

RECENT DEVELOPMENT

A CRITIQUE OF THE IMMIGRATION AND NATURALIZATION SERVICE'S NEW RULE GOVERNING TRANSNATIONAL ADOPTIONS

"Every day, an average of 20 American couples adopt babies from overseas. Most of them come from Third World nations where orphanages overflow, abandoned children sleep in the streets, and poor parents see foreign adoption as one of the few ways to give their children a decent life."¹

I. INTRODUCTION

In response to the declining number of American children available for adoption and the delays associated with the process,² American citizens have increasingly turned to international adoptions. Although relatively quicker,³ the international adoption process is cumbersome, involving state adoption laws, federal immigration law,⁴ and the law of the child's native

1. Michael S. Serrill, *Going Abroad to Find A Baby: The laws of supply and demand have led to a boom in overseas adoption, but the quest can be lengthy, expensive and sometimes morally troubling*, TIME, Oct. 21, 1991, at 86.

2. Adopting an American child now takes between two and ten years. Nancy E. Dowd, *Book Review: A Feminist Analysis of Adoption*, 107 HARV. L. REV. 913, 918 (1994). Many attribute the decline of American children available for adoption to the greater use of contraception, abortion, improved medical technology prolonging the birth parents' lives, and societal approval of single mothers. Richard R. Carlson, *Transnational Adoption of Children*, 73 TULSA L.J. 317 (1988).

However, the "shortage" of American infants is actually only a shortage of healthy caucasian infants. *Id.* at 332. Because of widespread prejudice against interracial adoptions, local laws forbidding them, protests by certain minority groups, and the traditional dictum that "adoption should mirror biology," adoption agencies have traditionally been extremely reluctant to place a noncaucasian baby with a caucasian couple. *Id.* Congress officially ended this practice with the Multiethnic Placement Act of 1994, part of the Improving America's Schools Act, Pub. L. No. 103-382 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2807, 3254. Ironically, to supplement the short supply of caucasian infants, couples often turn to international adoptions, which are generally interracial and always intercultural. Carlson, *supra* at 333. However, the international adoption agencies facilitating transnational adoptions do not adhere to the philosophy of race matching. *Id.* For a comprehensive overview of racial considerations in domestic adoptions, see Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163 (1991).

3. International adoptions generally take about one year. Serrill, *supra* note 1, at 87.

4. The federal government has plenary and exclusive authority over the admission of aliens into the United States. *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892).

country.⁵ This complexity necessarily requires cooperation between the domestic and international agencies executing these laws.⁶ In addition, the current process creates substantial disparities between countries that do not legally recognize the terms "illegitimate" and "legitimate" children ("nondistinguishing countries") and countries that continue to observe this legal distinction ("distinguishing countries").⁷

This Recent Development examines the impact that the newly amended federal immigration regulations ("1994 Regulations")⁸ will have on international⁹ adoptions. It focuses on how a foreign-born child can become eligible for adoption by American parents, and on the foreign father's paternity rights. Specifically, this Recent Development examines the rights of children born in countries that do not distinguish between children born in or out of wedlock.¹⁰ Based on the conclusion that the current approach to international adoptions has many flaws and inconsistencies, this Recent

5. International adoptions are often cancelled because of internal strife in the child's native country. Fabio Santiago & John Donnelly, *The Foreign Baby Business Interest Runs High in Adoptions From Outside the United States, but Would-be Parents Find It's Not Always Easy*, MIAMI HERALD, Oct. 16, 1994, at 1J. In fact, many foreign countries have prohibited foreign adoptions because rumors persist that the children are actually bought for their organs. Serrill, *supra* note 1, at 86.

For example, South Korea has changed its foreign adoption policy. *Id.* The country previously conducted the most foreign adoptions but now it only allows the adoption of handicapped and mixed race children. *Id.* Also, Romania severely restricted international adoptions to combat the scandalous black baby market that developed after the fall of dictator Nicolae Ceausescu and the mass exodus of Rumanian children through international adoptions. *Baby Market Still Flourishes in Romania*, CLEVELAND PLAIN DEALER, Sept. 4, 1994, at 15A. Currently, Romania only allows registered orphans to leave. *Id.* Similarly, Russia only permits children with "special needs," those who are older or handicapped, to be adopted overseas. Serrill, *supra* note 1, at 87.

6. Carlson, *supra* note 2, at 318-21. Even though a child may be successfully relinquished for adoption pursuant to the foreign country's code, there is no guarantee that the child will meet federal immigration relinquishment requirements. *Id.* at 319. Similarly, once a child satisfies the federal immigration standards for adoption, he may nonetheless be rejected by the receiving State court. *Id.*

7. For a discussion of the different treatment of "legitimate" and "illegitimate" children in distinguishing and nondistinguishing countries, see *infra* note 51.

8. 8 C.F.R. § 204 (1995).

9. The terms "international," "intercountry," and "transnational" are used interchangeably in this Recent Development. The term "American" refers solely to a resident of the United States.

10. The phrase "born out of wedlock" essentially means an illegitimate child or a child born to an unmarried woman. However, many foreign nations, especially South and Central American countries, have deleted the legal terms "illegitimate" and "legitimate" from their constitutions and legal codes in order to prevent discrimination against illegitimate children and to make all children equal before the law. In these countries all children are labeled "legitimate." See *infra* note 51.

Legitimate and illegitimate children traditionally have different legal rights regarding inheritance; their fathers' rights to visitation, adoption or removal; their mothers' right to obtain child support; and their fathers' criminal liability for nonsupport. *In re Oduro*, 18 I. & N. Dec. 421, 423 (B.I.A. 1983) (citing *In re Reyer*, 17 I. & N. Dec. 646 (B.I.A. 1978)).

Development proposes an amendment that would make the application of the United States' immigration laws uniform and cohesive by balancing the prospective adoptive child's best interests with the competing rights of both the illegitimate foreign father and the prospective adoptive parents.

II. OVERVIEW OF THE INTERNATIONAL ADOPTION PROCESS

The international adoption process begins with the foreign country relinquishing the child, followed by the Immigration and Naturalization Service ("INS") granting the child a visa, and ends when the state court where the petitioning parents¹¹ reside issues a state adoption decree.¹² At all levels, legal adoption requires two elements: (1) the child must be eligible for adoption, and (2) the parents must be competent to receive the child.¹³ Unfortunately, state, federal, and international law do not always agree on the standards for measuring these criteria. This discrepancy may deny or at least delay a child's placement in a suitable home.¹⁴

11. The terms "petitioning parent(s)" and "petitioner(s)" refer to the prospective adopting American citizen(s). Because many foreign nations allow both single and married parents to adopt, these terms are used in both the singular and plural. These terms are derived from the orphan petition that the United States citizen must file with the INS in order to commence the adoption. In particular, the rule defines the following terms.

Orphan petition means Form I-600 (Petition to Classify Orphan as an Immediate Relative). The petition must be completed in accordance with the form's instructions and submitted with the required supporting documentation and, if there is not an advanced processing application approved within the previous 18 months or pending, the fee as required in 8 CFR § 103.7(b)(1). The petition must be signed in accordance with the form's instructions by the married petitioner and spouse, or the unmarried petitioner.

Petition is synonymous with orphan petition.

Petitioner means a married United States citizen of any age, or an unmarried United States citizen who is at least 24 years old at the time he or she files the advanced processing application and at least 25 years old at the time he or she files the orphan petition. In the case of a married couple, both of whom are United States citizens, either party may be the petitioner.

Prospective adoptive parents means a married United States citizen of any age and his or her spouse of any age, or an unmarried United States citizen who is at least 24 years old at the time he or she files the advanced processing application and at least 25 years old at the time he or she files the orphan petition. The spouse of the United States citizen may be a citizen or an alien. An alien spouse must be in lawful immigration status if residing in the United States.

Immigrant Petitions, 8 C.F.R. § 204.3(b) (1995).

12. Carlson, *supra* note 2, at 335.

13. Margaret Liu, Comment, *International Adoption: An Overview*, 8 TEMP. INT'L & COMP. L.J. 187, 208 (1994).

14. International adoptions have become increasingly difficult because some countries have tightened their adoption codes to prevent black market baby trade and other related corrupt activities. See *supra* note 5. In addition, some countries do not have established laws governing adoption. Therefore, determining when a child is eligible for adoption is an imprecise practice. Carlson, *supra*

A. Foreign Requirements

An international adoption begins when either the natural parents or parent or a foreign official relinquishes the child.¹⁵ The relinquishment may occur pursuant to a formal judicial or administrative proceeding or through a private transaction in the child's native country.¹⁶ Although the rules vary by country, foreign nations usually require that the adoption occur in the child's native country or to an American parent.¹⁷

B. Federal Requirements

In addition to the foreign country's relinquishment of the child, federal immigration officers must grant the child admission into the United States.¹⁸ Although federal officials do not have the authority to authorize an adoption before issuing a visa,¹⁹ they must make an administrative determination that the petitioning parents are qualified to receive the child and that the child is eligible for adoption.²⁰ This precautionary measure

note 2, at 338. Ecuador, for example, does not have a precise legal definition of how a child becomes adoptable. *Id.* at 338. Consequently, American courts may not accredit an Ecuadorian decree of adoptability because of possible due process violations. Jane T. Ellis, *The Law and Procedure of International Adoption: An Overview*, 361 SUFFOLK TRANSNAT'L L.J. 361, 386 (1982).

15. Carlson, *supra* note 2, at 335.

16. *Id.* Foreign relinquishment procedures vary from country to country. See Liu, *supra* note 13, at 202. Countries lacking effective adoption procedures increase the likelihood of illegal adoption practices and baby buying, stealing, and selling. *Id.*

17. Ellis, *supra* note 14, at 362. In contrast, Ecuador requires that foreign adopting parents complete the adoption process in Ecuador. *Id.* at 385. In general, Ecuador requires that the decree be issued in an Ecuadorian court and that the parents personally file the adoption petition, including a home study of the parents, their birth certificates, and other things. *Id.* The Ecuadorian system also requires the prospective parents to appoint an Ecuadorian attorney or agent to respond to any inquiries about the child for a period of five years after the date the adoption decree is issued. *Id.* at 386. If the parents violate any Ecuadorian adoption laws, the Ecuadorian court has the power to revoke the adoption decree on its own initiative or by another interested party. *Id.*

18. Carlson, *supra* note 2, at 342.

19. For a discussion of the four ways a foreign adopted child may obtain a visa, see *infra* notes 32-38 and accompanying text.

20. Carlson, *supra* note 2, at 342. The administrative determinations of the child's and adoptive parents' eligibility by the immigration officers parallel those made later at a state court proceeding once the child has immigrated to the United States. *Id.* Even though state and federal requirements overlap, a favorable decision by the immigration official does not guarantee that the state will grant the adoption. *Id.* The major federal concern is deciding whether the child is eligible to immigrate. However, this requires a preliminary federal finding of state adoptability, even though the ultimate adoption decree comes from the domicile state itself. *Id.*

helps prevent the immigration of unwanted children.²¹ However, in order to ascertain the above-mentioned conditions for entry, federal immigration policy must necessarily overlap with certain areas of both state and foreign law.²²

1. *Adoptive Parent's Suitability*

Before a child can obtain a visa, federal law requires the petitioning parents to satisfy state and federal eligibility requirements.²³ First, the prospective parents must show the INS officers that they have completed all relevant state pre-adoption requirements.²⁴ Second, they must comply with section 101(F) of the Immigration and Naturalization Act ("INA"), which outlines the basic federal requirements necessary to complete an international adoption.²⁵ Finally, the INS must be satisfied that proper care

21. *Id.* at 345. For a discussion of the adoptive parents' suitability, see *infra* notes 23-28 and accompanying text.

22. Carlson, *supra* note 2, at 345. For example, the United States requires that the foreign country's relinquishment procedures comply with federal immigration law in order for the child to obtain a visa. *Id.* at 335. Accordingly, the United States is able to exert control over some foreign adoption procedures. *Id.*

In contrast, state courts have no jurisdiction over the foreign relinquishment. This can create problems because state courts issue the final adoption decree according to their own standards. Thus, even if the foreign relinquishment is already faithfully executed under the foreign nation's law and approved by the INS, state courts can insist that it meet state standards. *Id.* This causes problems because foreign standards for determining a child's eligibility for adoption do not always correspond with American legal standards or individual state requirements. *Id.*

23. *Id.* at 345.

24. 8 U.S.C. § 1101(b)(1)(F) (1988). In general, federal officials determine what the petitioners' state requires as a prerequisite for adoption and predict whether a state court would approve of the applicants. Carlson, *supra* note 2, at 345. Immigration officials may require the petitioners to present a statement from a state welfare department listing that state's adoption requirements. *Id.* at 346. In addition, immigration officials must receive a report on the prospective parents' qualifications under state law. *Id.* Most states require a court to evaluate the potential adoptive parents' financial, physical, mental, and moral suitability. Typically, this includes a professional home study, which is also an independent federal prerequisite for adoption. Generally, federal officials accept recommendations from the state licensed social worker who completed the state home study. However, if state and federal authorities disagree on the results of the home study, the immigration officers may reject the adoption petition. *Id.* at 347.

25. These requirements are listed under the INA's definition of "child":

a child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 1151(b) of this title, 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; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for

will be furnished to the child if admitted in to the United States.²⁶ Although the INS promulgates federal regulations interpreting this broad statutory language,²⁷ in general, the prospective parents only need to establish that they have the financial means, mental capacity, and moral resolve to properly provide for the incoming child.²⁸

adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, *who have or has complied with the preadoption requirements, if any, of the child's proposed residence, provided, that the Attorney General is satisfied that proper care will be furnished the child if admitted to the United States: Provided further, That no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter.*

8 U.S.C. § 1101(b)(1)(F) (emphasis added).

26. *Id.*

27. 8 C.F.R. § 204.3 (1995). These regulations outline the exact procedures petitioners must follow to adopt a child, including home study, fingerprinting, checking criminal records check, and providing financial statements. *Id.*

28. Liu, *supra* note 13, at 207. The new federal regulations require a detailed home study: In addition to meeting any State, professional, or agency requirements, a home study must include the following:

(1) *Personal interview(s) and home visit(s)*

(2) *Assessment of the capabilities of the prospective adoptive parents to properly parent the orphan.* [It must discuss]

(i) *Assessment of the physical, mental, and emotional capabilities of the prospective parents to properly parent the orphan* The home study must include the home study preparer's assessment of any such potential problem areas, a copy of any outside evaluation(s), and the home study preparer's recommended restrictions, if any, on the characteristics of the child to be placed in the home. Additionally, the home study preparer must apply the requirements of this paragraph to each adult member of the prospective adoptive parents' household.

(ii) *Assessment of finances of the prospective adoptive parents*

(iii) *History of abuse and/or violence.* [The rules outline the extensive procedures the home study preparer must follow in order to properly and thoroughly screen for abuse and violence.]

(iv) *Previous rejection for adoption or prior unfavorable home study*

(v) *Criminal history* Failure [of parents to disclose any arrest and/or conviction] may result in denial pursuant to paragraph (h)(4) of this section or in delays

(3) *Living accommodations.* The home study must include a detailed description of the living accommodations where the prospective adoptive parents currently reside

(4) *Handicapped or special needs orphan.* A home study conducted in conjunction with the proposed adoption of a special needs or handicapped orphan must contain a discussion of the prospective adoptive parents' preparation, willingness, and ability to provide proper care for such an orphan.

(5) *Summary of the counseling given and plans for post-placement counseling.* The home study must include a summary of the counseling given to prepare the prospective adoptive parents for an international adoption and any plans for post-placement counseling. Such preadoption counseling must include a discussion of the processing, expenses, difficulties, and delays associated with international adoptions.

(6) *Specific approval of the prospective adoptive parents for adoption*

(7) *Home study preparer's certification and statement of authority to conduct home studies*

(8) *Review of home study.* If the prospective adoptive parents reside in a State which requires

2. *Children's Eligibility*

If prospective adoptive parents meet the federal requirements, then immigration officials ascertain whether the child is eligible for adoption.²⁹ Although this determination is traditionally a state function, immigration officials make this finding pursuant to federal criteria.³⁰ Although the federal requirements for child eligibility parallel state laws in many ways, they differ in several important areas.

The INA defines a "child" eligible for adoption as one who is

under the age of sixteen at the time a petition is filed [and] . . . 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 . . .³¹

3. *Methods of Entry into the United States*

If federal officials are satisfied that both the child and prospective parents are qualified to proceed with the adoption, the State Department will issue a visa. Currently, there are four ways that an adoptable child may enter the United States.³² Usually, the adoptive parents can petition the State Department to have the child declared an "immediate relative."³³ This categorization allows for expedited adoptions because the federal government does not subject "immediate relatives" to the lengthy wait most aliens

the State to review the home study, such a review must occur and be documented before the home study is submitted to the Service . . .

(9) *Home study updates and amendments.*

(i) *Updates.* If the home study is more than six months old at the time it would be submitted to the Service, the prospective adoptive parents must ensure that it is updated by a home study preparer before it is submitted to the Service.

(ii) *Amendments.* If there have been any significant changes, such as a change in the residence of the prospective adoptive parents, marital status, criminal history, financial resources, and/or the addition of one or more children or other dependents to the family, the prospective adoptive parents must ensure that the home study is amended by a home study preparer to reflect any such changes.

8 C.F.R. § 204.3(e) (1995) (emphasis added).

29. Carlson, *supra* note 2, at 347.

30. *Id.* In contrast to the parents' eligibility, the federal officials do not decide whether the child would be acceptable under state law. Rather, immigration officers need only determine that the child meets federal immigration standards. *Id.*

31. 8 U.S.C. § 1101(b)(1)(F). The statutory terms "abandonment" and "sole parent" used in the INA's definition of "child" were recently defined by the INS in 8 C.F.R. § 204.3 (1995).

32. Carlson, *supra* note 2, at 342.

33. *Id.*

must endure before receiving a visa.³⁴ In the alternative, the parents can petition to have the child classified as a "special immigrant."³⁵ In addition, a child can enter the United States under the Attorney General's discretionary parole authority.³⁶ Finally, children who do not qualify for immigration under the first three categories may enter as aliens subject to the federal numerical limitations.³⁷ Generally, however, federal immigration law makes transnational adoptions a high priority and exempts children from numerical restrictions in order to prevent the delay that accompanies regular immigration procedures.³⁸

34. The federal government establishes numerical limitations on the number of aliens permitted to immigrate to the United States per year. However, the United States allows "immediate relatives" to bypass these restrictions. The INA lists the type of aliens not subject to direct numerical limitations, which includes:

(2)(A)(i) *Immediate relatives.* For purposes of this subsection, the term "immediate relatives" means the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age

8 U.S.C. § 1151(b)(2)(A)(i).

The term "children" is defined in 8 U.S.C. § 1101(b)(1)(F). For a definition of "child," see *supra* note 25 and accompanying text. In addition, a few children are granted "immediate relative" status pursuant to the definition of "child" set out in 8 U.S.C. § 1101(b)(1)(E). This section is used primarily by adoptive parents who have resided overseas and who have adopted a foreign born child through a foreign proceeding. Carlson, *supra* note 2, at 342-43. This Recent Development examines the new rule's effect only on subcategory (F)'s definition of "child" and does not examine the impact of Subcategory (E).

Although oversimplified, it may be helpful to note that an alien subject to "numerical limitations" enters the United States on a first-come-first-serve basis as established through the INA. See generally 6 U.S.C. § 202 (1994). In contrast, the "immediate relative" status catapults the alien ahead of the "first come first serve line" and makes the alien's issue of a visa a priority. *Id.*

Because the new federal regulations only affect "orphans," as defined under the "immediate relative" status, this Recent Development discusses the impact the regulations will have on orphans pursuant to the "immediate relative" classification. The impact is still significant because most adopted children enter the United States through this immigrant category. Liu, *supra* note 13, at 205.

35. Liu, *supra* note 13, at 205. "Special Immigrants" include permanent residents, current and former U.S. government employees, and doctors. *Id.* See also 8 U.S.C. § 1101(27) (1994).

36. 8 U.S.C. § 1182(d)(5) (1994). In extraordinary cases, the Attorney General may grant admission to alien parolees who are otherwise unqualified for entry. Carlson, *supra* note 2, at 343. However, this status is temporary. Ultimately the orphan's status must be adjusted from parolee to permanent resident. *Id.* at 384-94. Identical standards are used to classify a prospective adoptive child as an "immediate relative" under section 101(b)(1). *Id.*

37. Liu, *supra* note 13, at 205. This is a non-priority classification for aliens who do not meet the standards of the first three categories. *Id.* For an extensive review of immigrant categories, see STEPHEN H. LEGOMSKY, IMMIGRATION LAW AND POLICY 107-230 (1992).

38. See Carlson, *supra* note 2, at 344. By categorizing the child as an "immediate relative," the orphan can bypass the lengthy wait that is standard for immigrants subject to numerical restrictions. *Id.* The INS has also instituted several additional fast track procedures for processing the immigration petitions to accelerate the adoption process. *Id.*

C. State Adoption Process

After the child has a visa to enter the United States, the prospective parents' state court must issue an adoption decree.³⁹ Just like the INS, the state must ascertain whether the child is adoptable and whether the prospective parents are suitable pursuant to state standards.⁴⁰ In practice, however, very few state courts have actually denied an international adoption decree.⁴¹

III. THE NEW FEDERAL REGULATIONS

Prior to the 1994 Regulations, the term "sole maternal parent" was defined as the mother of an illegitimate child.⁴² The father did not have to be deceased for her to be considered the "sole maternal parent." Accordingly, the single mother merely needed to be unwed in order for her to acquire this status regardless of the father's situation. However, if the parents were lawfully wed and alive, this language prevented them from terminating their rights to the child in writing.⁴³ Instead of facilitating

39. *Id.* at 351.

40. *Id.* at 352. There is no guarantee that the state will automatically grant the decree simply because immigration officials have determined that the child and prospective parents have met federal immigration standards. *Id.*

41. *Id.* at 354. Less than two percent of all international adoptions have been denied by state courts. *Id.* For an in-depth discussion of the varying state adoption laws and theories as to why so few international adoptions have been contested by state courts, see *id.* at 354-71.

42. 8 C.F.R. § 204.3(H)(ii) (1992). The regulation stated in relevant part:

A child shall be considered as having a *sole maternal parent* when it is established that the child is illegitimate and has not acquired a stepparent within the contemplation of section 101(b)(2) of the Act. A child shall be considered as having a surviving parent when it is established that one of the child's parents is living while one is deceased and the child has not acquired a stepparent within the meaning of section 101(b)(2) of the Act. When a child who has a sole or surviving parent has been adopted abroad, the requirement for an irrevocable release in writing for the child's emigration and adoption shall be considered to have been met if the adoption decree clearly sets forth that the adoptive petitioner and spouse, if married, reside in the United States and that the child's only parent has agreed to release the child for adoption

Id. (emphasis added).

The regulations also stated that "[i]f the child has only one parent, evidence that the sole or surviving parent is incapable of providing for the orphan's care and has irrevocably released the orphan for emigration and adoption [is sufficient to support a petition for adoption]." 8 C.F.R. § 204.3(f).

43. See Carlson, *supra* note 2, at 348 (finding federal law too restrictive because it only permitted voluntary relinquishment of a foreign child if the child had a single parent). Carlson notes that others found the old regulations too lax because they allowed children to immigrate even though their release from the foreign country did not satisfy certain state adoption release laws. *Id.* at 348-49. State regulation of paternity rights strictly adheres to procedural due process safeguards. *Id.* at 349. In contrast to the parents' federal eligibility requirements, children's federal adoptability standards do not require

adoption, this interpretation had the perverse effect of forcing married couples who were unable to adequately care for their offspring to "abandon" their children in an effort to make them legally adoptable pursuant to the INA's definition of "child."⁴⁴

On August 1, 1994, in response to widespread dissatisfaction with the ambiguous federal terms and policies governing international adoptions, the INS published a final rule, the 1994 Regulations.⁴⁵ These regulations amend the provisions that govern adoption petitions for foreign-born orphans by American citizens by adding, among other rules, a number of definitions.⁴⁶ Included in these provisions are definitions of "sole parent"⁴⁷ and "abandonment by both parents."⁴⁸ While these provisions were

an initial determination of whether the child is adoptable under state law. *Id.* at 347. Problems may arise under federal regulations because unlike most state laws, a judicial decree of abandonment is not necessary. *Id.* at 349. Furthermore, because state laws have strictly defined terms, immigration officials' *ad hoc* findings may not necessarily satisfy state procedural or substantive criteria. *Id.* at 350. If the child does not meet state standards, regardless of whether or not the child has met both the foreign and federal criteria, the adoption may be denied.

44. *Id.*

45. 8 C.F.R. § 204.3 (1995). The rule became effective on September 30, 1994.

46. 8 C.F.R. § 204.3(b) (1995).

47. *Id.* The new rule offers the following definition:

Sole parent means the mother when it is established that the child is illegitimate and has not acquired a parent within the meaning of section 101(b)(2) of the [INA]. An illegitimate child shall be considered to have a sole parent if his or her father has severed all parental ties, rights, duties, and obligations to the child, or if his or her father has, in writing, irrevocably released the child for emigration and adoption. This definition is not applicable to children born in countries which make no distinction between a child born in or out of wedlock, since all such children are considered to be legitimate. In all cases, a sole parent must be incapable of providing proper care as that term is defined in this section.

Id. (first and second emphasis added).

48. *Id.* Abandonment is defined as follows:

Abandonment by both parents means that the parents have willfully forsaken all parental rights, obligations, and claims to the child, as well as all control over and possession of the child, without intending to transfer, or without transferring, these rights to any specific person(s). Abandonment must include not only the intention to surrender all parental rights, obligations, and claims to the child, and control over and possession of the child, but also the actual act of surrendering such rights, obligations, claims, control, and possession. A relinquishment or release by the parents to the prospective adoptive parents or for a specific adoption does not constitute abandonment. Similarly, the relinquishment or release of the child by the parents to a third party for custodial care in anticipation of, or preparation for, adoption does not constitute abandonment unless the third party (such as a governmental agency, a court of competent jurisdiction, an adoption agency, or an orphanage) is authorized under the child welfare laws of the foreign-sending country to act in such a capacity. A child who is placed temporarily in an orphanage shall not be considered to be abandoned if the parents express an intention to retrieve the child, are contributing or attempting to contribute to the support of the child, or otherwise exhibit ongoing parental interest in the child. A child who has been given unconditionally to an orphanage shall be considered to be abandoned.

Id. (second emphasis added).

drafted "to help ensure . . . proper care" for children of orphan status,⁴⁹ they may have a negative impact on certain prospective adoptees.

IV. PROBLEMS CREATED BY THE 1994 REGULATIONS

Although the 1994 Regulations clarify some of the prior confusion over what constitutes an "orphan" within the meaning of the INA,⁵⁰ they impose restrictions that fall disproportionately on children in countries that do not recognize the legal distinction between "illegitimate" and "legitimate" children.⁵¹ The newly added definition of "sole parent" is particu-

49. 59 Fed. Reg. 38876 (1994).

50. The purpose of the new rule is discussed in the preamble:

The Commissioner of the Immigration and Naturalization Service certifies that she has assessed this rule in light of the criteria in Executive Order 12606 and has determined that this regulation will enhance family well-being: (1) by making the welfare of the orphan the foremost consideration when screening the prospective adoptive parents and other adults in the household through the fingerprint checks and the home study; (2) by providing prospective adoptive parents with guidelines which are clearer than the previous ones regarding the adoption of orphans; (3) by ameliorating some of the impact of the prior regulations without sacrificing the welfare of the orphan; (4) by providing improved guidelines for home studies which require that the home study preparer counsel the prospective adoptive parents about the intricacies of foreign processes with which they will come into contact; (5) by providing definitions for terms including "abandonment," "disappearance," "desertion," "separation," and "loss" which appear in the Act, thereby expanding the focus for determining whether a child is an orphan under the Act beyond the term "abandonment," which has been nearly the exclusive focus in the past; and (6) by requiring the Service's directors to maintain liaison with the adoption community.

Petitioning for Foreign-Born Orphans by United States Citizens, 59 Fed. Reg. 38876, 38881 (1994) (emphasis added).

51. Many nations have eliminated the term "illegitimate" to prevent discrimination against children born out of wedlock. For example, the INS has interpreted article 86 of the Guatemalan Constitution as making all children equal before the law and granting them identical rights. *In re Hernandez*, 17 I. & N. Dec. 7 (B.I.A. 1979). Although the term "legitimate" as used in section 101(b)(1) generally refers to a child born in wedlock, if the country where the beneficiary was born and continues to reside has eliminated all legal distinctions between "illegitimate" and "legitimate," then all natural children are considered to be the legitimate offspring of their biological fathers effective as of the date on which the laws were amended. *Id.* at 3-4. Guatemala's Civil Code also refuses to recognize any distinctions among children based upon their parents marital status. *Id.* at 4. Furthermore, article 209 of the Guatemalan Code specifically provides that "children born out of wedlock have the same rights as those born in wedlock . . ." *Id.* at 5.

Despite this language, several experts on Guatemalan law have objected to this characterization of the legal system. Letter from Marian McAndrews, President, A.M.O.R. Adoptions, to all Agency Directors (Oct. 20, 1994) (on file with *Washington University Law Quarterly*). According to Marian McAndrews, Lic. Jorge Armando Carrillo Guidel and Lic. Jose Luis Gonzalez Dubon, President and Vice President of the Institute of Family Rights of Guatemala and prominent Guatemalan legal authorities, both rejected the INS's interpretation. *Id.* They explained that the Guatemalan Civil Code recognizes three types of birth: (1) birth of a child from a legally married couple; (2) birth of a child from a "common-law" couple; and (3) birth of a child from a "single woman." *Id.* The Guatemalan legal experts explained that the Civil Code distinguishes between these categories but avoids using the

larly troublesome because it applies exclusively to unwed mothers of "illegitimate" children in distinguishing countries and not to unwed mothers in nondistinguishing countries.⁵² Because children in some nondistinguishing countries are "legitimate" regardless of their parents' marital status, the 1994 Regulations prevent unwed mothers from releasing their children for adoption in writing, irrespective of the biological father's behavior and commitment to the child.⁵³ Although less problematic, the new definition of "abandonment"⁵⁴ creates further ambiguities by apparently requiring abandonment by both parents and restricting the release of the child to an institution approved by the foreign sending country (i.e., a state orphanage).

A. "Sole Parent"

The main controversy over the 1994 Regulations concerns the language defining a "sole parent." The 1994 Regulations define sole parent as "the mother when it is established that the child is illegitimate."⁵⁵ The statutory

term "illegitimate," which they think is offensive and encourages discrimination. *Id.* at 2. At present, however, the officials at the United States State Department and the INS do not agree with this analysis of the Guatemalan Code. *Id.* The United States Consul General officials in charge of the orphan petitions in Guatemala agree with the Guatemalan legal experts and are currently trying to persuade the INS to reconsider its position. *Id.*

Different interpretations of foreign law arise because, in a visa petition proceeding, the law of a foreign country is a question of fact that must be established by the petitioner if the petitioner relies upon it to establish visa eligibility. *In re Hernandez*, 19 I. & N. Dec. 14 (B.I.A. 1983); *In re Annang*, 14 I. & N. Dec. 502 (B.I.A. 1973).

According to the Board of Immigration Appeals (B.I.A.), other countries have amended their laws to eliminate all legal distinctions between illegitimate and legitimate children. *See, e.g., Lau v. Kiley*, 563 F.2d 543, 550 (2d Cir. 1977) (holding that China's marriage law makes all children equal before the law); *In re Hernandez*, 19 I. & N. Dec. 14 (B.I.A. 1983) (holding that Columbian Law No. 29 of February 24, 1982 altered the civil status of children so that all children have the same rights and obligations); *In re Espinoza*, 17 I. & N. Dec. 522, 523 (B.I.A. 1980) (finding that Article 195 of Bolivian Constitution and Article 178 of the Bolivian Family Code provides that children born out of wedlock have the same rights as those born in wedlock); *In re Sanchez*, 16 I. & N. Dec. 671, 672 (B.I.A. 1979) (finding that the Honduran Constitution accords all children equal rights and duties and eliminates all distinctions between legitimate, illegitimate, and natural children); *In re Maloney*, 16 I. & N. Dec. 650, 651 (B.I.A. 1978) (holding that Panama's Constitution states that all acknowledged children are to be treated equally and considered legitimate, regardless of whether or not the natural parents ever marry).

52. 8 C.F.R. § 204.3(b) (1995).

53. *See supra* note 51.

54. 8 C.F.R. § 204.3(b) (1995).

55. Section 204.3(b) states:

Sole parent means the mother when it is established that the child is *illegitimate* An *illegitimate* child shall be considered to have a sole parent if his or her father has severed all

term "sole parent" is therefore inapplicable to mothers in nondistinguishing countries because such countries cannot have "illegitimate" children. The INS has thus prevented unwed mothers in nondistinguishing countries from giving their children up for adoption, even in cases where the natural father has no bona fide relationship with the child and has otherwise failed to fulfill his parental obligations. Furthermore, because the INS excludes both unwed mothers and fathers in nondistinguishing countries from the purview of the regulation,⁵⁶ unwed fathers in these nations are precluded from "irrevocably releas[ing] the child for emigration and adoption,"⁵⁷ an option available to identical unwed fathers in distinguishing countries.

In short, by drafting "sole parent" in terms of "legitimacy," the INS has made foreign adoptions from nondistinguishing countries far more difficult to procure than those from distinguishing countries. In particular, the regulation prevents single parents from knowingly and voluntarily signing away their parental rights and forces them to use one of the more severe alternatives to make the child eligible.⁵⁸ The 1994 Regulations may encourage desperate single mothers or parents in nondistinguishing countries to abandon their children instead of safely arranging for adoption through a written instrument prepared by an attorney or adoption agency.⁵⁹ Therefore, to become eligible for adoption, children must now actually be abandoned or deserted by, or separated or lost from both of their natural parents and placed in an institution approved by the foreign-sending

parental ties, rights, duties, and obligations to the child, or if his or her father has, in writing, irrevocably released the child for emigration and adoption. *This definition is not applicable to children born in countries which make no distinction between a child born in or out of wedlock, since all such children are considered to be legitimate.*

8 C.F.R. § 204.3(b) (1995) (second, third, and fourth emphasis added).

56. *Id.*

57. *Id.*

58. 8 U.S.C. § 1101(b)(1)(F) (1994). The provision continues, "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." *Id.* This provision does not apply to children in nondistinguishing countries unless one of the infant's parents has actually died. Because by definition a child in a nondistinguishing country cannot have a "sole parent," the living parent becomes a "surviving parent." *See supra* note 51 and accompanying text.

59. For example, if an unwed biological father actually fails to provide child support or the two unwed parents are unable to provide adequate child care, the child is still considered "legitimate" in a nondistinguishing country and therefore subject to the more demanding statutory requirements outlined in 8 U.S.C. § 1101(b)(1)(F) (governing the release of "legitimate" children with two parents). Section 1101(b)(1)(F) specifically requires that the child be an "orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents . . ." 8 U.S.C. § 1101(b)(1)(F) (emphasis added).

country.⁶⁰

The regulations also present problems for fathers in nondistinguishing countries. Unlike the impact that the 1994 Regulations have on adoptions in nondistinguishing countries, an unwed father has paternity rights over his illegitimate child so long as he has not “severed all parental ties, rights, duties, and obligations to the child in distinguishing countries.”⁶¹ In addition, the natural father has the option of “irrevocably releas[ing] the child for emigration and adoption” through a written instrument.⁶²

The 1994 Regulations improve the preceding rule for fathers of “illegitimate children” in distinguishing countries because the regulations give the natural father some control over the release of his illegitimate child for adoption, provided that he has established some degree of parental relationship.⁶³ However, because this provision only applies to natural fathers of illegitimate children in distinguishing countries, the 1994 Regulations support an artificial classification based upon arbitrary legalese that fails to represent reality.

More specifically, the status of an unwed father’s relationship with his child, or lack thereof, in a nondistinguishing country does not make a difference in the subsequent classification or treatment of the child or the single mother. In effect, the INS, under the false assumption that a child labeled “legitimate” is under the care of two parents, requires that a “legitimate” infant endure a severe form of neglect—complete abandonment by his or her parent(s)—before the child may be eligible for adoption. The INS, however, does not make the same assumption about unwed fathers in distinguishing countries. Rather, the INS makes a case-by-case evaluation of each father’s commitment to the “illegitimate child” when determining whether a specific child is eligible for adoption.⁶⁴

60. See Carlson, *supra* note 2, at 348. Because of this perverse effect, immigration officials will have a more difficult time determining which children are abandoned and which are merely temporarily separated from their parents and ineligible for adoption. *Id.*

The preamble of the new rule states that:

A child shall not be considered to be abandoned if he or she is placed temporarily in an orphanage, if the parents express an intention to retrieve the child, are contributing or attempting to contribute to the support of the child, or otherwise exhibit parental interest in the child.

59 Fed. Reg. 38876, 38877 (1994).

61. 8 C.F.R. § 204.3(b) (1995).

62. *Id.*

63. *Id.*

64. “An illegitimate child shall be considered to have a sole parent if his or her father has severed all parental ties, rights, duties and obligations to the child, or if his or her father has, in writing, irrevocably released the child for emigration and adoption.” *Id.*

B. "Abandonment"

Proponents of the 1994 Regulations may argue that parents who want to give their child up for adoption, including single mothers in nondistinguishing countries and married couples in any nation, will not be compelled to resort to abandonment to make the child eligible for adoption under the INA. Rather, these proponents may conclude that these parents will claim that the INS's new definition of "abandonment"⁶⁵ allows "both parents" to relinquish the child to a "third party [for custodial care in anticipation of adoption]. . . authorized under the child welfare laws of the foreign sending country to act in such a capacity."⁶⁶

However, although the 1994 Regulations provide some guidance to and uniformity in the international adoption process,⁶⁷ the INS's definition of "abandonment" continues to foster ambiguity⁶⁸ and create hardships for

65. 8 C.F.R. § 204.3(b) (1995). *See supra* note 48.

66. 8 C.F.R. § 204.3(b) (1995). *See supra* note 48.

67. In order to bring clarity and consistency to the process by which a child becomes an orphan, the 1994 Regulations defined the terms "abandon," "disappearance," "desertion," "separation," and "loss." 8 C.F.R. § 204.3(b). The preamble also notes that because most children became orphans through proof of abandonment, the 1994 Regulations are meant to expand the ways in which a child could qualify as an orphan. 59 Fed. Reg. 38876 (1994). The following terms, defined in the new regulation, were not defined in the earlier federal immigration regulations.

"Desertion" by both parents means that the parents have willfully forsaken their child and have refused to carry out their parental rights and obligations and that, as a result, the child has become a ward of a competent authority in accordance with the laws of the foreign-sending country.

"Disappearance" of both parents means that both parents have unaccountably or inexplicably passed out of the child's life, their whereabouts are unknown, there is no reasonable hope of their reappearance, and there has been a reasonable effort to locate them as determined by a competent authority in accordance with the laws of the foreign-sending country.

.....

"Loss from both parents" means the involuntary severance or detachment of the child from the parents in a permanent manner such as that caused by a natural disaster, civil unrest, or other calamitous event beyond the control of the parents, as verified by a competent authority in accordance with the laws of the foreign sending country.

.....

"Separation from both parents" means the involuntary severance of the child from his or her parents by action of a competent authority for good cause and in accordance with the laws of the foreign-sending country. The parents must have been properly notified and granted the opportunity to contest such action. The termination of all parental rights and obligations must be permanent and unconditional.

59 Fed. Reg. 38876, 38881-2 (1994) (emphasis added).

68. The INS has never clearly established the meaning of the term "abandonment." The 1992 federal immigration regulations did not define "abandonment" as used in 8 U.S.C. § 1101(b)(1)(F), which established the conditions under which a child became an "orphan." The 1992 federal regulations simply stated:

petitioning parents, single biological mothers, and children whose fathers have deserted them. For instance, the new definition does not appear to apply to single parents because it explicitly requires that "both parents" relinquish the child to a third party. A court reviewing this language would most likely interpret the plain meaning of "both parents" as excluding the application of "abandonment" to a single parent. In other words, this language prevents a single mother from directly releasing her child to an approved adoption agency without the consent of the putative father, who often cannot be found.

In the event a child is turned over to a state-run adoption agency, the 1994 Regulations require the petitioning parents to prove that both biological parents have abandoned the child and have not just "temporarily" left the child or are not "otherwise exhibit[ing] ongoing parental interest in the child."⁶⁹ Consequently, the 1994 Regulations will prevent many unwanted children from qualifying for adoption because the petitioning parents will not be able to prove "abandonment." Also, many other children will have to endure the conditions of over-run orphanages before they are adopted because they cannot not be directly released to unapproved third parties. Generally, foreign public orphanages provide substantially inferior medical services and less nurturing environments than the care and medical treatment provided by private adoption agencies or foster-mothers.⁷⁰

Additionally, the INS failed to explain which "third parties" are eligible for state authorization under the rule or how to attain such approval with the 1994 Regulations. Thus, the 1994 Regulations put an immediate halt to the numerous private adoptions conducted through independent United States based adoption agencies. These private transactions are often the healthiest and fastest way to legally complete a foreign adoption.⁷¹ In fact,

(a) Eligibility. An alien is eligible for classification under section 201(b) of the Act as an orphan if he or she meets the definition of "child" contained in section 101(b)(1)(F) of the Act

8 C.F.R. § 204.3 (1992). The regulations referred to the original statutory language without providing any additional guidance on what abandonment was or what degree of evidence was required to establish abandonment under federal law.

69. 8 C.F.R. § 204.3(b) (1995).

70. See generally Sandy Rovner, *Adopting From Abroad: Parents May Face Perplexing Health Problems When They Bring Home Children From Other Countries*, WASH. POST, Feb. 4, 1992, at Z12.

71. There are two approaches that a prospective adoptive parent may use to pursue an adoption: (1) through an American-based international adoption agency (agency adoption), or (2) through a more direct method which requires the assistance of a lawyer, doctor, or social worker (independent adoption). Liu, *supra* note 13, at 199. Latin American countries usually prefer independent adoptions, while Asian countries are more amenable to agency adoptions. *Id.*

some people have objected to the new rule on the ground that it reflects the INS's apprehensive attitude toward independent adoptions.⁷² Critics believe that the INS's bias is illustrated by its definition of "abandonment," which explicitly forbids parents from directly releasing their child (i) to prospective adoptive parents, (ii) to a temporary foster parent who cares for the child in anticipation of an adoption, or (iii) for a specific adoption.⁷³ Instead, it forces the parents to go through the foreign state. In fact, the only third party to whom both parents may release the child is an entity that has been officially approved by the foreign-sending country to act in such capacity.⁷⁴ Clearly, this has not been the general practice of most

Independent adoptions are attractive because (1) the independent practitioners (usually lawyers) can seek children publicly through newspaper advertisements, thus expediting the process; (2) pregnant mothers are able to keep the father's identity confidential; and (3) the pregnant mother's medical care during both the pregnancy and period before the child emigrates is financed by the petitioning parents so that both the mother and baby are as healthy as possible. *Id.* at 199-200.

72. See Carroll Bogert, *Bringing Back Baby: Family: In foreign adoption, the rules and risks are changing faster than ever*, NEWSWEEK, Nov. 21, 1994, at 79. The 1994 Regulations may not affect children in orphanages, but other destitute children will now be required to have signed consent from both parents, including absent fathers who are nearly impossible to locate. *Id.* As Linda Perilstein, the executive director of the Cradle of Hope Adoption Center in Washington, D.C. explains: "The U.S. is imposing its dislike of private adoptions on foreign countries. It's a horrific policy to force children into institutions." *Id.*

73. 8 C.F.R. § 204.3(b) (1995). See *supra* note 48.

74. The definition arguably may codify one of the many existing interpretations of "abandonment" prior to the promulgation of this latest rule. *In re Rodriguez*, 18 I. & N. Dec. 9 (B.I.A. 1980), illustrates the significance of the terms "illegitimate," "legitimate," "sole parent," and "both parents" under 8 U.S.C. § 1101(b)(1)(F).

In *Rodriguez*, the District Director denied a petition classifying the child as our "immediate relative" under § 201(b) of the INA because he erroneously believed the child had been legitimized by her natural father, who had acknowledged her within one week of her birth. *Id.* at 9. Under Peruvian law, however, the act of acknowledgement alone was insufficient to legitimate the child. *Id.* The District Director explained that because the child was not "illegitimate," the petitioning parents were required to show that the natural parents had disappeared, abandoned, deserted, been separated or lost from the child pursuant to § 101(b)(1)(F). *Id.* In particular, the District Director held that because "she has not become a ward of the State of Peru but rather had been turned over to the petitioners for adoption directly by her natural parents," she was not "abandoned" as contemplated under the INA. *Id.* at 10.

The Board of Immigration Appeals reversed the District Director's finding and granted the petition because it determined that the child had not been legitimated under Peruvian law and was therefore "illegitimate." *Id.* Because the "sole parent" of the child had irrevocably released her daughter for emigration and adoption, and a social welfare agency study in Peru had established that she was "incapable of providing the proper care," the BIA concluded that the child was an "orphan" within the statutory meaning and therefore eligible for adoption. *Id.* at 9-10.

This scenario demonstrates how a child's welfare hinges on the arbitrary label of "legitimate," a term with a wide range of meanings each determined according to the law of the foreign country. In addition, there are numerous ways in which a father may "legitimate" his child. The *Rodriguez* case illustrates this proposition because "even though . . . [the father's] act of acknowledgment would cause an

foreign nations in which private adoption agencies and independent agents annually orchestrate hundreds of lawful foreign adoptions.⁷⁵

V. PROPOSAL

The current definition of "sole parent"⁷⁶ is inconsistent with the general goal of placing many of the world's unwanted children with the many eligible American parents who desperately want them.⁷⁷ There are approximately 10,000 international adoptions a year in the United States. A large portion of these children are considered "illegitimate," although actual statistics are not available.⁷⁸ Although a putative father's interest in the adoption of his child born out of wedlock is legitimate, it should not be absolute and outweigh the child's welfare without some type of litmus test of whether the father does in fact provide for the child.

The paternity rights of both foreign and domestic fathers over an illegitimate child have been explored by Supreme Court rulings,⁷⁹ state

illegitimate child to be considered to have been legitimated if born in some other countries," it did not satisfy Peruvian law. *Id.* at 11.

75. 8 C.F.R. § 204.3(b) (1995). The definition provides several examples of entities that might be authorized under the laws of the foreign-sending country to receive a child for adoption: "a governmental agency, a court of competent jurisdiction, an adoption agency, or an orphanage." *Id.*

At present, it is unclear whether a U.S. based international adoption agency would constitute an "adoption agency" eligible for authorization under the child welfare laws of the foreign-sending country as required under the new regulations.

76. See *supra* note 47. By labelling children across the board as "legitimate" when they are born in countries that no longer distinguish between children born in or out of wedlock, the INS has ignored the carefully crafted statutory framework that balanced the interests of putative fathers' in their children against the interests of children whose fathers are absent or do not provide financial support.

77. Legislation regulating international adoption for United States citizens originated shortly after World War II when many children were permanently displaced from their parents and homes. 59 Fed. Reg. 38876 (1994). Congress initially intended the orphan statute, 8 U.S.C. § 1101(b)(1)(F), to apply to homeless and parentless children. *Id.* Over time, Congress has amended the original statute to expand the class of children eligible for adoption as an orphan. *Id.* Congress has amended the original statute "by raising the age of an eligible orphan, eliminating the two orphans per petitioner limit, allowing an unmarried individual to petition for an orphan, and defining the impact of the Immigration Reform and Control Act (IRCA) of 1986 on section 101(b)(1)(D) of the Act, regarding the relationship of an illegitimate child to its father in an orphan case." *Id.*

78. S. CON. RES. 1260, 101st Cong., 1st Sess., 135 CONG. REC. 7511 (1989) (enacted).

79. See *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanely v. Illinois*, 405 U.S. 645 (1972) (holding that constitutional protection of parental rights does not bar the state from denying legitimation and granting adoption based on best interests of child). Some of the basic concepts evinced from these cases are helpful to preparing the proper equation balancing the rights of foreign fathers and foreign children potentially subject to adoption in the United States. In particular, *Lehr* holds that "the rights of the

court decisions⁸⁰ and congressional resolutions.⁸¹ The current statutory scheme gives the father of an *illegitimate child* a sign-off right only if his presence and concern are evident.⁸² Therefore, if a father has disappeared or neglects his child or if he releases the child for emigration, the child

parents are a counterpart of the responsibilities they have assumed." 463 U.S. at 257.

In addition, *Lehr* instructs that:

When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'coming forward to participate in the rearing of the child,' his interest in personal contact with his child acquires substantial protection under the Due Process Clause But the mere existence of a biological link does not merit equivalent constitutional protection.

Id. at 261 (quoting *Caban*, 441 U.S. at 392).

80. For example, Florida's Supreme Court held in *In re Doe*, 543 So. 2d 741 (Fla. 1989), that "the failure of a putative unmarried father to assume support responsibilities and medical expenses for the natural mother when she requires such assistance and he is aware of her needs," could constitute grounds for excusing his consent to the adoption of the child, on the basis of abandonment or estoppel pursuant to section 63.072(1) of the Florida Statute. *Id.* at 743. The court concluded that the issue of abandonment turned on whether the father had "evinced a settled purpose to assume parental duties." *Id.* The court ultimately held that the failure to assume parental responsibility constituted abandonment, which thereby resulted in denial of parental rights. *Id.* at 748. This court also noted that this decision supported the national public policy interests of encouraging unwed fathers to assume parental responsibility both before and after birth. *Id.* The court referred to the Family Support Act, Pub. L. No. 100-485, 102 Stat. 2343 (1988), which was designed to enforce child support by unwed fathers and place major emphasis on national and state programs to establish paternity of illegitimate children (citing legislative history of Pub. L. No. 100-485, reprinted in 1988 U.S.C.C.A.N. 2776-3015).

Under Illinois state law, an illegitimate father is found to be an unfit parent if he does not show a reasonable degree of interest in the child within the first 30 days of the infant's birth. If this is found, then the father's consent is unnecessary for adoption purposes. 750 I.L.C.S. 50/8 (West 1992). However, until the adoptive parents establish the unfitness of the natural parents, the best interests of the child are not considered. *In re Doe*, 638 N.E.2d 181 (Ill. 1994). The court holds that the laws "are designed to protect natural parents in their pre-emptive rights to their own children wholly apart from any consideration of the so-called best interests of the child." *Id.* The court explains that if the law made the best interests of the child a sole qualification for determining child custody, people with superior income, intelligence, education, and so forth, could conceivably challenge parents for the rights to their own children. *Id.*

81. See S. CON. RES. 1260, 101st Cong., 1st Sess., 135 CONG. REC. 7511 (1989).

In itself, it is fair to extend consideration in foreign adoptions to the foreign fathers of illegitimate children. This, after all, parallels changes in domestic adoption . . . [which give] putative fathers sign-off rights on adoption when they had or attempted to have an actual relationship with their children. In light of this, foreign putative fathers should have *some right* when the issue is their child's adoption by American parents.

The problem comes in the logistics of enforcing a putative father's right in foreign adoptions American agencies can neither be expected to track down the fathers of illegitimate children in foreign countries, nor can we realistically require foreign countries to do this for us. INS officers tell my office that such searches are not their aim. They are concerned primarily with the putative fathers' rights when the presence of these fathers is manifest in the documentation that accompanies an application for immigration. This is reasonable. The father's approval should be sought if he is readily available.

Id. (statement of Senator Humphrey).

82. *Id.*

may retain his orphan status and emigrate to the United States, provided that the then "sole parent" is unable to provide for him.⁸³ The INS should develop a similar provision for unwed fathers in nondistinguishing countries.

In order to balance the children's best interests⁸⁴ with the law of nondistinguishing countries⁸⁵ and adequately accommodate the individual circumstances of each adoption, the INS should extend its paternity rights test for illegitimate children's fathers, encapsulated in the terms "sole parent"⁸⁶ and "parent,"⁸⁷ to unwed fathers in nondistinguishing countries.

83. *Id.*

84. The INS's final rule clearly establishes that it was not drafted in accordance with the United States' possible ratification and implementation of the Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption, which focused on the "best interest of the child." 59 Fed. Reg. 38876 (1994); *See also* Hague Conference on Private International Law: Final Act of the 17th Session, Including the Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption, 32 I.L.M. 1134 (1993) (explaining that the purpose of the Convention is "to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for its fundamental rights, and a system of cooperation among Contracting States to ensure respect for those safeguards and thereby prevent the abduction, the sale of, or traffic in children, and to secure the recognition of adoptions made in accordance with the Convention"); Holly C. Kennard, *Curtauling the Sale and Trafficking of Children: A Discussion of the Hague Conference Convention in Respect of Intercountry Adoptions*, 14 U. PA. J. INT'L BUS. L. 623 (1994) (providing a comprehensive critique of the effectiveness of the Hague Convention and providing an overview of the history of United Nations Conferences addressing the subject of international adoptions and children).

However, the preamble to these same federal regulations also states on several occasions that the welfare of the child is the top priority. 59 Fed. Reg. 38876, 38880 (1994). Therefore, although the specific phrase "the best interest of the child" is not used in the federal rules, a similar if not equivalent mandate is established by the use of such language as the "welfare of the orphan."

Many state constitutions and state civil adoption codes also make the "best interests of the child" an essential consideration. *See generally In re Doe*, 638 N.E.2d 181 (Ill. 1994) (discussing the Illinois Adoption Act and the proper framework within which to consider the best interests of the child).

85. The preamble of the final rule emphasizes that it is vital to comply with the foreign-sending nations domestic laws. 59 Fed. Reg. 38876, 38878 (1994). Failure to comply with the foreign regulations might make the foreign officials suspicious that the prospective parents' adoption was illegal, and this subsequently could have significant detrimental ramifications on the entire international adoption practice. *Id.*

Therefore, the INS should respect nondistinguishing countries' choice to eliminate the term "illegitimate" and should not simply treat children born out of wedlock as "de facto" illegitimate children. It should reword the statute so that it applies to children born in or out of wedlock.

86. *Id.* at 38882.

An illegitimate child shall be considered to have a sole parent if his or her father has severed all parental ties, rights, duties, and obligations to the child, or if his or her father has, in writing, irrevocably released the child for emigration and adoption.

Id.

87. For illegitimate children, "the term 'parent' does not include the natural father of the child if the father has disappeared or abandoned or deserted the child or if the father has in writing irrevocably released the child for emigration and adoption." 8 U.S.C. § 1101(b)(2) (1994).

These definitions should not be dependent on the term "illegitimate." Rather the definitions should be rewritten to determine (1) whether the child was "born out of wedlock," and (2) whether the natural father has shown interest in and commitment to the child.⁸⁸

This minor amendment would be in the child's best interest because it would ensure that the father's sign-off rights are contingent upon his ability to care for the child. Therefore, if the father is absent and the mother is unable to care for properly the infant, the child may be released in writing for adoption and will not have to risk spending time in an orphanage or being cruelly abandoned. Furthermore, this formula would allow willing and able fathers to care for their children. It incorporates the well-stated theory that "the unwed father's interest springs not from his biological tie with his illegitimate child, but rather, from the relationship he has established with and the responsibility he has shouldered for his child."⁸⁹ Finally, this simple revision would also benefit the prospective adoptive parents by removing the artificial legal barriers that hinder their ability to adopt truly needy children. In other words, the adoptive parents would be able to receive a child directly from the "sole parent," absent the presence of the natural father. Prospective adoptive parents would no longer have to prove that the "legitimate" child of unwed parents in nondistinguishing countries has been permanently abandoned in order to complete the adoption.

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88. The new rules should require a "fitness" test for the fathers of children born in countries that do not distinguish between illegitimate and legitimate children to verify actual paternal support and commitment. This would be consistent with the underlying rationales behind both the federal immigration restrictions applicable to fathers of illegitimate children in distinguishing countries, and with the various state parental "fitness" tests.

89. *In re Doe*, 543 So. 2d 741, 748 (Fla. 1989) (citing John T. Wright, Comment, *Caban v. Mohammed: Extending the Rights of Unwed Fathers*, 46 BROOK. L. REV. 95, 115-16 (1979)).

