family if the court considers the psychological attachment to foster parents, financial support, and effects of shifting back to a family with a different cultural orientation. The potential severity of court scrutiny is mitigated by the presumption that the child is better off with his or her biological parents rather than parent substitutes. The same presumption is probably determinative when parents seek repatriation of the child. Thus, in adjustment of custody, too, where the question is not so much one of continuity of care as quality of it, legal rules strive to serve the special needs of refugee children. Refugee movements into the United States are not extraordinary occurrences, and, with the passage of the 1980 Refugee Act, U.S. law acknowledged this fact of contemporary international life. While the regularity of migrations is not to be applauded—reflecting, as it does, crisis and tragedy abroad—the regularization of procedures for dealing with refugees is a salutary development. Refugee children are the direct beneficiaries of the custodial procedures that have developed of necessity in response to unabating crises.

NOTES

1 J. Goldstein, A. Freud, & A. Solnit, Beyond the Best Interests of the Child (1979) [hereinafter cited as Goldstein, Freud & Solnit].
2 Id. at 9.
3 Note, International Adoption—United States Adoption of Vietnamese Children: Vital Considerations for the Courts, 52 Denv. L.J. 711, 714 (1975) [hereinafter cited as Adoption of Vietnamese Children].
4 In this note, an unaccompanied refugee child is defined as a person who: (1) has not attained his or her eighteenth birthday, (2) has no known relative in the United States, (3) has been lawfully admitted to the United States by the federal government, and (4) is a refugee, meaning an alien who is persecuted or has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion in the country of his or her nationality or country of last habitual residence. This definition is derived from the definition of an unaccompanied Indochinese refugee in Office of Development Services and Social Security Administration, Department of Health, Education and Welfare, Action Transmittal SSA-AT-04, OHDS-AT-79-02, OHDS-AT-79-04, at 1 (Feb. 6, 1979) [hereinafter cited as Action Transmittal]. The definition of refugee is derived from the Refugee Act of 1980, Pub. L. No. 96-212, § 201(a), 94 Stat. 102 (1980) (to be codified at 8 U.S.C. § 1101(a) (42)). See text at notes 17–51 infra for a discussion of legal admission.
5 Teenage Escapees From Indochina Face Future Without Families, Washington Report, April 1979, at 6, col. 1 (published by American Public Welfare Association) [hereinafter cited as Teenage Escapees From Indochina].
6 Custody as used in this note generally refers to a legal status which confers the right and duty to protect, train, and discipline the child, and to provide food, shelter, legal services, education, and medical care. The custodian has the authority to consent to marriage, medical treatment, make decisions of substantial legal significance, and may be liable for torts which could have been avoided by more effective parental supervision. Custodial responsibilities may be shouldered by an individual or an agency. Some of these duties may be delegated

7 Technically, under American law, an adult relative who is not a parent has no automatic right to custody of a child. However, in practice, at least in the case of Indochinese refugees, a child is released to an accompanying close adult relative assuming the relative is willing and able to care for the child. Interview with William Eckoff, Policy Analyst, Office of Refugee Resettlement, in Washington, D.C. (Oct. 31, 1980).

8 Teenage Escapees From Indochina, supra note 5, at 6.

9 In 1980, states were reluctant to take on the responsibility of placing Cuban refugee children in foster homes without guarantees of federal reimbursement for expenses. Unaccompanied Cuban minors were detained in temporary camps until financial arrangements with the states were completed. See, e.g., Cuban Children Arriving Parentless, Wash. Post, June 1, 1980, § A, at 1, col. 2; Bureaucratic maze holds teens hostage, Detroit Free Press, Sept. 14, 1980, § A, at 1, col. 2; Cuban refugee camp cleaned up before probe, id., Aug. 28, 1980, § A, at 1, col. 2; 15, col. 2.

10 Child placement refers to the process of determining custody and assigning the task of being parent to a child. GOLDSTEIN, FREUD & SOLENT, supra note 1, at 5.


12 See text at notes 94-170 infra.


18 INA § 201.


The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

INA § 212(d)(5) (current version in Refugee Act of 1980, § 203(f), to be codified at 8 U.S.C. § 1182(d)(5)).

Conditional entries shall next be made available by the Attorney General, pursuant to such regulations as he may prescribe and in a number not to exceed 6 per centum of the number specified in section 201(a)(ii), to aliens who satisfy an Immigration and Naturalization Service officer at an examination in any non-Communist or non-Communist-dominated country, (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and (iii) are not nationals of the countries or areas in which their application for conditional entry is made; or (B) that they are persons uprooted by catastrophic natural calamity as defined by the President who are unable to return to their usual place of abode. For the purpose of the foregoing the term 'general area of the Middle East' means the area between and including (1) Libya on the west, (2) Turkey on the north, (3) Pakistan on the east, and (4) Saudi Arabia and Ethiopia on the south: Provided, That immigrant visas in a number not exceeding one-half the number specified in this paragraph may be made available, in lieu of conditional entries of a like number, to such aliens who have been continuously physically present in the United States for a period of at least two years prior to application for adjustment of status.

INA § 203(a)(7), as amended by Act of October 3, 1965, § 3 (repealed by Refugee Act of 1980, § 203(c)(3)).

INA § 212(d)(5) (current version in Refugee Act of 1980, § 203(f), to be codified at 8 U.S.C. § 1182(d)(5)).

INA § 245, 8 U.S.C. § 1255 (1976) (permits adjustment of status within numerical limitations imposed by the INA). In addition, special legislation has been enacted to provide adjustment of status for groups of refugees not otherwise eligible for adjustment of status under ordinary INA procedures because they were admitted to the United States by special legislation. E.g., Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161 (adjustment for Cubans); Act of October 28, 1977, Pub. L. No. 95-145, 91 Stat. 1223 (adjustment of Indochinese); Act of October 5, 1980, Pub. L. No. 95-412, § 5, 92 Stat. 907 (amended by Refugee Act of 1980, § 203(g)).

Harper, supra note 20, at 511.


See id. at 195-96 (Refugees in the United States in Laws and Programs, report by the Congressional Research Service).

Although the following is not a comprehensive list, it indicates the magnitude of the numbers of children admitted by parole: In 1956-1957, 839 orphans were paroled. Harper, supra note 20, at 511. In the first three years of influx of Cubans into the United States after

31 The provision was applicable to persons from the Eastern Hemisphere who had fled from Communist countries or the Middle East, or to persons who were uprooted by national disasters. Id.
32 See Hearings on S. 643, supra note 27, at 190.
35 The procedure for adopting a South Vietnamese child included three phases. (1) Local adoption agencies in the United States investigated applicants to determine their suitability as parents. (2) The agencies made recommendations to American agencies authorized by the South Vietnamese Government to handle such adoptions. (3) The agencies in South Vietnam then handled the paper work and arranged for transport of the child to the United States. See Relief and Rehabilitation of War Victims in Indochina: Part II: Orphans and Child Welfare: Hearings Before the Subcomm. to Investigate Problems Connected with Refugees and Escapees of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 98-99 (1973).
36 See generally, Refugee from Indochina, supra note 29, at 34-57 (statement of Leonard Walenty-nowicz, Administrator, Bureau of Security and Consular Affairs, Department of State).
37 See text at notes 94–170 infra.
40 The term “refugee” means (A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country of such person’s nationality or, in the case of a person having no nationality,
within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

Refugee Act of 1980, § 201(a) (to be codified at 8 U.S.C. § 1101(a)(42)).

41 Id.
42 Id. § 201(b) (to be codified at 8 U.S.C. § 1158).
45 In 1980, section 243 of the INA was amended to include nationality and membership in a particular social group as a basis of persecution. The amendment makes withholding of deportation mandatory when an alien's life or freedom would be threatened. The amended section 243 also adds four specific situations in which relief may not be granted. INA § 243, as amended by Refugee Act of 1980, § 203(e) (to be codified at 8 U.S.C. § 1253(h)).

48 Refugee Act of 1980, § 201(b) (to be codified at 8 U.S.C. § 1157(b)).
52 See Teenage Escapees from Indochina, supra note 5, at 6.
53 See text at notes 62-74 infra; text at notes 86-93 infra.
54 See, e.g., Hearings on H.R. 2816, supra note 16, at 419. Alternative resettlement patterns include placement in temporary orientation homes, small group homes, supervised independent living arrangements, and placement with aliens of the same nationality. Id. at 422, 425-426.
55 Generally, a local or state welfare agency provides the foster care and services itself or enters into a contract with a private voluntary child welfare agency. The federal government then reimburses state or local public agencies. See, e.g., Action Transmittal, supra note 4, at 3.
56 A voluntary agency is an agency which has been created by a constituency of individuals, groups, or organizations to provide a specific service. It is a private agency but it may cooperate voluntarily with government programs and may use public funds when they are available for the services the agency provides. Hearings on H.R. 2816, supra note 16, at 416. See also Zucker, Refugee Resettlement in the United States: The Role of the Voluntary Agencies, this volume.
57 See note 9 supra.

59 Interview with William Eckoff, supra note 7.

60 See Refugees from Indochina, supra note 29, at 34-47 (testimony of Leonard Walentynowicz, Administrator, Bureau of Security and Consular Affairs, Department of State); id. at 571-573 (Appendix I, Indochina Refugees—Chronology of Events).

61 Refugees from Indochina, supra note 29, at 64 (testimony of Leonard Chapman, Commissioner, Immigration and Naturalization Service and James Greene, Deputy Commissioner, Immigration and Naturalization Service).

62 Teenage Escapees from Indochina, supra note 5, at 5-6.

63 Id. at 6.

64 Indochina Migration and Refugee Assistance Act of 1975, §§ 2, 3.

65 Interview with William Eckoff, supra note 7.

66 Teenage Escapees from Indochina, supra note 5, at 1, 4; Hearings on H.R. 2816, supra note 16, at 418 (statement of Ingrid Walter).

67 Teenage Escapees from Indochina, supra note 5, at 4.

68 Hearings on H.R. 2816, supra note 16, at 418 (statement of Ingrid Walter).

69 Teenage Escapees from Indochina, supra note 5, at 6.

70 Id.

71 Action Transmittal, supra note 4, at 2.

72 Id.

73 Indochina Migration and Refugee Assistance Act of 1975, §§ 2, 3 (authorizing legislation); Action Transmittal, supra note 4, at 6.

74 Hearings on S. 643, supra note 27, at 60 (statement of Norman Lourie, Chairman, National Coalition for Refugee Resettlement and Representative, Council of State Public Welfare Administrators).

75 American Public Welfare Association, The Interstate Compact on the Placement of Children 1 (unpublished pamphlet available from APWA) [hereinafter cited as Interstate Compact].

76 Id. at 2.


78 "'Sending agency' means a party state, officer or employee thereof; a subdivision of a party state, or officer or employee thereof; a court of a party state; a person, corporation, association, charitable agency or other entity which sends, brings, or causes to be sent or brought any child to another party state." Interstate Compact, supra note 75, art. II(b); Wis. Stat. § 48.988 (1977).

79 Interstate Compact, supra note 75, art. V(a); Wis. Stat. § 48.988 (1977).

80 Memorandum from Bruce Gross, American Public Welfare Association Secretariat to Compact Administrators and Deputy Compact Administrators (April 17, 1979).

81 See id.

82 Memorandum from Betsey Rosenbaum, Interim Project Manager, American Public Welfare Association, to Compact Administrators and Deputy Compact Administrators (Dec. 5, 1979) [hereinafter cited as Rosenbaum Memorandum].

83 Interstate Compact, supra note 75, art. V(c); Wis. Stat. § 48.988 (1977).

84 Rosenbaum Memorandum, supra note 82.

85 White House takes action to free Cuban teens, supra note 29.

86 See note 48 supra.

87 See note 50 and accompanying text supra; Gordon & Rosenfeld, supra note 50.
Life is horror for teens at Cuban camp, Detroit Free Press, Aug. 24, 1980, § A, at 1, col. 4;
How refugee dream became a nightmare, id., Sept. 7, 1980, § A, at 1, col. 2; White House takes action to free Cuban teens, supra note 29; Bureaucratic maze holds teens hostage, supra note 9; Coming of age at refugee camp: Anger and despair, Detroit Free Press, Sept. 28, 1980, § A, at 1, col. 2.

See note 9 supra.

The special parole status rendered the federal financial support provisions of the Refugee Act inoperative because the provisions apply only to persons admitted as refugees. Refugee Act of 1980, § 311 (to be codified at 8 U.S.C. § 1522(d)-(e)).

White House takes action to free Cuban teens, supra note 29.

Id.; Anxiety, pain rule Fi. McCoy up to the end, Detroit Free Press, Oct. 5, 1980, § A, at 1, col. 3.


Teenage Escapees from Indochina, supra note 5, at 4.


Refugees from Indochina, supra note 29, at 415 (statement of Leonard Chapman, Commissioner, Immigration and Naturalization Service).


Nguyen Da Yen v. Kissinger, 528 F.2d 1194 (9th Cir. 1975).


Adoption of Vietnamese Children, supra note 3, at 778 & n. 24.

ILL. REV. STAT. ch. 40 § 1512(M) (1979).

See Restatement (Second) of Conflict of Laws § 6, comments c-k (1971).


Id. at 3.

Huynh Thi Anh, 586 F.2d at 625.

Id. at 629-31.

Le Thi Sang, 426 F. Supp. at 972; LaMontagne v. LaMontagne, 394 F. Supp. 1159, 1160 (D. Mass. 1975) (child custody dispute dismissed on grounds that federal courts lack jurisdiction to entertain domestic relations controversies).

But see Huynh Thi Anh, Nguyen Da Yen, and Le Thi Sang. Plaintiffs in each of these cases brought a habeas corpus action against INS in federal court.

586 F.2d 625 (6th Cir. 1978).

The four groups were the federal defendants mentioned in the text, the state defendants (Michigan Department of Social Services and several of its employees), the judicial defendants (Michigan probate judges), and the foster parents. 586 F.2d at 628.


Telephone interview with Martin Guggenheim, professor of law at New York University and plaintiffs' attorney in Huynh Thi Anh (Jan. 28, 1981).

CLARK, supra note 6, at § 17.3, at 578-79.

Id.
118 Roussel v. State, 274 A.2d 909, 921-23 (Me. Sup. Jud. Ct. 1971) (habeas corpus action brought by former foster parents dismissed because of lack of preexisting legal right to custody). *Contra*, Pukas v. Pukas, 129 W.Va. 765, 42 S.E.2d 11, 13 (W.Va. Sup. Ct. App. 1947) (petitioner in a habeas corpus action may be merely a person with a legally justified interest in the child's freedom, such as a father, brother, or aunt, but who is not seeking to establish a superior right to custody).


121 Huynh Thi Anh, 427 F. Supp. at 1287; Le Thi Sang, 426 F. Supp. at 972.


123 Le Thi Sang, 426 F. Supp. at 631.

124 Huynh Thi Anh, 426 F. Supp. at 633.

125 Huynh Thi Anh, 586 F.2d at 628; Le Thi Sang, 426 F. Supp. at 972.


128 Id.

129 Huynh Thi Anh, 586 F.2d at 628.


131 Id.

132 Huynh Thi Anh, 586 F.2d at 628, 630-31.


134 Huynh Thi Anh, 586 F.2d at 630.

135 Life is horror for teens at Cuban camp, supra note 88.

136 See text at notes 99-100 supra.


141 Clark, supra note 6, at § 17.5.

142 E.g., Doan Thi Hoang Anh v. Nelson, 245 N.W.2d 511 (Iowa Sup. Ct. 1976) (in habeas corpus action, natural mother awarded custody based on finding of an absence of valid release for adoption and a failure of adoptive parents to rebut presumption favoring natural parents' custody); Hao Thi Popp, 42 Conn. L.J. no. 26, at 2 nn.1 & 2 (listing unreported decisions returning Vietnamese children to their natural parents).

143 In re Hua v. Scott, 62 Ohio St. 2d 227, 405 N.E.2d 225 (1980).
144 Id. at 261 n.3.
145 245 N.W.2d 511 (Iowa Sup. Ct. 1976).
146 CLARK, supra note 6, at § 17.5.
147 GOLDSTEIN, FREUD & SOLNIT, supra note 1, at 4, 17-20.
149 Hearings on H.R. 2816, supra note 16, at 416; Action Transmittal, supra note 4, at 2.
150 Hearings on H.R. 2816, supra note 16, at 430, 431 (statement of Ingrid Walter). However, the commitment to family reunification by an agency which has legal custody may not be dispositive when parents seek custody. A developing trend, which recognizes foster parents' standing in custody modification proceedings, prevents the agency from transferring custody to the parents without foster parent consent or, at the very least, foster parent participation in the judicial determination. See Foster Parent Standing in Custody-Modification Proceedings, supra note 6, at 502-09.
151 See note 40 supra for the definition of refugee.
152 528 F.2d 1194 (9th Cir. 1975).
153 Id. at 1202-03 (footnotes omitted).
154 28 U.S.C. § 2241(c)(1), (3) (1976), quoted in text at note 120.
155 528 F.2d at 1203 n.16.
156 Huynh Thi Anh, 427 F. Supp. at 1287.
159 Id. at 513.
160 In re George Kozmin, Paul Kozmin, Richard Kozmin, and Peter Kozmin, Nos. 220638, 220639, 220640, 23788 (Family Ct. of Cook County, Ill., Decretal Order of Aug. 19, 1959), excerpted in 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 640 (1967).
161 In re Walter Polovchak, No. 80J-10145 (Juv. Ct., Cook County, Ill., filed 1980); International Tug-of-War for A 12-Year-Old, NAT'L L.J., Sept. 8, 1980, at 2, col. 3.
162 ILL. REV. STAT. ch. 37, 702-3 (1979).
164 Polovchak v. Landon, No. 80C-5595 (D.N. Ill., filed 1980).
165 International Tug-of-War for A 12-Year-Old, supra note 161, at 8, col. 2.
167 See Stanley v. Illinois, 405 U.S. 645, 651 (1972) (a denial to unwed fathers of hearing on parental fitness accorded to all other parents whose custody is challenged by the state constitutes violation of equal protection and due process clauses of Fourteenth Amendment).
168 CLARK, supra note 6, at § 17.5.
169 405 U.S. at 658; CLARK, supra note 6, at § 18.2.
173 Id.
174 Id.
175 Interview with William Eckoff, supra note 7.
176 See note 78 supra for a definition of “sending agency;” note 56 supra for a definition of “volag.”
178 See text at notes 52-58 supra.
179 Hearings on H.R. 2816, supra note 16, at 430; Teenage Escapees from Indochina, supra note 5, at 4.