

# The Admission of Unaccompanied Children into the United States

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For most of the twentieth century there have been, at any given time, millions of children endangered in or displaced from their native countries by war, famine, natural disaster, civil strife, and persecution.<sup>1</sup> Since World War II, the United States has admitted thousands of children by themselves from crisis areas and refugee camps. Although these children constitute a relatively small percentage of the total population admitted to the United States as permanent residents and refugees, their vulnerability and the special requirements for their support, placement, and integration into society produce an impact out of proportion to their numbers.

Children without a parent, guardian, or other adult who is legally responsible for them are sometimes referred to as "unaccompanied children."<sup>2</sup> Unaccompanied children have been admitted to the United States in two typical situations. The first is the evacuation of children from their own countries, in times of physical danger or persecution, separating them from their parents.<sup>3</sup> Evacuation of

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1. For a recent international review of the circumstances of children in armed conflicts and natural disaster, see *Children in Especially Difficult Circumstances*, U.N. ESCOR (UNICEF), U.N. Doc. E/ICEF/1986/L.3 (1986); *Overview: Children in Especially Difficult Circumstances*, U.N. ESCOR (UNICEF), U.N. Doc. E/ICEF/1986/L.6 (1986); *Children in Situations of Armed Conflict*, U.N. ESCOR (UNICEF), U.N. Doc. E/ICEF/1986/CRP.2 (1986).

2. E. Ressler, N. Boothby & D. Steinbock, *Unaccompanied Children: Care and Protection in Wars, Natural Disasters and Refugee Movements* 7 (1988) [hereinafter *Unaccompanied Children*]. This definition will be used throughout the article. The definition used by the United States Immigration and Naturalization Service (INS) and Department of State in overseas refugee processing is substantially similar. See *infra* note 128. For the definition of "unaccompanied minor" used by the Office of Refugee Resettlement, see *infra* note 80.

3. See *Unaccompanied Children*, *supra* note 2, at 123-26, 220, 248-50. "Evacuation" has no defined meaning in United States immigration law, but as used here it refers to

children usually separates them from their parents and other family members, thus causing them to become unaccompanied. The second is the acceptance of those already separated from parents, guardians, or other persons responsible for them. Such children are often thought to be orphans, but most of them have not experienced the death of both parents. Instead, they may have been separated from their parents by a variety of circumstances: accidental separation, abduction, prior removal from parents by governmental authorities, running away, entrustment to institutions or to other adults, abandonment or surrender of parental rights, or being sent away by their parents.<sup>4</sup> Many of these unaccompanied children have fled to countries other than their own and have been admitted to the United States as refugees.<sup>5</sup> Others have entered this country through adoption by United States citizens.

Historically, in admitting unaccompanied children the United States has acted under the authority of specific congressional authorization, the general parole power,<sup>6</sup> the relaxation of nonimmigrant admissions requirements, and, for the last nine years, the refugee admission procedures of the Refugee Act of 1980. In several instances unaccompanied children have been more willingly accepted than their adult compatriots and other children who are still with their family members. This preference sometimes has been expressed in legislation, but, more recently, it has resulted from low-visibility decisions in the administration of the overseas refugee selection program.

The plight of children in crisis, the most vulnerable and innocent of victims, is compelling, and the impulse to "save" them by admitting them to the United States can be emotionally powerful.<sup>7</sup> But

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the removal of children from a crisis area, usually with parental consent. Though they may become "unaccompanied" by virtue of their evacuation, such children can be distinguished analytically from those who are separated from parents or guardians in times of crisis for other reasons.

4. Unaccompanied Children, *supra* note 2, at 115-17, 218-21.

5. For a definition of "refugee" and a discussion of current refugee selection and admission procedures, see *infra* text accompanying notes 113-47.

6. INA § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1982). An alien paroled into the United States is physically permitted within its borders, but is not legally regarded as having been admitted and is thus subject to exclusion (as distinguished from deportation) proceedings at the discretion of the Attorney General. The alien is thus ineligible for certain forms of discretionary relief available under the Immigration and Nationality Act only to aliens in deportation proceedings. *Leng May Ma v. Barber*, 357 U.S. 185 (1958). Moreover, parolees do not qualify for the wide array of refugee benefits. See *infra* note 111.

7. At the extreme America is seen, literally, as the salvation of endangered children. James Fenton has written of Cambodian children:

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not all children from areas in crisis can possibly be accepted, nor is removal to the United States always in their best interests. After decades of ad hoc responses, the passage of the Refugee Act of 1980 has established permanent authority for the admission of unaccompanied children and the administrative apparatus for their placement and support once they are here. We have largely resolved the *how* of accepting unaccompanied children, but not the *why* or the *when*. This Article examines the wisdom of admitting unaccompanied children from other countries and suggests some guidelines as to when such a policy is and is not appropriate. The Article seeks to answer a question addressed only obliquely by present law and practice: under what circumstances should this country accept unaccompanied children?<sup>8</sup>

This Article contends that the choice involves a complex interaction of protection, family unity, foreign policy, and domestic concerns and explores each of these in the contexts of both evacuation and the admission of already unaccompanied children. It concludes that evacuation often traumatizes the children involved, alienates them from their culture, and creates obstacles to later family reunion. In the case of already unaccompanied children, the benefit of admission to the United States must be weighed against the disruptive effect of integration into a new culture and living situation. Furthermore, the creation of exceptional opportunities to enter the United States as an unaccompanied child may actually cause children and parents to separate in order to facilitate the children's ultimate acceptance into the United States. These effects, coupled with other interests of United States foreign and domestic policy, support limiting United States admissions of unaccompanied children to instances where it is necessary to preserve or restore family unity,

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In dangerous camps between facing armies,  
The prey of pirates, raped, plundered or drowned,  
In treacherous waters, in single file through the minefields,  
Praying to stave off death till they are found,  
Begging for sponsors, begging for a Third Country,  
Begging America to take them in —  
It is they, it is they who put everything in hazard.  
What we do decides whether they sink or swim.

J. Fenton, *Children in Exile*, in *Poems 1968-1984*, at 30, 36 (1984).

8. Because this Article is concerned with admissions policy, it does not directly address the situations in which children enter illegally and remain here undocumented or later apply for political asylum, even though some of them are undoubtedly fleeing crises in their homelands. These unaccompanied children asylum-seekers and other children entering the United States present many of the same issues of age determination, designation of legal responsibility, and placement as those admitted from overseas.

or where protection or legitimate foreign policy objectives clearly outweigh family unity.

This Article thus recommends that children be admitted from crises by themselves only in certain delineated situations. First, children should be evacuated alone only when their parents are unable to accompany or follow them; in all other cases children removed directly from crisis areas should be accompanied by at least one parent. For those children already separated from their parents, admission to the United States should be limited to four sets of circumstances. These are: (1) when the parents have preceded the child to the United States; (2) when the child's foster family or guardian is admitted; (3) when the refugee population of which the child is a member is brought as a group to the United States; or (4) when the child faces exceptional risks or harm by virtue of separation from his or her parents, or when acceptance is necessary to provide adequate age-appropriate care. When these situations are not present, the United States response to children in crisis should involve foreign policy initiatives, including moral and political suasion and material aid, rather than admission of the children themselves.

Part I of the Article provides a brief overview of the history of United States admissions programs, focusing primarily on the authority and rationale for past decisions to accept unaccompanied children. Part II discusses the present legislative and administrative scheme for the selection, guardianship, placement, and support of unaccompanied refugee children. Part III then explores the sometimes conflicting policy grounds for admission of unaccompanied children. Based upon this examination of policy, Part IV presents a set of recommendations concerning United States admissions policy.

*I. History and Analysis of United States Admission of Unaccompanied Children to 1980*

Since World War II the United States has admitted approximately 33,000 unaccompanied children from abroad through 12 different major programs.<sup>9</sup> The following table summarizes the United States programs for admission of unaccompanied children from

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9. In some instances, such as during World War II, more than one legal strategy has been used to deal with what may be regarded as a single crisis. Whether these should be counted as more than one program is debatable. Since this section seeks only to describe the dimensions of United States admission of unaccompanied children and the major legal issues involved, there is no need to define the term "program" with precision and no such definition is attempted.

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Program	Date	Number of Children	Origin	Age Limits	Status of Admittees
(Wagner-Rogers Children's Bill)*	1939	(20,000)	Germany	(0-14)	(proposed legislation)
Evacuation of British children	1940	861	UK	5-14	Immigrants & Visitors
Child refugees on the Continent	1940	450	UK		Quota Immigrants
	1942	110	Europe**		Quota Immigrants
Truman Doctrine of 1945	1945-48	1,275	Europe***		Preference for Refugees & Displaced Persons within National Quota
Displaced Persons Act of 1948	1948-52	3,037	Europe****	16	Non-quota Immigrants
Refugee Relief Act of 1953	1953-56	4,000	Asia & Europe†	10	Non-quota Refugee
Refugee-Escapee Act of 1957	1957-59	2,500	Asia & Europe††	14	Non-quota Refugee
Hungarian Refugee Program	1956-57	1,000	Hungary	18	Non-quota Refugee & Parole
Cuban Refugee Program	1960-67	8,000	Cuba	6-18	Nonimmigrant (student & visitor)
Operation Babylift	1975	2,547	Vietnam	0-12	Parole
Indochinese Refugee Program	1975	800	Vietnam	18	Parole
Indochinese Refugee Program	1979-Present	8,000	Indochina†††	18	Parole & Refugee
Amerasians	1982-Present	300	Indochina††††	18	Non-quota Immigrants & Refugee

\* Never Adopted.

\*\* Most from Poland.

\*\*\* Poland, Czechoslovakia, Hungary, Germany, Rumania, Lithuania, Estonia, in descending order of numbers of children.

\*\*\*\* Germany, Greece, Poland, Italy, Yugoslavia, and Austria.

† Japan, other Asian countries, Greece, Italy, and Austria.

†† Korea, Japan, Italy, and Greece.

††† Vietnam, Cambodia, Laos.

†††† Most from Vietnam.

1939 to the present.<sup>10</sup> Each of these programs has its own rich history, but the details are not recounted here on a program-by-program basis. Rather, their major features are described in the ensuing analysis of their authority<sup>11</sup> and purposes<sup>12</sup> and the discussion of the general policy bases for such resettlement.<sup>13</sup>

With the exception of statutory provisions that evolved to permit the adoption of overseas children, many of whom were from crisis areas,<sup>14</sup> the United States response to the plight of unaccompanied children was ad hoc and situation-specific until the enactment of the Refugee Act of 1980. There was no general policy regarding the purposes which might appropriately be served by resettlement. Nor were there permanent mechanisms providing for the children's custody, placement or support. Prior to 1980 each program for children entering the United States utilized its own admission eligibility definition, with the scope of each definition varying according to the purpose and breadth of the program. Though prior experiences were drawn on as succeeding programs were developed, in each instance an administrative structure and operational guidelines had to be created. Despite the disjunctive nature of these programs, however, some patterns did develop. The following discussion examines the legal authority and purposes of these programs.

#### A. Legal Authority

As with refugee resettlement in general, until the passage of the Refugee Act of 1980 there existed no ongoing legislative authority for resettlement of refugee children that was free of temporal, geographical, numerical, or ideological restrictions.<sup>15</sup> In response to

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10. This chart draws on the following works: Forbes & Fagen, *Unaccompanied Children: The Evolution of U.S. Policies 1939-1984*, 3 *Migration News* 1 (1985); *Unaccompanied Children*, *supra* note 2, at 9-112; D. Wyman, *Paper Walls: America and the Refugee Crisis 1938-1941* (1968) [hereinafter *Paper Walls*]; Immigration and Naturalization Service, *Annual Report* (1957); Immigration and Naturalization Service, *Annual Report* (1961).

11. *See infra* text accompanying notes 15-29.

12. *See infra* text accompanying notes 30-68.

13. *See infra* text accompanying notes 149-252.

14. *See infra* notes 25-29, 72-73 and accompanying text.

15. Until 1965, admissions in response to crises overseas took place against the background of general immigration statutes containing immigration quotas based on national origins for countries outside the western hemisphere. Since 1965, immigrants other than immediate relatives must come within the preferences now contained in the Immigration and Nationality Act §§ 201-203, 8 U.S.C. §§ 1151-1153 (1982) [hereinafter *INA*], with per-country limits of 20,000. *See generally* Select Commission on Immigration and Refugee Policy (SCIRP), *U.S. Immigration Policy and the National Interest*, Staff Report 295-351 (1981). Moreover, legislation to admit refugees outside of the quotas and outside of the numerical and other limitations of the preference system was limited

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the demands of particular crises, a variety of legal mechanisms were used to effect the admission of unaccompanied children.

Some unaccompanied children were admitted in crises as immigrants coming within existing national quotas.<sup>16</sup> In addition, some legislation designed to admit refugees from a particular set of circumstances outside of the national quota system included special provision for unaccompanied children. For example, the Displaced Persons Act of 1948 contained a special provision for 5,000 orphans.<sup>17</sup> In contrast to adults' visas, which were charged or "mortgaged" against the future quotas of the refugees' nationality, the orphans admitted under the Displaced Persons Act were admitted completely outside their nations' quotas.<sup>18</sup> The Refugee Relief Act of 1953, designed primarily to permit immigration of individuals from communist or communist-dominated countries, included 4,000 "eligible orphans" among 209,000 people, all of whom were admitted on a nonquota basis.<sup>19</sup> The reservation of a set number of immigrant visas for the orphans defined in these Acts gave them a certain priority within the affected groups, obviating the necessity of competing against other eligible applicants.<sup>20</sup> Although not limited to children, the 1982 legislation permitting immigration by persons fathered by United States citizens in five Asian countries before 1982<sup>21</sup> and the 1987 legislation admitting as immigrants those residing in Vietnam who were born of United States citizen fathers in Vietnam between 1962 and 1975 are other legislative actions that benefited children.<sup>22</sup>

On several other occasions the executive branch, acting within its legislatively granted discretionary powers, facilitated the entry of

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by geographic, ideological, or temporal restrictions. The various Acts concerned only refugees from limited geographic areas, or who were fleeing specified conditions, or who fled during particular time periods. Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 *San Diego L. Rev.* 9, 12-20 (1981); T. Aleinikoff & D. Martin, *Immigration: Process and Policy* 621-23 (1985).

16. During World War II, 5,000 visas within existing national quotas were approved for children, mostly natives of Poland, in refugee camps in Vichy France, Portugal, and Spain; tragically, few of the visas were used because the Nazis occupied Southern France before the children could depart. Paper Walls, *supra* note 10, at 128-34.

17. Pub. L. No. 80-774, § 2(e), 62 Stat. 1009, 1010-11 (1948), *amended by* Pub. L. No. 81-555, § 3(e)-(f), 64 Stat. 219, 220 (1950).

18. Pub. L. No. 81-555, § 3(f), 64 Stat. 219, 220 (1950).

19. Pub. L. No. 83-203, § 5, 67 Stat. 400, 402 (1953).

20. For more on the definition of qualified orphans under these Acts, see *infra* note 25.

21. Pub. L. No. 97-359, 96 Stat. 1716 (1982), *amending* INA § 204, 8 U.S.C. § 1154 (1982).

22. Pub. L. No. 100-202, § 584, 1987 U.S. Code Cong. & Admin. News (101 Stat.) 1329, 1329-184.

unaccompanied children. Such children included the Hungarian refugees in 1956-1957 and the Indochinese refugees in 1975 admitted under the parole power.<sup>23</sup> The executive branch also modified the requirements for nonimmigrant visitor visas in order to facilitate admission of children in two other programs, the evacuation of children from the United Kingdom in 1940 and of Cuban children in 1960-1967.<sup>24</sup>

In addition, in 1953, 1957, and 1960 Congress enacted a series of statutes permitting the entry of orphans adopted abroad, or brought to the United States for adoption by United States citizens.<sup>25</sup> Although they appeared in refugee legislation, these provisions concerning orphans were not limited to those from a particular background or crisis, in contrast to the provisions for adults in the same legislation. Many of the children admitted under these Acts came from populations where the incidence of loss of one or both parents and the incapability of support by the surviving parent were likely to be high. For example, many Korean children were adopted by Americans in the years following the Korean War. Some had been fathered by American soldiers, but most were of Korean parentage; many of these were illegitimate children who were seriously disfavored in Korean society.<sup>26</sup>

In 1961, Congress permanently amended the Immigration and Nationality Act (INA) to permit adoption by United States citizens of children under age 14 who had lost both parents or who had been released for adoption by the sole or surviving parent.<sup>27</sup> Children

23. Forbes & Fagen, *supra* note 10, at 11-12, 17.

24. See *infra* text accompanying notes 39-40, 43-45.

25. Orphan Act of 1953, Pub. L. No. 83-162, 67 Stat. 229; Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400; Refugee-Escapee Act of 1957, Pub. L. No. 85-316, § 4, 71 Stat. 639; Fair Share Refugee Act of 1960, Pub. L. No. 86-648, § 7, 74 Stat. 504, 505. An "eligible orphan" under these statutes was defined as an alien child

who is an orphan because of the death or disappearance of both parents, or because of abandonment or desertion by, or separation or loss from, both parents, or who has only one parent due to the death or disappearance of or abandonment or desertion by, or separation or loss from the other parent and the remaining parent is incapable of providing care for such orphan and has in writing irrevocably released him for emigration and adoption.

Pub. L. No. 83-203, § 5, 67 Stat. 400, 402 (1953). In 1957, the age component of the orphan definition, which originally had been 10, was raised to 14. A requirement that the child had been lawfully adopted abroad, or that the pre-adoption requirements of the state of proposed residence had been met, was also added. Pub. L. No. 85-316, § 4(a)-(b), 71 Stat. 639 (1957).

26. Unaccompanied Children, *supra* note 2, at 37-43; Kim & Carroll, Intercountry Adoption of South Korean Orphans: A Lawyer's Guide, 14 J. Fam. L. 223 (1975).

27. Pub. L. No. 87-301, §§ 1-4, 75 Stat. 650, 651 (1961). The upper age limit was raised to 16 in 1981. Pub. L. No. 97-116, § 2(b), 95 Stat. 1611 (1981).

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adopted under this provision become eligible for nonquota admission as immediate relatives.<sup>28</sup> All of the orphan legislation has barred the child's natural or prior adoptive parents from receiving any later right, privilege, or status under the INA by virtue of their parentage.<sup>29</sup>

Legal authority for the admission of unaccompanied children thus took a number of forms prior to 1980. As with adult refugees, where the political support was strong enough, both Congress and the President were willing to create statutory exceptions to the basic immigration structure or to relax existing provisions in order to facilitate the children's admission. Indeed, in several crises unaccompanied children were treated more favorably than similarly situated adults, for reasons discussed in the next section.

### *B. Program Purposes*

Programs admitting unaccompanied children have sought to accomplish a variety of goals. Three overriding objectives can be identified. The first objective is the evacuation of children directly from areas of danger or persecution. The aim of these programs has been to rescue children from perceived risks of harm by removing them to the United States. This movement often separates the children from their parents, other relatives, and their environment. A second objective has been the resettlement of already unaccompanied children from countries, other than their own, to which they have fled.<sup>30</sup> Children in this group differ from evacuees in that they are already apart from their parents or other legally responsible adults and have already been displaced when first identified. Considerations of physical safety figure in the admission of these children to the United States, as they do in the case of evacuees. However, other concerns, such as the children's need for foster care, the desire to free the children from the confines of refugee camps, and an interest in relieving the countries of first asylum of

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28. INA § 101(b)(1)(F), 8 U.S.C. § 1101(b)(1)(F) (1982). Orphans can be adopted by either a United States citizen and spouse or by an unmarried citizen over 25 years of age.

29. *Id.*

30. "Resettlement" has no defined legal meaning but is used by those working with refugees to denote movement of an already displaced individual or population from one place of asylum to another locale, usually in order to establish a permanent residence there.

the burden of the children's support, have also motivated these programs.<sup>31</sup> A third objective has been the facilitation of inter-country adoption by Americans. In addition to these three objectives, ulterior purposes have occasionally motivated the acceptance of unaccompanied children, though they have tended to be mixed with the three objectives.<sup>32</sup> The following discussion organizes the programs by the predominant purpose each sought to achieve.

1. *Evacuation of children from areas of danger or persecution.* This objective has a long, if somewhat controversial, history in international law,<sup>33</sup> and the United States experience has both reflected and helped to shape international views. The earliest attempt to breach the national quotas on behalf of refugees, the Wagner-Rogers Children's Bill, would have permitted 20,000 German children aged 14 or younger to enter the United States as immigrants outside of the annual German quota each year during the two year

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31. "Countries of first asylum" are the countries to which refugees first flee. These are also known as "second countries," because the people involved have left their country of origin or "first country." Resettlement of refugees from the "country of first asylum" or "second country" to yet another nation is often called "third country" resettlement.

32. In some crises those who favored admission of a particular population have first focused their attention on its children, recognizing their special political and emotional appeal. Professor David Wyman attributes this strategy to the proponents of the 1939 Wagner-Rogers Children's Bill to admit 20,000 German children:

Most advocates of a more liberal refugee policy agreed that the mood of Congress precluded any change in the quota system in favor of adult refugees. But the pitiful circumstances of thousands of German children led to the thought that Congress might be willing to open the door to a limited number of these boys and girls without charging them to the quota.

Paper Walls, *supra* note 10, at 75. Opponents of the bill had a sharp retort to this argument: "20,000 charming children would all too soon grow into 20,000 ugly adults." R. Breitman & A. Kraut, *American Refugee Policy and European Jewry, 1933-1945*, at 74 (1987). Undoubtedly the hope that these children would ease the way for later arrivals of adult refugees was also present among the plan's proponents.

The reception of children by themselves, with its attendant publicity, has been seen at times as a means to discredit those from whom the children were being "rescued." Adult refugees (or escapees) have been invoked for this cause as well. See G. Loescher & J. Scanlan, *Calculated Kindness: Refugees and America's Half-Open Door, 1945 to the Present* 36-38 (1986) [hereinafter *Calculated Kindness*]. For example, requesting approval of Operation Babylift in 1975, the South Vietnamese Minister of Social Welfare wrote:

The American Ambassador has also interceded with me to permit the orphans to leave the country altogether. . . . He stressed, in addition to this emigration issue, how a million refugees and war victims fleeing the areas taken over by the communists would help to turn American public opinion regarding Vietnam, particularly the orphans arriving in the United States, given extensive TV and press coverage with narrated reports from witnesses of the situation, would have considerable influence.

Letter from Dr. Phan Quang Dan (undated), *quoted in* Forbes & Fagen, *supra* note 10, at 18.

33. See *infra* text accompanying notes 160-61.

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period 1939-1940.<sup>34</sup> The Bill required that these children be supported and cared for by private agencies and individuals, and a Non-Sectarian Committee for German Refugee Children began to compile offers for the children's placement and support.

The program was proposed in the wake of the Kristallnacht pogroms and the promulgation of Nazi racial laws, but it was not explicitly limited to Jewish children. At the time of the Bill's introduction, numerous children had lost parents to Nazi violence, concentration camps, or suicide, and all Jewish children were barred from German schools.<sup>35</sup> Opponents attacked the Bill on a variety of grounds: that the German children's circumstances did not require their removal; that any such aid should go to poor American children; that the German children would eventually compete with Americans for jobs; that the Bill would violate the sanctity of the national quota system and its numerical restrictions; that there would later be pressure to admit the children's families also outside of normal quotas; and that children should not be separated from their parents.<sup>36</sup> The likelihood that most children admitted under the Bill would be Jewish also motivated some of its opposition, according to some later observers.<sup>37</sup> In the face of likely defeat and unwilling to accept an amendment giving children first preference within the existing German quota—thereby disadvantaging the tens of thousands of adult refugee applicants—the sponsors did not press the Bill. The onset of war in September 1939 ended the effort, though several hundred unaccompanied children did enter as quota immigrants in the next few years.<sup>38</sup>

Proposals to evacuate children from Great Britain to the United States for the duration of World War II fared differently. The 1940 air attacks on Great Britain caused an outburst of American support for evacuation of English children to the United States, resulting in the formation of the United States Committee for the Care of European Children, with Eleanor Roosevelt as honorary president.<sup>39</sup> In response to the favorable public sentiment, the departments of

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34. H.R.J. Res. 165, 76th Cong., 1st Sess. (1939); H.R.J. Res. 168, 76th Cong., 1st Sess. (1939).

35. Paper Walls, *supra* note 10, at 74, 80.

36. *Id.* at 78-81, 84-85; Forbes & Fagen, *supra* note 10, at 5; H. Feingold, *The Politics of Rescue* 150 (1970).

37. Paper Walls, *supra* note 10, at 127-28 (contrasting the negative response by "patriotic groups" to the Wagner-Rogers Bill to their favorable response to the Mercy Ships Bill, which facilitated the evacuation of British children); R. Breitman & A. Kraut, *supra* note 32, at 73-74 (citing opponents' threats to publicize the percentage of Jewish immigrants).

38. Paper Walls, *supra* note 10, at 97-98, 126-34.

39. *Id.* at 118.

State and Justice modified visitor visa requirements to facilitate the children's entry.<sup>40</sup> In addition, Congress quickly passed the Mercy Ships Bill, amending the Neutrality Act to permit American ships to transport the children from a war zone.<sup>41</sup> But a combination of factors, including the British government's loss of enthusiasm for the project and the sinking of a ship evacuating British children to Canada with the loss of 79 of the 90 children on board, soon ended the evacuation program. In all, the organized effort brought only 861 children to the United States, though some others came under individual sponsorship.<sup>42</sup>

The largest evacuation of children to the United States was that of Cuban children in 1961-1962 following Fidel Castro's assumption of power. Parents who were unwilling or unable to leave Cuba themselves sent their children to Florida in a program which came to be called "Operation Pedro Pan."<sup>43</sup> What had begun as a plan to move several hundred students from an American school in Havana to Florida grew into an exodus of thousands when the Cuban government made no effort to halt their departure:

Between January 1961, when the U.S. broke diplomatic relations with Cuba, and October 1962, when Cuba suspended airline flights to the U.S., over 14,000 unaccompanied minors entered this country. About 6,000 of these children immediately joined family members while the remaining 8,000 were placed in foster care or institutions for some period of time. Most of the unaccompanied minors were the children of middle class and professional parents who were afraid that their children would be subject to Communist indoctrination if they stayed in Cuba.<sup>44</sup>

Some children arrived with student visas, and the State Department agreed to waive visa requirements for those aged six to eighteen who did not have visas.<sup>45</sup> As with the evacuation of British children in World War II, the Cuban children's presence in the United States was originally planned to be temporary, but the worsening of relations between the United States and Cuba, culminating

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40. *Id.* at 120-21. The modifications included suspension of the rules barring entry by a child unless he or she was accompanied by or following to join a parent and excluding aliens whose passage was paid for by an organization. For the first time, "corporate affidavits," guaranteeing an organization's financial support for groups of children, were accepted to satisfy the requirement that the entrant not become a public charge. *Id.* at 120.

41. Act of Aug. 27, 1940, Pub. L. No. 76-776, 54 Stat. 866. The legislation required that the ships receive safe-conduct assurances from all belligerent nations, which the German government refused to provide. Paper Walls, *supra* note 10, at 126.

42. Paper Walls, *supra* note 10, at 118-28.

43. Forbes & Fagen, *supra* note 10, at 13.

44. *Id.*

45. *Id.* at 14.

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in the October 1962 Cuban missile crisis, prevented both repatriation and family reunion in the United States. It was not until late 1965 that large-scale movement from Cuba resumed, at which time parents of children in the unaccompanied minors program were given first priority for admission.

The next United States evacuation of children from abroad did not occur until 1975, when Operation Babylift brought 2,547 Vietnamese children to the United States in the days immediately before the fall of South Vietnam. Although some attempt was made to portray these children as being in physical danger,<sup>46</sup> there is no evidence of subsequent harm directed at the children who remained there. In fact, Operation Babylift seems to have been motivated by a combination of adoption pressures<sup>47</sup> and foreign policy concerns, including the creation of public sympathy toward the Republic of South Vietnam.<sup>48</sup>

Recent Amerasian legislation fits within the evacuation pattern, since one of its purposes is the removal of Amerasian children from persecution on the basis of race and origin. Signing the 1982 legislation authorizing immigration of Amerasian children from five Asian countries (Korea, Vietnam, Laos, Cambodia, and Thailand), President Reagan stressed this point: "Through no fault of their own, these children have frequently lived in the most wretched of circumstances and have often been ostracized in the lands of their birth."<sup>49</sup> Similar sentiments were voiced about the Amerasian Homecoming Act of 1987, which benefits Amerasians in Vietnam and their immediate family members.<sup>50</sup> These children's American

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46. Unaccompanied Children, *supra* note 2, at 71.

47. See *infra* text accompanying notes 70-71.

48. See *supra* note 32.

49. Remarks on Signing S. 1698 into Law, 18 Weekly Comp. Pres. Doc. 1,374 (Oct. 22, 1982).

50. "Because of their prominent physical features in an extremely homogeneous society, these children are often harshly ostracized. Their families, especially the mothers, face severe discrimination and shame." 133 Cong. Rec. S11476 (daily ed. Aug. 6, 1987) (statement of Sen. Bumpers). See also Pub. L. No. 100-204, § 905(a)(2)-(3), 1987 U.S. Code Cong. & Admin. News (101 Stat.) 1404 (congressional "findings" that: "[i]t has been reported that many of these Amerasian children are ineligible for ration cards and often beg in the streets, peddle black market wares, or prostitute themselves" and that "[t]he mothers of Amerasian children in Vietnam are not eligible for government jobs or employment in government enterprises and many are estranged from their families and are destitute"). In a 1985 study of 251 Vietnamese Amerasian families, 48% of the mothers reported some form of discrimination, most commonly ridicule and denial of jobs. United States Catholic Conference Migration and Refugee Services, In Our Fathers' Land: Vietnamese Amerasians in the United States 9 (1985) (on file with author) [hereinafter In Our Father's Land]. This study concludes "that harsh discrimination

paternity and the United States recent connections with the lands of their birth also influenced the decision to accept them.<sup>51</sup>

2. *Refugee resettlement.* The majority of unaccompanied children admitted to the United States since World War II had already separated from their parents at the time they were selected for admission. Most of these have been resettled from countries of first asylum to which they had fled, rather than from their own countries. In general, the United States has supported the approach of the Office of the United Nations High Commissioner for Refugees (UNHCR) and its post-World War II predecessor, the International Refugee Organization (IRO), by first working toward repatriation or local settlement in the country of first asylum before resorting to resettlement.<sup>52</sup> Unaccompanied children, along with their adult compatriots and the children of those adults, have been resettled from a number of crises. On occasion, though, resettlement programs have been more generous toward unaccompanied children than to other similarly situated refugees.

The program for displaced persons following World War II demonstrates these themes. The presence of unaccompanied children among the millions of displaced persons in Europe was quickly recognized, and children's centers were established in the Allied zones of occupation.<sup>53</sup> The Constitution of the IRO, the body ultimately given responsibility for all displaced persons in Europe, specifically included within the organization's mandate "unaccompanied children who are war orphans or whose parents have disappeared, and who are outside their countries of origin."<sup>54</sup> This special mention freed unaccompanied children for resettlement, in contrast to

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against Amerasian families was more sporadic and regional than concerted or country-wide." *Id.* at 10.

The 1987 Amerasian immigration legislation was enacted for reasons discussed *infra* text accompanying notes 194-96.

51. See *In our Father's Land*, *supra* note 50, at 10; Note, *America's Responsibility to Amerasian Children: Too Little, Too Late*, 10 *Brooklyn J. Int'l L.* 55 (1984); Note, *Welcoming Home Our Children: An Analysis of the New Amerasian Immigration Law*, 2 *B.U. Int'l L.J.* 299 (1983).

52. Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428(v) Annex 8, 9 (1950).

53. *Unaccompanied Children*, *supra* note 2, at 24; L. Holborn, *The International Refugee Organization: A Specialized Agency of the United Nations, Its History and Work 1946-1952*, at 505-07 (1956).

54. Constitution of the International Refugee Organization, 62 Stat. 3037, 3050, 18 U.N.T.S. 3 Annex I, Part I, § A, ¶ 4 (1946), *reprinted in* L. Holborn, *supra* note 53 app. I. Additionally, the IRO Constitution directed that "[s]uch children, 16 years of age or under, shall be given all possible priority assistance, including, normally, assistance in repatriation in the case of those whose nationality can be determined." *Id.*

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adults, who would be resettled only if they expressed a “valid objection” to returning to the country of their nationality.<sup>55</sup> The IRO’s policy was to reunite the children with their parents wherever the parents were located. Where parental reunion was impossible, the IRO originally placed the child’s fate in the hands of the authorities of its country of nationality, who would usually repatriate the child.<sup>56</sup> In 1948, however, the United Nations Economic and Social Council modified this second priority, repatriation, to include the qualification, “always providing that the best interest of the individual child shall be the determining factor.”<sup>57</sup> The American authorities, in particular, denied repatriation under the best interests standard to those children who expressed opposition to returning to their country of origin, and generally were reluctant to repatriate children to Soviet bloc countries.<sup>58</sup> A majority of the unaccompanied children within the IRO mandate were ultimately resettled rather than repatriated, with the United States accepting the largest share.<sup>59</sup>

The United States admitted these children under the authority of the Displaced Persons Act of 1948.<sup>60</sup> The Act encompassed only “eligible displaced orphans” who had experienced the “death or disappearance of both parents,”<sup>61</sup> a more stringent requirement than even the later adoption-oriented legislation. Resettlement was chosen over repatriation and local settlement for a variety of reasons: conditions in the camps were abysmal, especially immediately after the war; the countries of refuge—Germany and Austria—were economically unable and socially unwilling to integrate a foreign population, though some children were left with foster families with whom they were forcibly placed during the war; and Jews and those fearing new communist regimes in their homelands were fearful of persecution.<sup>62</sup> Resettlement provided a solution which was both humanitarian and political.

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55. *Id.* at § C, 1. See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 438 n.20 (1987) (discussion of the meaning of “valid objection”).

56. “The national representatives did have authority to ‘release’ children for resettlement, however, and Poland, Czechoslovakia, and Yugoslavia agreed to the resettlement of Jewish unaccompanied children who were their citizens. For the most part, though, national representatives were extremely reluctant to permit any placement but repatriation, mainly out of a desire to rebuild their populations.” *Unaccompanied Children*, *supra* note 2, at 237.

57. E.S.C. Res. No. 157 (VII), U.N. Doc. E/1027 (Aug. 24, 1948).

58. *Unaccompanied Children*, *supra* note 2, at 25.

59. L. Holborn, *supra* note 53, at 513-14.

60. Pub. L. No. 80-774, § 2(e), 62 Stat. 1009, 1110 (1948).

61. *Id.*

62. L. Holborn, *supra* note 53, at 365; *Calculated Kindness*, *supra* note 32, at 2.

Since World War II, unaccompanied child refugees have been resettled from countries of first asylum in several crises, notably Hungarian unaccompanied children in 1956-1957, and Indochinese in 1975 and from 1979 to the present. The desire to relieve the burden on countries of refuge and free the children from the confinement and possible dangers of refugee camps,<sup>63</sup> coupled with sympathy for the refugees' urge to leave their homelands, were common to both programs.<sup>64</sup> By the time of the Hungarian and Indochinese resettlement programs, no requirement of parental death or disappearance was imposed; rather, it was sufficient that the child be "unaccompanied" by a parent or guardian.<sup>65</sup>

In both cases resettlement included many unaccompanied children, probably a majority, who were in no danger of persecution except, perhaps, for the act of unauthorized departure. Many of the Hungarian "freedom fighters" were young students and workers under 22 years old, and at first it was thought that many of the unaccompanied children would face persecution for their participation in the 1956 uprising if they were returned. Further investigation revealed "[o]nly a few could give coherent motives for their flight."<sup>66</sup> Similarly, it is unlikely that many of the Indochinese unaccompanied minors were fleeing for actual or well-founded reasons of persecution.<sup>67</sup>

Resettlement of unaccompanied children refugees, as with the selection of those for evacuation, demonstrates the influence of political and cultural factors on United States policy. Not all children found alone outside their countries of origin have been resettled, and, as with adult refugees, there has been a marked tendency to accept those who have fled Communist regimes.<sup>68</sup>

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63. Most Hungarian unaccompanied minors lived among the larger refugee population. "UNHCR and the social welfare agencies involved agreed that the camps were unsuitable for unaccompanied youths. Authorities repeatedly mentioned the destructive environment of the camps with their lack of vocational opportunities and the dangers of idleness and promiscuity." *Unaccompanied Children*, *supra* note 2, at 47.

64. Not only were the Hungarians fleeing a Communist regime at the height of the Cold War, but they had been led to believe that America would not fail them both before and during the revolution. *Calculated Kindness*, *supra* note 32, at 53. Indochinese refugees, of course, were fleeing lands the United States had overtly sought to defend against Communist takeover.

65. The Hungarians, in fact, were accepted in spite of a 1957 Hungarian decree necessitating the consent of the state guardianship authorities to parental declarations concerning their child's residence abroad that was issued after the uprising of 1956 and aimed at preventing parental agreement to resettlement. *Unaccompanied Children*, *supra* note 2, at 240 & n.172.

66. *Unaccompanied Children*, *supra* note 2, at 45.

67. *See infra* text accompanying notes 214-23.

68. *Cf.* *Calculated Kindness*, *supra* note 32, at 213; Anker & Posner, *supra* note 15, at 14.

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3. *Adoption.* As noted above, several refugee acts prior to 1961 allowed for the admission on a numerically limited basis of "eligible orphans," including both true orphans and those with one parent who had released them for adoption. These provisions facilitated inter-country adoption by United States citizens, an objective that took on increasing importance with the decline in the number of healthy, adoptable American babies in the period since World War II.<sup>69</sup> Though it was not geographically limited to such locales, in practice this legislation made certain crisis areas a source of adoptable children. Operation Babylift, for example, began as an effort by private adoption agencies, with the cooperation of the United States government, to remove from South Vietnam 1,400 children who were already being processed for adoption in this country. The adoption agencies and the prospective adopting parents did not want to forfeit the opportunity to adopt the children, a result that the fall of the South Vietnamese regime undoubtedly would have entailed.<sup>70</sup> These "pipeline orphans," as they were called, were quickly joined by about 1,100 other children, mostly from South Vietnamese children's institutions.<sup>71</sup>

Though not an explicit purpose of the adoption legislation, one effect has been to remove children from orphanages or other institutions in their countries of origin, providing them instead with a family placement in the United States. The addition in 1957 of a requirement that the prospective adoptive parents have met pre-adoption requirements in their state of residence added some assurance of the suitability of the adopting families.<sup>72</sup> It remains true, however, that existing legislation permits adoption by United States citizens regardless of whether or not satisfactory placements can be found within the country of origin. This legislation serves primarily as an adoption vehicle, and only incidentally as a means of evacuation, refugee resettlement, or method of providing otherwise unavailable placements for the children.

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69. Intercountry Adoptions and Immigration Laws: Issues and Proposals: Hearing Before the Subcomm. on Immigration, Citizenship, and International Law, 95th Cong., 1st Sess. 115, 116 (1977) (appendix of J. Jones); *see also* Note, The Law and Procedure of International Adoption: An Overview, 7 *Suffolk Transnat'l L.J.* 361, 361 n.1 (1983).

70. Unaccompanied Children, *supra* note 2, at 71-72.

71. Carbonneau, 'Operation Babylift'—The Dilemma Surrounding Child Custody Controversies, in *The Family in International Law: Some Emerging Problems* 87, 92-93 (R. Lillich ed. 1981); *see* *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194 (9th Cir. 1975).

72. Refugee-Escapee Act of Sept. 11, 1957, Pub. L. No. 85-316, § 4, 71 Stat. 639.

## *II. Care, Protection, and Selection of Unaccompanied Children under the Refugee Act of 1980*

The Refugee Act of 1980<sup>73</sup> affects all aspects of the acceptance and treatment of unaccompanied children. First, through its procedures for overseas refugee selection it establishes a permanent mechanism for their admission.<sup>74</sup> Second, the Act authorizes federal funding for services to unaccompanied refugee children, including foster and health care. Third, the Act clarifies legal responsibility for these children. Fourth, the Act creates an Office of Refugee Resettlement (ORR) in the Department of Health and Human Services with authority over the children's placement and financial support and the obligation to collect and maintain data on their location and status. The Act thus contains a permanent, federally funded and supervised program for the admission and maintenance of unaccompanied children. The following discussion describes the scope of this program, first in the children's care and protection and then in their selection.<sup>75</sup>

### *A. Care and Protection*

The Refugee Act of 1980 and the regulations and policies developed for its administration have resolved many of the most serious recurring problems in supporting, supervising, and placing unaccompanied children admitted to the United States, while providing a forum for the solution of most other difficulties that may arise. For this reason alone, it has proven to be a great step forward.

By providing for total reimbursement to states and nonprofit agencies for child welfare services to unaccompanied children, including foster care and health benefits, the Act sets to rest an issue that had long plagued efforts to bring unaccompanied children to the United States. Until the influx of Cuban children in 1960-1962, programs to admit unaccompanied children to the United States, both proposed and implemented, had required, prior to the children's entry, private assurances that the children would not become

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73. Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified in scattered sections of 8 U.S.C.).

74. See *infra* text accompanying notes 113-47.

75. For any individual child, selection for admission obviously precedes care and protection in the United States. This Article treats the latter issue first because it forms part of the background to the discussion of the policy bases and recommendations concerning the selection decision which is the subject of the remainder of the article.

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public charges.<sup>76</sup> The only accommodation to the exigencies of the children's circumstances was permission to qualified organizations to give "corporate affidavits" of support for unnamed children it would later select.<sup>77</sup>

When the needs of the Cuban children who arrived in Florida by themselves in the early 1960s overwhelmed the capacities of the private organizations that came to their aid, the federal government stepped in for the first time. Although the Department of Health, Education, and Welfare provided emergency support for both these Cuban children and the Indochinese who arrived in 1975, the funding was arranged only after their unexpected appearance.<sup>78</sup> Financial assistance for Indochinese children resettled in 1979 began under the Indochinese Refugee Assistance Program; however, since that Act was due to expire at the end of the 1979 fiscal year, agencies accepting the children had no assurance that financial aid would continue.<sup>79</sup> Thus, until 1980, the absence of a permanent, in-place, funding source for unaccompanied children resettled in the United States produced an air of uncertainty over all efforts to admit and integrate them.

Through ORR, the federal government now provides total support for children meeting its unaccompanied minor definition, including foster care maintenance, medical care, and other support services.<sup>80</sup> States receiving these funds "must provide unaccompanied minors with the same range of child welfare benefits and

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76. See, e.g., Displaced Persons Act of 1948, Pub. L. No. 774, § 2(e), 62 Stat. 1009, 1010 (including in the definition of "eligible displaced orphan" a demand for "satisfactory assurances . . . that such person, if admitted into the United States, will be cared for properly").

77. These were used in the evacuation of British children and the resettlement of children from Europe after World War II. Forbes & Fagen, *supra* note 10, at 6-9.

78. Forbes & Fagen, *supra* note 10, at 14-15, 20-21.

79. Pub. L. No. 95-145, §§ 201-202, 91 Stat. 1123, 1124-25 (1977).

80. INA § 412(d)(2)(A), 8 U.S.C. § 1522(d)(2)(A) (1982). The ORR definition of "unaccompanied minor" is as follows:

'Unaccompanied minor' means a person who has not yet attained 18 years of age (or a higher age established by the State of resettlement in its child welfare plan under Title IV-B of the Social Security Act for the availability of child welfare services to any other child in the State); who entered the United States unaccompanied by and not destined to (a) a parent or (b) a close nonparental adult relative who is willing and able to care for the child or (c) an adult with a clear and court-verifiable claim to custody of the minor; and who has no parent(s) in the United States. *Limitation*: No child may be considered by a State to be 'unaccompanied' for the purpose of this part unless such child was identified by INS at the time of entry as 'unaccompanied,' except that a child who was correctly classified as 'unaccompanied' by a State in accordance with Action Transmittal SSA-AT-79-04 (and official interpretations thereof by the Director) prior to the effective date of this definition may continue to be so classified until such status is terminated in accordance with

services available in foster care cases to other children in the State."<sup>81</sup> This support continues until the child is reunited with a parent,<sup>82</sup> is "united" with another adult to whom custody or guardianship has formally been given, or reaches age 18, unless the state uses a higher age for child welfare services in general.<sup>83</sup> In addition, resettled unaccompanied refugee children benefit from the special educational services, including English language training, provided to all refugee school children.<sup>84</sup> This total package of support for unaccompanied children far exceeds the financial and other assistance made available to resettled adult refugees<sup>85</sup> and to refugee children who are not unaccompanied.<sup>86</sup> The five year evolution of the program for Amerasian Vietnamese has recapitulated the history of United States support for resettled children in general by moving from a private support model to treating Amerasians from Vietnam as refugees eligible for the full range of assistance just described.<sup>87</sup>

Over the years the issue of establishing legal responsibility for unaccompanied children brought to the United States had proven especially problematic. Guardianship for temporarily evacuated

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§ 400.113(b) of this subpart; and the Director may approve the classification of a child as 'unaccompanied' on the basis of information provided by a State showing that such child should have been classified as 'unaccompanied' at the time of entry. 'Title IV-B plan' means a State's plan for providing child welfare services to children in the State under part B of Title IV of the Social Security Act.

45 C.F.R. § 400.111 (1987).

81. 45 C.F.R. § 400.116(a) (1987).

82. 45 C.F.R. § 400.113(b)(1) (1987). More precisely, benefits are for up to 90 days after the parent's or parents' arrival, as necessary, with the possibility of further extension in compelling cases. Office of Refugee Resettlement, Refugee Resettlement Program; Statement of Goals, Priorities, Standards, and Guidelines for the Unaccompanied Minor Refugee and Cuban/Haitian Entrant Programs, 52 Fed. Reg. 38,147, 38,148, 38,151 (1987).

83. 45 C.F.R. § 400.113(b)(2)-(3) (1987).

84. INA § 412(d), 8 U.S.C. § 1522(d)(1) (1982).

85. States are provided with federal funding for the non-federal share of aid to families with dependent children (AFDC), supplemental security income (SSI), and medical assistance (Medicaid) for eligible refugees during their first 36 months in the United States. INA § 412(e), 8 U.S.C. § 1522(e) (1982). For refugees not eligible for these programs, the federal government funds special programs of cash and medical assistance during their first 12 months in the United States. 45 C.F.R. § 400 (1987), *amended* by 53 Fed. Reg. 32,222 (1988).

86. In addition to the educational services mentioned, *supra* text accompanying note 84, these children are eligible for other child welfare services and medical assistance for 36 months after entry. INA § 412(d)(2), 8 U.S.C. § 1522(d)(2) (1982).

87. Compare Pub. L. No. 97-359, § 4, 96 Stat. 1716 (1982) (requiring private guarantee of financial support at a level of at least 125% of the poverty level for 5 years or until the alien reaches age 21, whichever is longer) with Act of Dec. 22, 1987, Pub. L. No. 100-202, § 584(c), 1987 U.S. Code Cong. & Admin. News (101 Stat.) 1329, 1329-184 (Amerasians born and residing in Vietnam are eligible for the same benefits as resettled refugees, including those benefits available to unaccompanied children).

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children was relatively simple: the British crown assumed the guardianship of its children who entered in 1940, and the parents retained guardianship of the Cuban children who arrived in 1960-1962.<sup>88</sup> For unaccompanied children resettled from abroad—other than orphans coming for adoption—however, a variety of forms of legal responsibility were tried. Voluntary organizations and state agencies were used as guardians; with the Hungarian children the Immigration and Naturalization Service itself acted as the legally responsible body.<sup>89</sup> The ad hoc nature of the arrangements meant that children were sometimes left in legal limbo.<sup>90</sup> Disputes sometimes arose among several agencies or organizations as each sought to avoid legal responsibility for certain children, which at the time involved the obligation to provide financial support.<sup>91</sup>

The Refugee Act contains a straightforward procedure for assigning legal responsibility for refugee children resettled in the United States. The Director of ORR is obligated to “attempt to arrange for the placement under the laws of the States” for these children before or as soon as possible after their arrival; in the interim, including the period of transit, the Director has legal responsibility for the children.<sup>92</sup> Proceedings to establish legal responsibility (custody and/or guardianship) must be initiated within 30 days after the child arrives at the location of resettlement.<sup>93</sup>

For certain children, however, legal responsibility is not resolved by the Act or its regulations. One problem concerns children who enter the United States accompanied by a non-parental relative but who subsequently leave the relative’s care. ORR regulations encompass only those who entered the United States “unaccompanied” and who were identified by INS at the time of entry as “unaccompanied,”<sup>94</sup> thus excluding from the protection of the Act children who separate from accompanying family members or other adults after their arrival. Since this limitation is not necessarily mandated by the

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88. Forbes & Fagen, *supra* note 10, at 6, 15.

89. *Id.* at 12-13; Unaccompanied Children, *supra* note 2, at 50.

90. Forbes & Fagen, *supra* note 10, *passim*.

91. *Id.* See also H.R. Rep. No. 608, 96th Cong., 1st Sess. 27 (1979).

92. INA § 412(d)(2)(B)(ii), 8 U.S.C. § 1522(d)(2)(B)(ii) (1982); Durkee, Social Problems of Custody for Unaccompanied Children in the United States, 1982 Mich. Y.B. Int'l Legal Stud. 197, 214-15 (1982).

93. 45 C.F.R. § 400.115(a) (1987).

94. 45 C.F.R. § 400.111 (1987). See *supra* note 80.

statute,<sup>95</sup> the problem could be resolved by expanding the ORR definition of unaccompanied refugee children to include those who are first identified as unaccompanied after arrival in the United States.

A second concern is the situation of children who enter with a non-parental relative or who are destined for such relatives within the United States. It has recently been reported that "HHS [that is, ORR] has interpreted the term 'unaccompanied' narrowly, so that in practice, section 412(d)(2) applies only to children who are neither entering the United States as part of a family unit including adult relatives (of whatever degree) nor entering the United States to be placed with adult relatives (of whatever degree)."<sup>96</sup> Such children thus never fall within the Refugee Act's provisions governing legal responsibility for unaccompanied children.<sup>97</sup> The Department of State, which plays a role in the children's selection,<sup>98</sup> therefore has been compelled to involve itself in arrangements for their custody and guardianship after their arrival. The department has attempted to fill the void in a variety of ways. First, it has insisted that voluntary agencies providing initial reception services ensure that legal responsibility be promptly established, according to state law, for all children in foster care.<sup>99</sup> When this proved unworkable because the State Department lacked the legal authority to compel the child's relatives to establish formal custody or guardianship, the department sought at least to inform relatives about the relevant state laws on foster care, child custody, and guardianship.<sup>100</sup> More recently, the department has required that the voluntary agencies perform home studies of relatives already living in the United States before making a final decision to place the child with them, and has insisted upon follow-up home studies of all children living with non-parental

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95. INA § 412(d)(2)(B), 8 U.S.C. § 1522(d)(2)(B) (1982), puts within ORR's mandate "a refugee child who is unaccompanied by a parent or other close adult relative (as defined by the Director). . . ." Thus, the statute does not restrict this coverage to those children who *entered* unaccompanied by a parent or close relative, as the implementing regulations do at present.

96. McLeod, *Legal Protection of Refugee Children Separated from Their Parents: Selected Issues 17* (May 27, 1988) (on file with author).

97. Over 80% of the children separated from their parents who entered the United States from March 1987 to March 1988 did not fall within the Act as implemented. *Id.*

98. *See infra* text accompanying note 122.

99. McLeod, *supra* note 96, at 17-18.

100. *Id.* at 18. This was necessary because a Department of State survey revealed that in the majority of jurisdictions, children may not live with non-relatives or with certain distant relatives without formal custody, guardianship, or foster home placement, nor may these adults consent to emergency medical treatment or enroll children in schools. *Id.* at 18-19.

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relatives.<sup>101</sup> Another solution, at least for those children accompanied by or coming to join all but the “closest” relatives, would be to amend the regulations to bring these children within the protection of the Act.<sup>102</sup>

Placement of unaccompanied children—the selection and supervision of the children’s living arrangements—has an enormous impact on their subsequent adjustment and development.<sup>103</sup> Historically, placement had been handled by voluntary agencies or by private committees formed for that purpose. They often, but not always, worked under the supervision of a governmental body such as the Children’s Bureau of the Department of Labor or, later, the Department of Health, Education, and Welfare.<sup>104</sup> The Refugee Act of 1980 gives the Director of the Office of Refugee Resettlement authority over the placement of unaccompanied refugee children meeting its definition.<sup>105</sup> In practice, most of the children are sponsored through either the United States Catholic Conference or the Lutheran Immigration and Refugee Service and are placed in programs operated by local affiliates of these agencies; in a few states the children are placed through the public child welfare system.<sup>106</sup> Placements include foster care, group care, independent living, or residential treatment. The choice among these options aims at meeting each child’s individual needs.<sup>107</sup> ORR works closely with

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101. *Id.* at 19-20.

102. For those coming with “close relatives,” an amendment to the Act might be necessary. *Cf. id.* at 17.

103. Unaccompanied Children, *supra* note 2, at 190: “Most minors remain in care until they reach adulthood. The placement decision is thus likely to have an important impact on the adjustment that the minor makes to the host country and the plans that he makes for his future.”

104. Forbes & Fagen, *supra* note 10, *passim*. In the program for Hungarian youths in which the Immigration and Naturalization Service played a direct role in placement by setting policy and even conducting pre-placement home studies, it was criticized for ignoring child welfare principles and impeding proper placements. *Id.* at 13; *see also* Unaccompanied Children, *supra* note 2, at 50.

105. States receiving assistance for resettled refugees must meet “standards, goals, and priorities, developed by the Director, which assure the effective resettlement of refugees and which promote . . . the efficient provision of services.” INA § 412(a)(6)(B), 8 U.S.C. § 1522(a)(6)(B) (1982). Further, as a condition for receiving this assistance, a state must submit to the Director a plan which provides “for the care and supervision of and legal responsibility for unaccompanied refugee children in the State.” INA § 412(a)(6)(A)(iv), 8 U.S.C. § 1522(a)(6)(A)(iv) (1982). In administering these and other refugee assistance programs, the ORR and its director are to act “in consultation with and under the general policy guidance of the United States Coordinator for Refugee Affairs.” INA § 411(b), 8 U.S.C. § 1521(b) (1982).

106. U.S. Dep’t of Health and Human Services, Office of Refugee Resettlement, Refugee Resettlement Program 50 (1988) (on file with author).

107. *Id.*

the agencies, but leaves to them the selection of individual placements. ORR has recently issued standards regarding placement that include a preference for "ethnically matched foster homes" for children under 12 years old.<sup>108</sup> Selection of appropriate placements for resettled unaccompanied children has been the subject of study and debate in the United States and abroad for as long as unaccompanied children have been resettled, intensifying in the last 10 years in response to the influx of Indochinese.<sup>109</sup> However, the present cooperative arrangement between ORR and the responsible agencies seems adequate to respond to evolving requirements.

### B. Selection of Unaccompanied Children

Most unaccompanied children accepted into the United States since 1980 have come through the refugee admission provisions of the Refugee Act of 1980. While the following discussion will concentrate on those provisions and their application to unaccompanied children, it should be noted at the outset that the Immigration and Nationality Act provides other means for their acceptance. First, if the children have the appropriate qualifications, they may be admitted as the children of United States citizens or lawful permanent residents.<sup>110</sup> Second, where refugee status is unavailable, the possibility of parole into the United States still exists, though since 1980 its use in lieu of refugee admission has been restricted to those for whom the Attorney General finds compelling reasons in the public interest that require that the particular alien be paroled rather than admitted as a refugee.<sup>111</sup> Third, for those who qualify, the

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108. Office of Refugee Resettlement, *supra* note 82, at 52 Fed. Reg. 38,147, 38,152 (1987). The reason given for this standard is that ethnically matched foster care "supports" the children's understanding of their native culture. A more compelling justification is the correlation between this form of foster placement and satisfactory adjustment to the United States. See *infra* text accompanying notes 182-83. Other criteria in these standards impose limits on the number of different placements these children may experience, in apparent response to an unacceptably high number of unsuccessful placements some programs had experienced.

109. See Unaccompanied Children, *supra* note 2, at 4-5, 181-205.

110. INA §§ 101(b)(1), 201(b), 203(a)(2), 8 U.S.C. §§ 1101(b)(1), 1151(b), 1153(a)(2) (1982). In fact, one who so qualifies under these provisions will "not be processed as a refugee unless it is in the public interest." 8 C.F.R. § 207.1(d) (1987).

111. INA § 212(d)(5)(B), 8 U.S.C. § 1182(d)(5)(B) (1982). See Scanlan, *Regulating Refugee Flow: Legal Alternatives and Obligations Under the Refugee Act of 1980*, 56 Notre Dame L. Rev. 618, 633-34 (1981). While parole admits the alien to the United States, that person is not eligible for standard refugee resettlement assistance, cannot adjust his or her immigration status without special legislation, and requires prior authorization to work. In 1985, the Immigration and Naturalization Service began a program of humanitarian parole for so-called "Border Khmer" along the Thai-Cambodian border. Among the "emergent reasons" that must be shown in order to obtain this

## Admission of Unaccompanied Children

Amerasian legislation of 1982 and 1987 provides an alternate route into the United States.<sup>112</sup>

The Refugee Act of 1980 created a permanent process for the selection of refugees of "special humanitarian concern" to the United States.<sup>113</sup> To be chosen as a refugee of special humanitarian concern, an alien must first come within the refugee definition, which applies to overseas refugee processing as well as to discretionary grants of political asylum to those at or within United States borders.<sup>114</sup> A refugee is defined as a person who is outside his or her country of nationality or habitual residence and is unwilling or unable to return to 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.<sup>115</sup> Groups of people still within their country of nationality or habitual residence who have experienced persecution or have a well-founded fear of persecution may also meet the refugee definition if a presidential determination so designates.<sup>116</sup>

Those who meet the refugee definition are only eligible for admission as refugees if they come within the annual designation of those

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humanitarian parole are "vulnerability or hardship experienced or expected to be encountered by the prospective beneficiary by virtue of age, physical impairment and related factors in his/her present environment"—conditions that could easily apply to unaccompanied children. Immigration and Naturalization Service, Requesting Humanitarian Parole for "Border Khmer" (May 1986), *reprinted in* 63 Interpreter Releases 489-91 (1986). *See also infra* text accompanying note 136.

112. *See supra* notes 21-22 and accompanying text.

113. INA § 207(a)(3), (b), (c)(1), 8 U.S.C. § 1157(a)(3), (b), (c)(1) (1982).

114. INA §§ 207-208, 8 U.S.C. §§ 1157-1158 (1982).

115. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1982). The refugee definition for both those outside their country of origin and those still within it excludes persons who themselves "ordered, incited, assisted or otherwise participated" in persecution. INA § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B) (1982). That this provision can be implemented to present a serious obstacle to overseas refugee admission is illustrated by the large number of Cambodians denied refugee status on the ground of suspected involvement with the Khmer Rouge after 1975. *See* Golub, *Looking for Phantoms: Flaws in the Khmer Rouge Screening Process* (United States Committee for Refugees, April 1986) (on file with author). The potential unfairness of applying this bar to children would be prevented by exempting from its application those who participated or assisted in persecution as children, on the ground that they were unlikely to have made any meaningful choice. *Compare* INA § 212(a)(28)(I), 8 U.S.C. § 1182(a)(28)(I) (1982) (exempting from exclusion for membership in communist organizations, or those which advocated the violent overthrow of the United States government, aliens whose membership or affiliation took place "solely when under sixteen years of age"). *Cf.* INA § 212(a)(9), 8 U.S.C. § 1182(a)(9) (1982) (aliens who have committed only one crime involving moral turpitude while under the age of 18 are, under certain conditions, exempt from exclusion).

116. INA § 101(a)(42)(B), 8 U.S.C. 1101(a)(42)(B) (1982).

of special humanitarian concern to the United States.<sup>117</sup> For each fiscal year, the President determines, after statutorily mandated consultations with Congress, the number of such refugees to be admitted, subject to upward revision for unforeseen emergencies.<sup>118</sup> The annual presidential determinations allocate the yearly admission of those outside their country of nationality or habitual residence by region, without specifying which refugees within those regions should be accepted.<sup>119</sup> It is from these designated regions that already unaccompanied children outside their countries of origin may be chosen. For admission of those still in their own countries, categories of eligible refugees are also defined in the presidential determination.<sup>120</sup> Children evacuated from their own countries would need to fit within one of these categories to be admitted as refugees.

Since there is usually a far larger number of refugees within the designated regions or categories than the numbers allocated for them, further selection is required.<sup>121</sup> This process is performed by the Department of State, which accepts and screens refugee applications, and the Immigration and Naturalization Service (INS), which

117. In addition, the person must be otherwise admissible, INA § 207(c)(1), 8 U.S.C. § 1157(c)(1) (1982). Admission is made easier by the inapplicability to refugee applicants of certain grounds of exclusion and the Attorney General's authority to waive others. INA § 207(c)(4), 8 U.S.C. § 1157(c)(4) (1982). Further, an applicant who is firmly resettled in any foreign country may not be admitted as a refugee. INA § 207(c)(1), 8 U.S.C. § 1157(c)(1) (1982); 8 C.F.R. § 207.1(b), (c) (1988). *But see* the exemption from this provision for children of refugees, *infra* text accompanying note 272.

118. INA § 207, 8 U.S.C. § 1157 (1982). For an account of the background of the Refugee Act and a description of the consultation process, see Martin, *The Refugee Act of 1980: Its Past and Future*, in 1982 Mich. Y.B. Int'l Legal Stud. 91 (1982). *See also* Anker & Posner, *supra* note 15.

119. For example, the presidential determination for the 1989 fiscal year allocates 90,000 refugee admissions as follows:

Africa .....	2,000
East Asia, First Asylum .....	28,000
East Asia, Orderly Departure Program .....	25,000
Eastern Europe/Soviet Union .....	24,500
Latin America/Caribbean .....	3,500
Near East/South Asia .....	7,000

Presidential Determination No. 89-02 of Oct. 5, 1988, 53 Fed. Reg. 45,249 (1988).

120. For fiscal year 1988 these categories are:

- a. Persons in Vietnam and Laos who have past or present ties to the United States, or who have been or currently are in re-education camps in Vietnam or seminar camps in Laos and their accompanying family members.
- b. Present and former political prisoners and persons in imminent danger of loss of life in countries of Latin America and the Caribbean, and their accompanying family members.
- c. Persons in the Soviet Union.

*Id.* at 45,250.

121. Martin, *supra* note 118, at 104.

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makes the actual selection.<sup>122</sup> The two departments employ a set of refugee processing priorities that the State Department calls a "Worldwide Priorities System."<sup>123</sup> The priority system, in effect, determines which refugees from the eligible multitudes will be considered for admission to the United States as refugees.

The presidential determinations, by controlling the geographic areas or circumstances from which refugees may be selected, impose some limits on the acceptance of unaccompanied children, since those outside the designated areas or groups are excluded from any consideration. The presidential determination thus defines the outer bounds of the process of selection of unaccompanied children. The crux of the selection process, however, lies in the application of the refugee definition and the "Worldwide Priorities." As the following discussion reveals, both have been implemented in a manner designed to facilitate the acceptance of certain unaccompanied children.

Observers agree that the Refugee Act's requirement of persecution or fear of persecution on one of the five specified grounds is applied much less stringently in overseas refugee processing than in domestic asylum adjudication.<sup>124</sup> Unaccompanied children benefit both from this relaxed interpretation and from a more favorable application of the refugee definition than is afforded overseas adult applicants. This treatment began in 1981, soon after the Refugee Act went into effect, when the INS started to question whether individual Khmer and Vietnamese being interviewed in countries of first asylum met the refugee definition.<sup>125</sup> After an outcry inside and outside the government, President Reagan directed the Attorney General to "determine whether there are categories of persons

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122. 1 C. Gordon & H. Rosenfield, *Immigration Law and Practice* § 2.24(A)(e) (1988).

123. Department of State, 9 Foreign Affairs Manual, Part IV app. D, § 6, *reprinted in* 6A C. Gordon & H. Rosenfield, *supra* note 122, at § 33.3. For a description of the priorities themselves, *see infra* note 135.

124. *See* Martin, *supra* note 118, at 112 ("As the provisions are actually administered . . . the UN [refugee] definition poses a significantly higher hurdle for asylum applicants. Overseas refugee staffs devote very little attention to the question of likely persecution."); N. Zucker & N. Zucker, *The Guarded Gate* 153-56 (1987); Scanlan, *supra* note 111, at 633 ("Refugees applying from abroad are . . . scrutinized less intensively regarding their personal grounds for seeking refuge."); Gallagher, Forbes & Fagen, *Of Special Humanitarian Concern: U.S. Refugee Admissions Since Passage of the Refugee Act 49* (Refugee Policy Group 1985) [hereinafter *Of Special Humanitarian Concern*] ("In effect, applicants are first asked if they meet the priorities and, only then, are they asked if they meet the refugee definition." ).

125. N. Zucker & N. Zucker, *supra* note 124, at 81-84.

who—under the Refugee Act of 1980—share common characteristics that identify them as targets of persecution in a particular country”; among the categories identified were unaccompanied children.<sup>126</sup>

Most of the unaccompanied children accepted since 1980 have come from Southeast Asia.<sup>127</sup> The INS and State Department currently use a joint policy and procedure for selecting unaccompanied minors from that region to be admitted as refugees or parolees.<sup>128</sup> This procedure has three stages. First, “[t]he United States looks to UNHCR, as the responsible international organization, to determine in the first instance what is in the unaccompanied minor’s best interest: return to his or her parents or other relatives in the country of origin, local integration, or third country resettlement.”<sup>129</sup> Second, those whom UNHCR recommends for resettlement are “adjudicated” on an individual basis to determine if they come within the

126. National Security Decision Directive on Refugee Policy and Processing Refugees from Indochina (May 19, 1983), *reprinted in* 133 Cong. Rec. S13698 (Oct. 7, 1987).

127. Since 1979, over 95% of all children within ORR’s unaccompanied children programs have come from Vietnam, Cambodia, and Laos. Telephone interview with William Eckhof, Program Analyst, Office of Refugee Resettlement (Aug. 26, 1988). According to State Department records, 87.5% of the unmarried refugee children who entered unaccompanied by a parent during the period March 1, 1987, through March 31, 1988, came from Indochina. Department of State, Bureau of Refugee Programs, Refugee Data Center, Arrivals Between 87/03/01 and 88/03/31 (undated) (on file with author). The discrepancy in these figures is probably due to the disjunction between those selected as “unaccompanied children” overseas and those regarded as “unaccompanied children” within the ORR mandate. *See supra* text accompanying notes 96-97.

128. U.S. Policies and Procedures for Adjudicating Unaccompanied Minors Seeking Admission to the U.S. as Refugees or Parolees, 87 State 394,304 (1987) (outgoing telegram) [hereinafter cited as INS/State Policy]. For its purposes an “unaccompanied minor” is defined as an unmarried person under 18 not with a parent, a close non-parental adult relative caring for the child, or a legal guardian. A minor who is with a non-relative who is not a legal guardian is considered unaccompanied. *Id.* at § 3(B). Although these policies and procedures are currently being used only for Southeast Asian children, an adaptation for worldwide use is now under consideration.

129. *Id.* at § 4(A). UNHCR policy was recently stated:

[W]hile the best durable solution for an unaccompanied refugee child will depend on the particular circumstances of the case, the possibility of voluntary repatriation should at all times be kept under review, keeping in mind the best interests of the child and the possible difficulties of determining the voluntary character of repatriation.

Executive Committee of the UNHCR Programme, Conclusions on Refugee Children (k), A/AC. 96/702 Annex I (1987) (on file with author).

The UNHCR, in Guidelines on Refugee Children § 148 (1988) (on file with author), recommends that “[i]n seeking solutions, careful regard must be given to the principles of family unity and best interests of the child.” Cases are to be thoroughly and individually assessed and decisions taken by “competent bodies that include qualified experienced child welfare personnel.” *Id.* The child should be provided representation and should be permitted to participate. The views of the parents or others *in loco parentis* should be obtained. The guidelines also contain a sliding scale of deference to the child’s own wishes: for children over fifteen they are presumptively followed; for those

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refugee definition. Finally, the priority system for overseas refugees is then applied to those who are found to be refugees, and parole is considered for those who are not. Generally, unaccompanied children's applications for resettlement are to be considered on a priority basis.<sup>130</sup>

The policy for determining whether or not an unaccompanied child meets the refugee definition permits reliance on three bases: (1) the minor's own articulation of persecution or a well-founded fear of persecution, including possible persecution for unauthorized departure; (2) objective evidence known to the United States government that there is a reasonable possibility that the minor would be persecuted in his country of origin, including evidence that other family members were persecuted; or (3) evidence that, although the minor personally may not have been aware of a threat of persecution, the minor's parents or nearest guardians sent the minor out of his country to protect the minor from persecution.<sup>131</sup> In addition, the INS/State policy notes that a person who leaves his country for reasons other than fear of persecution may be a refugee if his departure is likely to be viewed as an act against the state.<sup>132</sup> The policy directs that these criteria are to be administered sympathetically, with the child to be interviewed "in a non-adversarial setting and manner"; special interviewing and investigative techniques are to be employed to gather relevant information from other sources; and the child is to be given "the benefit of the doubt by applying the refugee definition generously."<sup>133</sup> The instructions in their entirety evince a willingness to bring unaccompanied children within the refugee definition.<sup>134</sup>

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between nine or ten and fifteen the children's choices are given "appropriate consideration." *Id.* at § 150. "In each case the minor's mental maturity must be determined in light of personal, family and cultural background and his/her evolving capacity." *Id.*

130. INS/State Policy, *supra* note 128, at § 4(C).

131. INS/State Policy, *supra* note 128, at § 6(B), (E), (G). The telegram approves the view expressed in Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status § 218 (1979) that "[i]f there is reason to believe that the parents wish their child to be outside the country of origin on grounds of well-founded fear of persecution, the child himself may be presumed to have such fear." But the INS/State policy goes on to state: "The mere fact that the parents send their minor out of the country does not in itself create a presumption of persecution. It may, however, be evidence of persecution or a fear of persecution." *Id.* at § 6(F).

132. INS/State Policy, *supra* note 128, at § 6(B).

133. *Id.* at § 6(L).

134. In light of this approach, the legitimate fear that unaccompanied children will be unable to meet the refugee definition, *see* Of Special Humanitarian Concern, *supra* note 124, at 63, may not be realized, but only at the expense of distorting the refugee definition itself.

Of those children from Southeast Asia recommended for resettlement who meet the refugee definition, "the United States is prepared to accept all who have links to the United States and half of those who do not."<sup>135</sup> In fact, informed sources recently report that the United States now accepts substantially more than 50% of those children without United States ties. Those with United States ties who nevertheless fail to qualify as refugees are reviewed for possible humanitarian parole, with "special weight" being given to the best interests of the minor.<sup>136</sup>

Basing a finding of refugee status on the minor's own expression of past persecution or a well-founded fear of persecution, or on "objective evidence known to the United States Government that there is a reasonable possibility that the minor would be persecuted in his country of origin"<sup>137</sup> is unexceptionable, and would be a proper approach for political asylum as well. The latter factor, permitting a finding of refugee status on the basis of information of which the child may be unaware, is necessary to protect those too young to comprehend the existence of the possibility of persecution.<sup>138</sup>

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135. INS/State Policy, *supra* note 128, at §§ 4(A), 5(A). Acceptance is accomplished under the Worldwide Priorities System, *see supra* text accompanying note 123. United States links may bring the children within Priority Three (Family reunification) or Priority Five (Additional family reunification). Priority Three covers refugees who are spouses, sons, daughters, parents, siblings, or unmarried minor grandchildren of persons in the United States. Priority Five covers refugees who are married siblings, unmarried grandchildren who have reached their majority, or married grandchildren of persons in the United States, as well as more distantly related individuals who are part of the family group and dependent on the family for support. To come within either priority the anchor relative in the United States must be a United States citizen, lawful permanent resident alien, refugee, or asylee. Children of former employees of the United States government, or of American business firms, foundations, and voluntary agencies may acquire derivative status under Priorities Two (Former United States Government employees) and Four (Other ties to the United States). The emphasis on family and other United States ties in the selection of unaccompanied children mirrors the overseas refugee selection process in general. *See Of Special Humanitarian Concern*, *supra* note 124, at 47-48; Anker, *Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980*, 28 Va. J. Int'l L. 1, 35-36 (1987). Children without these United States links presumably would be accepted within Priority One (Compelling concern/interest: those in an urgent, life-threatening situation) or, more likely, Priority Six (Otherwise of national interest: other refugees in specified regional groups whose admission is in the national interest.)

136. INS/State Policy, *supra* note 128, at § 7; *see supra* note 111. The INS office responsible for the decision is to be "as generous as possible consistent with ensuring that applicable statutory requirements for parole are met." INS/State Policy, *supra* note 128, at § 7(E).

137. INS/State Policy, *supra* note 128, at § 6(E).

138. *Accord Unaccompanied Children*, *supra* note 2, at 258-59. The authors state: Determination of refugee status for unaccompanied children should focus on the objective situation of the child. . . . If the persecution is severe enough to give adult members of the relevant group a well-founded fear of persecution, then [those]

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In light of the realities of recent refugee movements, however, one may question the weight which is given by the INS/State policy to the parents' decision to send the child out of the country.<sup>139</sup> Adolescent males constitute a disproportionate number of unaccompanied children fleeing from recent crises.<sup>140</sup> Many have departed, with or without parental consent, for a variety of reasons. For example, among the Vietnamese "boat people," a number of children were found unaccompanied because "[i]n many cases a family could only afford to send one person. Often they would choose the favorite son, or the eldest son, with the idea of giving that child a better life and with the hope that when the boy was resettled and economically secure he could sponsor the rest of the family."<sup>141</sup> In other cases, the child was sent on a different boat than the parents as a means of increasing the likelihood that at least one family member would reach foreign soil.<sup>142</sup> While the motivation for a family's sending a child off by himself depends on the particular circumstances, it is questionable to what degree the parents' sending the child away alone generally supports a conclusion that the parents feared persecution of the child. Moreover, this factor does not weigh nearly so heavily in domestic asylum adjudication.<sup>143</sup>

In addition, the INS/State policy for unaccompanied children permits a finding of refugee status for a child "who leaves his country for reasons other than fear of persecution . . . if his departure is likely to be viewed as an act against the state and to result in persecution if he returns."<sup>144</sup> On its face, this treatment of unauthorized departure is far more favorable to the alien than in the domestic

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responsible for the child should have the duty to assert a claim to refugee status on behalf of that child whether or not the child has a 'fear of persecution' or even an awareness of his membership in the group.

139. See *supra* note 131.

140. See *infra* text accompanying note 214.

141. Pask & Jayne, *Refugee Camps and Legal Problems: Vietnamese Refugee Children*, 22 J. Fam. L. 537, 539 (1983).

142. *Id.*

143. Indeed, until it was enjoined from doing so in *Perez-Funez v. District Director, I.N.S.*, 619 F. Supp. 656 (C.D. Cal. 1985) and 611 F. Supp. 990 (C.D. Cal. 1984), the INS actively encouraged unaccompanied children apprehended within the United States to agree to voluntary departure (leaving the country prior to the initiation of deportation proceedings), causing them to forfeit even the possibility of claiming political asylum under INA § 208, 8 U.S.C. § 1158 (1982), as well as other forms of relief from deportation. Far from inferring a fear of persecution on the part of the children's parents, this practice seemed to operate on a presumption of non-persecution from the fact of flight. The relief granted in *Perez-Funez*—oral and written notice of the right to apply for political asylum and a telephone call to a relative or legal services organization—does not speak to the significance of their family separation in the finding of a fear of persecution, and the INS remains free to continue to deny this factor any weight.

144. INS/State Policy, *supra* note 128, at § 6(B).

asylum context, where, at the least, the applicant must show either that his unauthorized departure was politically motivated or that prosecution or punishment on his return will be more likely or severe due to his political opinion.<sup>145</sup> The prospect of prosecution for illegally leaving the state of origin, without more, generally does not establish a well-founded fear of persecution for applicants other than overseas unaccompanied children.

In sum, the policies and procedures just described have three major effects, which together produce a United States policy of accepting large numbers of the unaccompanied child population in Southeast Asian countries of first asylum. First, the United States defers to UNHCR's decision as to whether resettlement is in the child's best interests; but inherent in UNHCR's role is the possibility that decisions will be influenced by the position of the country of asylum, potential resettlement countries, and its own desire to achieve a durable solution.<sup>146</sup> Second, as just discussed, the United States generously interprets and applies the refugee definition. Third, of those unaccompanied children coming within this liberal application of refugee status, the United States will accept all who have relatives in the United States or whose parents have had

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145. See *Matter of Janus & Janek*, 12 I. & N. 866, 876 (B.I.A. 1968) ("We are not convinced that every travel restriction imposed by an Iron Curtain country and punished, in the breach, by imprisonment, is political persecution; or that every person who leaves such a country and subjects himself to the penalty provided under those laws by remaining outside of his country for longer than permitted is a bona fide refugee."); *Matter of Nagy*, 11 I. & N. Dec. 888, 891 (B.I.A. 1966); *Matter of Liao*, 11 I. & N. Dec. 113, 119 (B.I.A. 1965). An asylum applicant appears likely to succeed in establishing refugee status only if he can establish that the departure was politically motivated and that he faces politically motivated punishment for his unauthorized departure. *Id.*; see also United Nations High Commissioner for Refugees, *supra* note 131, at § 61. Some courts have suggested that these criteria are disjunctive. *Henry v. I.N.S.*, 552 F.2d 130, 131 (5th Cir. 1977); *Coriolan v. I.N.S.*, 559 F.2d 993, 1000 (5th Cir. 1977). Even this less demanding interpretation, however, is more stringent than the INS/State policy toward unaccompanied children who have left their homelands without authorization.

146. See *Unaccompanied Children*, *supra* note 2, at 274. In recent actions UNHCR has moved closer to a pure best interests approach to decisions regarding unaccompanied children. The Executive Committee of the UNHCR Programme, *Conclusions on the International Protection of Refugees*, at No. 24, § 7, speaks only of tracing and the need to "clarify" the family situation, but in introducing them the Director of International Protection stated that "[t]he point of departure should always be to seek to ensure that [unaccompanied children's] best interests were fully protected." Executive Committee of the UNHCR Programme, *Report on the Meeting of the Subcommittee of the Whole on International Protection*, A/AC. 96/599, § 27 (Oct. 12, 1981) (on file with author). See also Executive Committee of the UNHCR Programme, *Conclusions on Refugee Children*, *supra* note 129, at (k); UNHCR, *Guidelines on Refugee Children*, *supra* note 129, at §§ 148-150 ("Resettlement should only be considered where other solutions are not appropriate"); UNHCR, *Note on Refugee Children*, 30 EC/SCP/46 (July 9, 1987).

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United States connections, as well as at least half of all other unaccompanied minor refugees, except for those who have ties with some other resettlement country.<sup>147</sup>

Reviewing these policies and procedures one cannot help but admire the sensitivity and compassion which come through; in many ways they exemplify the best humanitarian ideals of our nation. The contrast between this approach and the niggardly and ultimately tragic reaction to appeals on behalf of the Nazis' child victims in 1939 could not be more striking.<sup>148</sup> But the net effect amounts to wide-scale acceptance of children found unaccompanied in Southeast Asia. Moreover, no comparable policy exists for the unaccompanied children in other regions such as Africa and Central America. The totality of this approach invites further inquiry into the objectives the admission of unaccompanied children ought to serve.

### *III. Policy Bases for Admission of Unaccompanied Children*

The decision to admit unaccompanied children involves considerations of protecting children from harm and persecution, preserving family unity, and promoting United States interests, both international and domestic. While these factors figure in refugee processing for adults as well as for children still with their families, they play themselves out in unique ways with regard to unaccompanied children. Protection concerns loom larger in any policy directed at unaccompanied children because these children are separated from the adults who are normally expected to furnish a first line of care. The impact on family unity of policies toward unaccompanied children is obviously greater than that of refugee resettlement in general. Due to these children's greater vulnerability, the effect of their admission on foreign policy interests and on domestic resources is also different than for adults, both in the support they require and the public attention they receive. This section discusses separately these three policy bases—protection, family unity, and domestic and international effects of admission. The last section of the article seeks to integrate these interests and embody their accommodation in a set of recommendations.

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147. INS/State Policy, *supra* note 128, at § 5(B).

148. The defeat of the Wagner-Rogers Children's Bill has been called perhaps "the cruelest single action in United States immigration history." Select Commission on Immigration and Refugee Policy, U.S. Immigration Policy and the National Interest, Staff Report 199 (1981), *quoted in* T. Aleinikoff & D. Martin, *supra* note 15, at 52.

Evaluation of these three policy bases is not a scientific process, and the importance of each can vary with the circumstances of particular crises. Additionally, the policy objectives may conflict with each other. For example, protection from danger or persecution through admission to the United States may come at some cost, both in the psychological repercussions of cultural dislocation and in the more tangible effects on family unity. In addition, the admission of children found unaccompanied from countries of first asylum may influence parents and children in the region to separate from each other. Foreign policy objectives such as relieving asylum countries of the burden of the children's care or assisting persons or factions favored by the United States, it will be seen, can work either in consonance or at odds with the aims of protection or family unity.

*A. Protection from Physical Harm or Persecution*

1. *Evacuation from family and crisis area.* As discussed above, the evacuation of children directly from crisis areas to the United States has taken place several times in the recent past.<sup>149</sup> Whether temporary or permanent, evacuation can serve to extricate children from physical danger; from persecution on grounds of race, religion, nationality, political expression, or social group membership; or from totalitarian or authoritarian conditions or civil upheaval. Evacuation to the United States can bring immediate relief from these perils.

But evacuation also has some serious disadvantages. Removal from a crisis area separates the child from his family, community, and, often, his culture—vital sources of the bodily care, affection, intellectual stimulation, and socialization necessary for healthy development.<sup>150</sup> A “child first” immigration policy is a reversal of the historical pattern in which the adult breadwinner would arrive first to find work and housing and to familiarize himself with the United States before being joined by his children.<sup>151</sup> In reversing this process, evacuation deprives the child of critical parental support just when he or she needs it most. Morris Fraser has written:

There is a certain universality about a child's response to disaster. The varying realities of the event may well add details to nightmare and fantasy, but the child's fear is always, in essence, that of loss of the factors that make for physical and emotional security. He dreads the prospect of separation from his parents as much, if not more, than he

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149. *Supra* text accompanying notes 33-51.

150. *Unaccompanied Children*, *supra* note 2, at 135-46.

151. O. Handlin, *The Uprooted* 207-08 (2d ed. 1973); M. Jones, *American Immigration* 181 (1960).

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does bodily harm to himself—an aspect of preventive psychiatry often forgotten in the rush to evacuate children from disaster areas.<sup>152</sup>

Similarly, Neil Boothby describes the family and community as the first and second “rings of security” for children in times of crisis.<sup>153</sup> After examining research on children evacuated from their families, he concludes that “studies of evacuated and nonevacuated children clearly suggest that separation from families during most emergencies was more traumatic than exposure to war, bombardments, and reductions in food rations.”<sup>154</sup>

The historical experience of temporary evacuation from crises demonstrates practical problems as well. In a widespread war or other crisis, it is virtually impossible to remove all children from danger, raising the possibility that the process of selection will give rise to real or perceived inequities.<sup>155</sup> Where the endangered group is by its nature self-limited this is less likely to be a problem; the Amerasian immigration legislation, for example, is open only to persons fathered by United States citizens within certain time periods.<sup>156</sup> Temporary evacuations have often lasted far longer than originally contemplated, producing long-term or even permanent separation.<sup>157</sup> For example, many of the Cuban children remained apart from their parents for years, rather than months as planned.<sup>158</sup> During such a period, the children can grow away from their families and cultures to the point where family reunion and repatriation are difficult or impossible.<sup>159</sup>

For these reasons evacuation of children to other countries from areas of war is no longer particularly favored in international humanitarian law. Protocol II to the Geneva Conventions encourages removal of children from areas of hostility during internal armed conflicts, but only temporarily, with the consent of their parents or those primarily responsible for them, and even then only to other

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152. M. Fraser, *Children in Conflict* 73 (1973).

153. Unaccompanied Children, *supra* note 2, at 147-52.

154. *Id.* at 297.

155. One reason for British government participation in the 1940 evacuation scheme was the desire to stifle criticism that privately supported removal was, in practice, only available to the well-to-do. Paper Walls, *supra* note 10, at 121.

156. See *supra* text accompanying notes 21-22.

157. Unaccompanied Children, *supra* note 2, at 123-26, 296.

158. See Forbes & Fagen, *supra* note 10, at 16.

159. Substantial percentages of the children evacuated from Spain to Mexico and the U.S.S.R. during the Spanish Civil War and from Finland to Sweden during the Finnish-Soviet War from 1939-1944 never returned. Unaccompanied Children, *supra* note 2, at 13-17, 26-28. On the other hand, over 98% of the more than 10,000 children evacuated from Biafra in 1968-1969 during the Nigerian Civil War were successfully reunited with a family member in Nigeria after the war's end. *Id.* at 64-65.

areas within the country.<sup>160</sup> Evacuations by occupying powers in international conflicts are restricted to temporary evacuations for compelling reasons of health or medical treatment of the children.<sup>161</sup>

2. *Children already separated from their families.* For children already separated from their families, the protection concerns are different. For these children, their separation from parents or other responsible adults means they are already living apart from those who would ordinarily provide nurturing, care, and protection. Assessing the protection concerns involves balancing the conditions in which such children are found, often in refugee camps in their countries of asylum, against the effects of cross-cultural settlement which admission to the United States entails.

Unless they are taken in by other caring adults, unaccompanied children must fend for themselves in obtaining food, shelter, clothing, and medical care. More intangible but equally necessary emotional and psychological support, guidance, education, and protection also may be unattainable.<sup>162</sup> Thus, in addition to possible exposure to war or persecution, already unaccompanied children in crisis areas face additional risks and require special protection.<sup>163</sup>

In most crises it should be possible to provide material assistance to unaccompanied children as part of a general relief effort to the affected population by local governmental and welfare organizations

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160. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of NonInternational Armed Conflicts, art. 4(3)(e), *opened for signature* Dec. 12, 1977, in International Committee of the Red Cross, Protocols Additional to the Geneva Conventions of 12 August 1949, at 92 (1977) [hereinafter Protocol II].

161. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, art. 78, *opened for signature* Dec. 12, 1977, in International Committee of the Red Cross, *supra* note 160, at 58-60 [hereinafter Protocol I]. In addition, the Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III)A (Dec. 9, 1948), 78 U.N.T.S. 277, includes within the genocide definition the forcible transfer of children of one group to another group when done with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group. The Genocide Convention was ratified by the United States Senate in 1986. The Genocide Convention Implementation Act, Pub. L. No. 100-606, 1988 U.S. Code Cong. & Admin. News (102 Stat.) 3045, was recently signed into law.

162. Unaccompanied Children, *supra* note 2, at 122-23, 299-300.

163. In international law the need for special care and protection for children without parents is recognized in The Declaration of the Rights of the Child, G.A. Res 1386 (XIV) (Nov. 20, 1959) Principle 6 ("Society and the public authorities shall have the duty to extend particular care to children without a family. . . ."); and in the Draft Convention on the Rights of the Child, U.N. Doc. E/CN.4/1988/W.G.I/W.P./Rev. 1 (Feb. 24, 1988), art. 10(l) ("A child permanently or temporarily deprived of his family environment for any reason shall be entitled to special protection and assistance provided by the State.").

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and international relief agencies.<sup>164</sup> Similarly, if they have not already done so, displaced populations—even those within refugee camps—can be encouraged to develop adequate placements for their children in the country of asylum.<sup>165</sup> But even the most sensitive assistance and placement cannot shield children completely from the toll exacted by extended refugee camp confinement:

Refugee children are restricted in their freedom of movement and grow up dependent upon care and maintenance support, often living in poor conditions with little to keep them occupied. The situation and limited day-to-day occupations of parents and the refugee community have changed, leaving children disoriented and without traditional role models. The normal processes of socialization and development of children are impeded or blocked. . . . Extended residence in a camp leads to extremes of behavior in children, who become either passive and submissive, or aggressive and violent. . . . There have been reports of vandalism, drug addiction, rape, assault, robberies and other offenses by refugee youth. Refugee children sometimes face serious adaptation problems when they finally leave the camp.<sup>166</sup>

Unaccompanied children may be endangered even beyond the distorting effects refugee camp life can have on all children.<sup>167</sup> On a number of occasions they have been victims of sexual abuse, forced military recruitment, and other forms of exploitation. For example, Cambodian unaccompanied children in Thai border camps have been recruited by Cambodian resistance groups.<sup>168</sup> Even within the United States, unaccompanied Cuban boys and girls were subjected to sexual and psychological abuse in a refugee compound in 1980.<sup>169</sup>

How much the need to protect unaccompanied children from these perils militates in favor of United States resettlement depends on three factors: first, the nature and extent of the risk to unaccompanied children within the refugee camps; second, the degree to which this danger is caused by their unaccompanied status; and,

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164. Unaccompanied Children, *supra* note 2, at 300-02, 306-11.

165. *Id.* at 312-21.

166. UNHCR, Guidelines on Refugee Children, *supra* note 129, at §§ 159-160. *See also* Executive Committee of the UNHCR Programme, Conclusions on Refugee Children, *supra* note 129, at (m) (noting "with serious concern the detrimental effects that extended stays in camps have on the development of refugee children").

167. UNHCR, Guidelines on Refugee Children, *supra* note 129, at § 160; INS/State Policy, *supra* note 128, at § 4(A) ("Unaccompanied children are particularly vulnerable, both physically and emotionally, during flight and while in refugee camps"); Unaccompanied Children, *supra* note 2, at 169-72.

168. Boothby, *Children and War*, 10 *Christian Sci. Q.* 28, 29 (1988).

169. Eddie, Milestone Report: Unaccompanied Minor's Program (unpublished 1982), *cited in* Unaccompanied Children, *supra* note 2, at 170.

third, the comparative benefit of resettlement. With respect to the first factor, many of the detrimental effects of camp life bear equally on all children, as well as on adults.<sup>170</sup> To the extent that all children are exposed to harm, all should be resettled equally. Only where camp conditions prevent adequate foster care or group living arrangements for unaccompanied children, or where they are especially exposed to sexual abuse, military recruitment, or other physical and psychological risk, does their unaccompanied status clearly distinguish them from other refugee camp children. Even then, the first response should be to meet these needs within the camp confines. Where this is impossible, the special hazards to these children do give reason for their removal from the camps.<sup>171</sup>

Resettlement to the United States eliminates the disturbances of camp life, but it also introduces its own set of stresses. The trauma of separation from family, often coupled with exposure to violence, hunger, persecution, or abuse, is then compounded by the cultural uprooting most resettlement entails.<sup>172</sup> The net effect of resettlement of unaccompanied refugee children is difficult to evaluate. While there is now a substantial body of literature on the subject, most of it concerns Southeast Asian children resettled within the past 13 years and therefore constitutes only an interim report on children from a related cluster of cultures.<sup>173</sup> Some observers question how well western child psychiatric concepts, which underlie most of the studies, can be applied to children from non-western

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170. This was recently recognized in a sense of the Congress resolution that "renewed international efforts must be taken to address the problem of Indochinese refugees who have lived in camps for 3 years or longer." Foreign Relations Authorization Act, Pub. L. No. 100-204, § 904(c)(3), 1987 U.S. Code Cong. & Admin. News (101 Stat.) 1331, 1403.

171. For the implicit conclusion that unaccompanied children should be admitted whether or not they qualify as refugees because of their especially vulnerable circumstances within refugee camps, see *Of Special Humanitarian Concern*, *supra* note 124, at 5, 63.

172. Redrick & Wood, *Cross-Cultural Problems for Southeast Asian Refugee Minors*, 61 *Child Welfare* 365 (1982); Kinzie, Sack, Angell, Manson & Rath, *The Psychiatric Effects of Massive Trauma on Cambodian Children: I. The Children*, 25 *J. Am. Acad. Child Psychiatry* 370 (1986) [hereinafter Kinzie & Sack]; *Unaccompanied Children*, *supra* note 2, at 153-54, 186-207; Baker, *Substitute Care for Unaccompanied Children*, 61 *Child Welfare* 353 (1982). Even those who contend that adolescent unaccompanied refugees often had family problems in Asia before resettlement suggest that migration exacerbated their tendency toward emotional distress. Williams & Westermeyer, *Psychiatric Problems Among Adolescent Southeast Asian Refugees: A Descriptive Study*, 171 *J. Nervous & Mental Disease* 79 (1983).

173. A review of the literature of the strengths and weaknesses of foster, group, and institutional placements appears in *Unaccompanied Children*, *supra* note 2, at 187-207, but its discussion does not focus on the overall net effects of resettlement. See also Hammond & Hendricks, *Southeast Asian Refugee Youth: A Bibliography* (1987) (on file with author).

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cultures.<sup>174</sup> Furthermore, as Jan Linowitz and Neil Boothby write: "Adjustment to a new culture is a complicated, personal process with no decisive end-point; differences in adaptation are difficult to quantify."<sup>175</sup>

With these qualifications, three general conclusions have emerged from studies of past resettlement efforts. First, resettled unaccompanied children experience a relatively high rate of depression and depressive symptoms.<sup>176</sup> A 1983 study of 420 resettled unaccompanied children by Nancy Schulz and Ann Sontz discovered that 56% had suffered from incidents of depression or had manifested depressive symptoms sometime during the resettlement process.<sup>177</sup> Significantly, unaccompanied children who were resettled without a family member experienced a greater degree of disturbance than those who were able to establish contact with at least one such relative within the United States.<sup>178</sup> For example, a study of Cambodian children who entered the United States at about age 14 concluded:

[T]he amount of trauma per se, or the experience in Pol Pot Cambodia as reported by the students, by age or sex, were not related to the current diagnosis or global functioning. However, not living with a nuclear family member predicted the diagnosis of a major illness as well as lower global assessment scores. Indeed, 13 out of 14 people living in foster homes or alone had a psychiatric diagnosis. Although the students in general had lost members of their family, averaging 3 members of the nuclear family, those who had been able to reestablish family contact with any family member and live with them did much better than those without some contact. It may be that those without any family contact—that is, they lost their entire family—had more trauma. But it seems more likely that having reestablished some contact with family members in this setting mitigated some of the symptoms of the severe trauma, while being alone or in a foster family exacerbated the disorder. The role of the family continued to be extremely important in modifying these disruptive symptoms.<sup>179</sup>

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174. See Krener & Savin, *Indochinese Immigrant Children: Problems in Psychiatric Diagnosis*, 24 *J. Am. Acad. Child Psychiatry* 453 (1985).

175. *Unaccompanied Children*, *supra* note 2, at 187.

176. Baker, *supra* note 172, at 356-57.

177. N. Schulz & A. Sontz, *Voyagers in the Land: A Report on Unaccompanied Southeast Asian Refugee Children* (1983) (on file with author). The population studied was mostly randomly selected from a larger sample of 1,445 in local unaccompanied minor programs affiliated with the United States Catholic Conference. The larger sample represented one-half of the total Southeast Asian unaccompanied minor population in the United States at the time of the study. *Id.* at 12, 18. Sixty-five percent of the children were Vietnamese, fourteen percent were Khmer (Cambodian), three percent were Lao, and seventeen percent were Ethnic Chinese (presumably of Vietnamese national origin). *Id.* at 34.

178. Krener & Savin, *supra* note 174.

179. Kinzie & Sack, *supra* note 172, at 375.

In addition to depression, many unaccompanied children have experienced guilt feelings for their relatively privileged status in the United States while their family members are suffering or have died, and in some cases for their failure in the mission of bringing their families to this country.<sup>180</sup>

The second conclusion is that adjustment does appear to improve over time. Worries and fears seem to diminish and feelings of acceptance seem to increase the longer the period after entry.<sup>181</sup> The third and final conclusion is that ethnically similar placements seem to ameliorate the difficulties of adjustment.<sup>182</sup> Schulz and Sontz report that children in ethnically similar foster homes experienced severe depression with approximately half the frequency of those in their total sample.<sup>183</sup> Where ethnically similar placements are impossible, it appears desirable to "cluster" placements in a few communities so that children from the same cultural background can have frequent contact with each other.<sup>184</sup>

What this says about the advisability of resettlement as opposed to a policy of leaving unaccompanied children in refugee camps or only resettling them as part of a larger refugee population is unclear. Resettlement, while traumatic, so far does not seem to have had a seriously deleterious permanent effect on children, though a more definite answer must await studies over a longer term.<sup>185</sup> Against the known negative effects of cross-cultural resettlement, the particular risks to which such children are exposed must be balanced. In sum, apart from other policy objectives, in certain circumstances the protection of children probably justifies their resettlement to the United States.

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180. Baker, *supra* note 172, at 356.

181. Daly & Carpenter, Adjustment of Vietnamese Refugee Youths: A Self-Report, 56 Psychological Reps. 971, 974 (1985); Sokoloff, Carlin & Pham, Five Year Follow-up of Vietnamese Refugee Children in the United States, 23 Clinical Pediatrics 565 (1984).

182. Unaccompanied Children, *supra* note 2, at 194-196; Adler, Ethnic Placement of Refugee/Entrant Unaccompanied Minors, 64 Child Welfare 491 (1985). N. Schulz & A. Sontz, *supra* note 177, at 50, report that children in ethnic foster homes experienced only a little more than half the frequency of depression as those in the total sample. ORR now strongly recommends ethnically matched placements for unaccompanied children under 12 years. See *supra* note 108.

183. Schulz & Sontz, *supra* note 177, at 52.

184. Unaccompanied Children, *supra* note 2, at 346. Cluster sites are planned for Vietnamese Amerasians admitted under the 1987 legislation. 9 Refugee Reports (May 20, 1988, at 15-17).

185. See *supra* note 181 and accompanying text. Cf. Unaccompanied Children, *supra* note 2, at 183-86 (discussion of the long-term, generally positive, effects of transcultural adoption).

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### B. Family Unity

The opportunity for parents and children to live together if and when they choose is an important goal of our immigration system as a whole.<sup>186</sup> Family unity permits the parents to meet the physical and emotional needs of their child, a requirement for healthy growth and development in normal times<sup>187</sup> that is even more critical in times of disturbance.<sup>188</sup> Beyond its functional attributes, the desire of parents and children to live together appears to be a fundamental impulse, existing in virtually all cultures.<sup>189</sup> The admission of unaccompanied children, in conjunction with other refugee, immigration, and family law policies, can have a profound impact on the ability of parents and their children to live together.

1. *Evacuation of children from crisis areas.* Evacuation of children by themselves from areas of danger or persecution initially separates them from their family members. When it is carried out with the consent of the parents or others primarily responsible for the child, as has been the case with all removals to the United States—except for some of the children involved in Operation Babylift—it is consistent with parental autonomy. After all, one aspect of parental supervision is the right to control the child's residence, including placement with other adults, or in schools or other institutions.<sup>190</sup> In other words, the parents have the right to decide whether family unity takes precedence over their other concerns for their child. Evacuation, voluntarily undertaken, is an expression of the parents'

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186. See E.P. Hutchinson, *Legislative History of American Immigration Policy 1798-1965*, at 505-20 (1981) ("From the beginning of federal regulation of immigration . . . Congress consistently followed a policy of facilitating the coming of families as a unit and the reuniting of families whose members did not all immigrate at the same time." *Id.* at 505); Sanger, *Immigration Reform and Control of the Undocumented Family*, 2 *Geo. Immigr. L.J.* 295, 296-97 (1987); Guendelsberger, *The Right to Family Reunification in French and United States Immigration Law*, 21 *Cornell Int'l L.J.* 1, 7-25, 44-66 (1988).

187. J. Goldstein, A. Freud & A. Solnit, *Before the Best Interests of the Child 9-10* (1979); *Unaccompanied Children*, *supra* note 2, at 135-46.

188. *Supra* text accompanying notes 152-54.

189. The universality of the parent-child connection finds expression in national and international law. For example, a comparative study concludes that in the law of virtually all countries, "parents have as they always had, the right to keep and bring up their child as *their* child." S.J. Stoljar, *Children, Parents and Guardians*, 4 *Int'l Encyclopedia of Comparative Law*, ch. 7, at 41 (1971); see generally *Law and the Status of the Child*, 13 *Colum. Hum. Rts. L. Rev.* 1 (1981). The Declaration of the Rights of the Child, *supra* note 163, at Principle 6, states that the child "shall, whenever possible grow up in the care and under the responsibility of his parents. . . ." The Draft Convention on the Rights of the Child, *supra* note 163, art. 8(l), provides that the "[p]arents, or, as the case may be, guardians, have the primary responsibility for the up-bringing and development of the child."

190. *Unaccompanied Children*, *supra* note 2, at 220.

preference for other aspects of the child's well-being over the unity of the family, temporarily or even permanently. Parents' favorable disposition toward evacuation, however, does not settle the question of how willingly the United States should respond.

As noted above, temporary evacuations often continue for longer than originally planned.<sup>191</sup> Family reunion in the country of origin ultimately may not be desired by the parents or the children, as happened with the many Cubans in the early 1960s. Alternatively, the danger of persecution may appear likely to continue indefinitely, as with the Amerasian children. These eventualities raise the prospect of permanent separation. In these contexts, the United States has given special admission preference to the parents of evacuated children in order to restore family unity. Thus, parents of Cuban children who entered in the unaccompanied minors program after 1960 were given first priority for admission when emigration from Cuba was resumed in 1965 after a three year hiatus. The present overseas refugee processing priorities likewise give preference to adults whose children have been resettled in the United States.<sup>192</sup> In this respect history has borne out the fear of the critics of the 1939 proposal to admit 20,000 German children that "the separation of families produced by this very legislation" would be used later as a plea to admit their relatives.<sup>193</sup>

The evolution of policy toward Amerasian children, at least those from Vietnam, illustrates the powerful demands of family unity on the United States admissions process. The original 1982 Amerasian legislation, while allowing immigration by certain persons of American parentage from five Asian countries, had no provision for immigration of the Amerasians' mothers or other family members; indeed, it explicitly required the mother or guardian to "irrevocably" release any child under age 18 for emigration.<sup>194</sup> In order to avoid the family separations that would have resulted, Vietnamese Amerasian children, along with their mothers, were admitted not under this legislation but rather as refugees under the Refugee Act of 1980.<sup>195</sup> The absence of family unity provisions thus severely undercut the 1982 Act's usefulness. The Amerasian Homecoming Act of 1987 remedies this deficiency, though only for those from Vietnam, by allowing Amerasian immigrants to be accompanied or followed by their children, their spouses, their natural mothers, their

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191. *Supra* text accompanying notes 157-59.

192. *See supra* note 135.

193. Forbes & Fagen, *supra* note 10, at 5.

194. INA § 204(g)(2)(C), 8 U.S.C. § 1154(g)(2)(C) (1982).

195. N. Zucker & N. Zucker, *supra* note 124, at 79-80.

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mothers' spouses and children, and under certain circumstances, other persons who have acted in effect as their mother, father, or next of kin.<sup>196</sup>

Child evacuation programs appear, then, to have had two related effects on family unity. First, in the short run they have caused parents and children to part, often for far longer than either initially anticipated. Second, this separation has created pressures to restore family unity through later admission of the parents and other relatives into the United States.<sup>197</sup> While this latter effect is not necessarily negative, it should be recognized as a likely concomitant of any program to evacuate unaccompanied children to the United States.

2. *Children already separated from their families.* For children already separated from their families, many of whom are likely to be in refugee camps outside their countries of origin, resettlement to the United States may have two negative effects on family unity. First, if the child is in the vicinity of his or her family members before resettlement, the child's relocation may impede efforts to trace these relatives and reunite the child with them. In response to this possibility, the INS/State policy sensibly requires UNHCR to explore the possibility of family reunion within the asylum country before requesting United States resettlement, and excludes from resettlement as unaccompanied minors those children "who have reasonable expectations of being joined by relatives within a relatively short period of time."<sup>198</sup> If resettlement is otherwise advisable, however, it should not be long delayed by the possibility of tracing and family reunion, unless there is a good chance that tracing will promptly locate parents who want the child to return—a question that will depend on the circumstances of the child, the parents, and the nature of their separation.<sup>199</sup> Tracing can continue even after resettlement, though perhaps with greater difficulty.<sup>200</sup> Reunion in

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196. Continuing Appropriations Fiscal Year 1988, Pub. L. No. 100-202, § 584(b)(1)(B)-(C), (2), 1987 U.S. Code Cong. & Admin. News (101 Stat.) 1329, 1329-183, 1329-184.

197. For a discussion of provisions which currently permit child-parent reunion within the United States, see *infra* text accompanying notes 269-77.

198. INS/State Policy, *supra* note 128, at § 3(B)(2).

199. Compare Executive Committee of the UNHCR Programme, Conclusions on the International Protection of Refugees, *supra* note 146, at No. 28. ("Every effort should be made to trace the parents or other close relatives of unaccompanied minors *before* their resettlement.") (emphasis added).

200. Unaccompanied children, *supra* note 2, at 330, 334. ORR's regulations forbid contact with the child's natural parents in establishing legal responsibility within the United States "since contact could be dangerous to the parents." 45 C.F.R. § 400.115(b) (1987). This prohibition is probably too broad since contact will not be

the country of origin can sometimes be arranged if it is desired and possible, though the child's willingness to return may lessen once he or she is resettled, and the country of origin may be unwilling to permit repatriation.<sup>201</sup> Resettlement, even over long distances, need not present insurmountable logistical obstacles to family reunion, at least within the United States.

Second, and more important, the generous resettlement possibilities for unaccompanied children, discussed above,<sup>202</sup> may cause parent-child separations by encouraging the child to leave on his own, or the family to send him off alone, in the hope of his subsequent resettlement to the United States. Exceptional resettlement opportunities for unaccompanied children may thus exert a "magnet effect" on them and their families, attracting them to the once-in-a-lifetime chance for immediate, legal, expense-paid emigration to the United States. The independent draw of resettlement may operate in conjunction with other "pull" factors such as the existence of relatively better education, employment, or material standards of living in the United States, or with such "push" factors in the country of origin as conscription—particularly for an unpopular war—or restrictions on basic freedoms.<sup>203</sup> The difference in conditions between the two countries, coupled with a good chance of resettlement, may produce a flow of children from their lands and families into areas of refugee processing.<sup>204</sup>

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dangerous to the parents in all cases, but tracing efforts must be sensitive to that possibility. *Compare* Executive Committee of the UNHCR Programme, Conclusions on the International Protection of Refugees, *supra* note 146, at § 56: ("Efforts to clarify [the unaccompanied minor's] family situation with sufficient certainty should also be continued after resettlement.")

201. *See generally* A. Dowty, *Closed Borders* (1987). There is strong direction in international law that political and legal barriers be relaxed in order to permit family reunion for unaccompanied children. Protocol I to the Geneva Convention, *supra* note 161, at art. 74, obligates States Parties to "facilitate in every possible way the reunion of families dispersed as a result of armed conflict." The UNHCR has called for the application of liberal entrance and exit policies to facilitate family reunion and the relaxation of national requirements for documentation of family relationships. Executive Committee of the UNHCR Programme, Conclusions on the International Protection of Refugees, *supra* note 146. In addition, the Draft Convention on the Rights of the Child, *supra* note 163, at art. 6 *bis*, would mandate that "applications by a child or his parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane, and expeditious manner."

202. *See supra* text accompanying notes 127-47.

203. *Cf.* Stein, *The Refugee Experience: Defining the Parameters of a Field of Study*, 15 *Int'l Migration Rev.* 320 (1981).

204. This picture of children (and parents) purposefully taking advantage of the refugee selection and support system may at first appear inconsistent with the description of the psychologically troubled young inhabitants of refugee camps, *supra* text accompanying notes 166-69. There are several considerations, however, that allow for this seeming contradiction. First, the material on refugee camp children mainly addresses the conditions faced by all children, of whom emigration-minded youths are only a relatively

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The attraction of resettlement may be made even stronger by the possibility of family reunion in the United States, which is provided by both immigration law and refugee policy. First, if the child has been preceded by a relative (parent or non-parent), that relative's presence enhances the child's own likelihood of admission. If the child qualifies as a refugee, the relative's status as a citizen, lawful permanent resident, refugee, or asylee is likely to bring the child within the Worldwide Priorities' selection criteria.<sup>205</sup> Even if the child fails to qualify as a refugee such "U.S. links" render him eligible for consideration for humanitarian parole.<sup>206</sup> A significant proportion of unaccompanied children selected worldwide for refugee admission have come to join family members here. From March 1987 through March 1988, 69% of the unmarried minors who arrived unaccompanied by a parent or relative were destined to join at least one parent or another relative in the United States.<sup>207</sup> An unaccompanied child's opportunities for admission to join a parent or relative through overseas refugee processing are considerably broader than those available through normal immigration.<sup>208</sup>

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small part. Second, a child can choose to leave his or her family, or, more commonly, be encouraged to do so by his or her parents, without fully comprehending the difficulties of the journey from home and family to American foster care. Regardless of initial motivation, a child who has responded to the "magnet" of the United States unaccompanied minors program can be as affected by refugee camp life as any other child. The same holds true for their difficulties in integration. Indeed, the burden of shouldering one's own future alone in a strange land, perhaps knowing that the future of the family depends on one's success, can reasonably be seen to add to the child's stress. Studies of Southeast Asian unaccompanied children have shown that "the minor's awareness of his natural family's continuing struggle in Southeast Asia can interfere with his enjoyment of foster family life. His feelings about his new home will be colored by his guilt and worry about the fates of other family members." Unaccompanied Children, *supra* note 2, at 192. Moreover, an "anchor child" may feel a sense of "failed mission" if he or she is unable to arrange for the family's admission to the United States. Baker, *supra* note 172, at 356.

205. See *supra* note 135.

206. See *supra* note 136.

207. Department of State, Bureau of Refugee Programs, Refugee Data Center, *supra* note 127. During this reporting period 26,802 minor unmarried refugees arrived in the United States, of whom 3,176 (11.8%) were traveling without a parent or parents. Of this latter group, 1,407 (44%) were traveling and resettling with non-relatives, 536 (17%) were destined for foster care, 328 (10%) were destined to join their parents, and 890 (28%) were destined to join non-parental relatives.

208. The INA allows unlimited immigration of children of United States citizens, INA § 201(b), 8 U.S.C. § 1151(b) (1982), see also *infra* text accompanying note 269, and grants the child of any preference immigrant the same status as the parent, if accompanying or following to join the parent, INA § 203(a)(8), 8 U.S.C. § 1153(a)(8) (1982). "Following to join" has been interpreted to permit derivative status for the child if he or she comes to join the preference immigrant at any time after the immigrant acquires lawful residence status. 9 Department of State, Foreign Affairs Manual, § 40.1 n.5, reprinted in 3 C. Gordon & S. Mailman, Immigration Law and Procedure, app. J-6 (1988). In addition, the INA allows for numerically limited second preference entry for sons and daughters of lawfully resident aliens, INA § 203(a)(2), 8 U.S.C. § 1153(a)(2) (1982), and

Second, an unaccompanied child's arrival here opens avenues of admission for other family members which would not otherwise have existed. Most important, if the child's parents, grandparents, or unmarried siblings qualify as refugees themselves and are eligible for refugee processing, they then come within Priority Three of the Worldwide Priorities; other relatives may come within Priority Five.<sup>209</sup> Without the child's presence, or that of another close relative, these family members would not come within these priorities for overseas refugee selection. In addition, if the child subsequently becomes a United States citizen, when he turns 21 his parents may enter as "immediate relative" immigrants outside of the numerically restricted preferences,<sup>210</sup> and his brothers and sisters are eligible for fifth preference immigration.<sup>211</sup>

Sending a child off as an unaccompanied minor so that his presence in the United States may later serve as an "anchor" for the resettlement of other family members may create what is sometimes called the "anchor syndrome." The INS and State Department recognize its existence in their policy for unaccompanied children from Southeast Asia, but strongly state that "under no circumstances" should the minor be "prejudiced by the fact that he or she may eventually be an anchor for other relatives"; rather, "the fact that a minor may become an anchor should not be considered in evaluating the merits of the persecution claim."<sup>212</sup>

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fifth preference entry for brothers and sisters of United States citizens, INA § 203(a)(5), 8 U.S.C. § 1153(a)(5) (1982). But the latter two categories have far more demand than there are available visas. Select Commission on Immigration and Refugee Policy, U.S. Immigration Policy and the National Interest, Executive Summary of the Final Report and Recommendations 1, 14-15 (1981); Guendelsberger, *supra* note 186, at 21; Guendelsberger, Implementing Family Unification Rights in American Immigration Law: Proposed Amendments, 25 San Diego L. Rev. 253, 260 (1988). No immigration preference exists for more distant relatives.

209. *Supra* note 135.

210. INA § 201(b), 8 U.S.C. § 1151(b) (1982).

211. INA § 203(a)(5), 8 U.S.C. § 1153(a)(5) (1982).

212. INS/State Policy, *supra* note 128, at §§ 4(B), 6(H). The entire policy statement, at § 6(B), reads:

With respect to minors who may potentially be "anchors" for other relatives, it is the policy of the United States to look at each case individually to ascertain whether the minor is a refugee without regard to whether he or she may or may not also eventually serve as an anchor for other family members. The United States recognizes that in some cases parents may send their children out to nations of first asylum solely to serve as "anchor relatives" without any real fear of persecution. This practice is abhorrent and must be effectively discouraged in cooperation with UNHCR and other governments. On the other hand, it is not improper for a parent to send a child to safety when there is a threat of persecution. The fact that the minor may in such circumstances serve as an anchor is not of concern to the United States; indeed, the United States places special emphasis on family reunification in its human rights and refugee policy and would welcome the later opportunity to

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These statements correctly underline the irrelevance of an anchor motivation to the refugee determination and evince a sensitivity to later family reunion concerns, but they neglect to consider the effect of the totality of United States policy toward unaccompanied children in drawing children from their families, with or without parental consent. Resettlement as an unaccompanied child, appealing in its own right, is made more attractive by the possibility of being joined upon arrival or afterward by parents, siblings, and other relatives. There is no reason to think that foreign populations, particularly those with some education and awareness of the world, will not respond to the incentives for family separation which current policy presents.<sup>213</sup>

In fact, the composition of the unaccompanied children population suggests that they do. Of those from Southeast Asia who have arrived after 1979, the overwhelming majority are ages 14 to 18, with 90% of them males.<sup>214</sup> Clearly, this is not a collection of children who have been separated from their parents by such random events as death or abandonment. It is perhaps possible that older, male children face persecution in disproportionate numbers, or that of those children who face persecution parents are most willing to send away their adolescent sons, preferring to keep older daughters and younger children at home. A more likely explanation, advanced by some commentators who have worked closely with them, is that these boys have been sent away by their parents, or have left on

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assist the minor's family to join him or her in the United States. The serious psychological and physical risks that minors are exposed to in camps make it particularly important that a minor whom UNHCR has determined should be resettled be resettled promptly whenever possible and that the minor under no circumstances be prejudiced by the fact that he or she may eventually be an anchor for other relatives.

213. The employer sanctions provisions of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 274A, 1986 U.S. Code Cong. & Admin. News (100 Stat.) 3359, 3360 (codified at 8 U.S.C. § 1324a (Supp. IV 1986)), are based on the belief that aliens' behavior can be influenced by the "stick" of foreclosing undocumented workers' employment opportunities within the United States. The premise that aliens' movements reflect rational evaluation of the costs and benefits embodied in United States immigration law supports the inference that the "carrot" of United States policies toward unaccompanied children will also influence the behavior of aliens in the affected region.

214. Telephone interview with William Eckhof, Program Analyst, Office of Refugee Resettlement (Aug. 1, 1988). Mr. Eckhof estimates that 90% of the unaccompanied minors in the ORR program have been males. Other groups, such as the Hungarians and Cubans, were also overwhelmingly composed of male adolescents. Of the 2,557 Indochinese unaccompanied minors under UNHCR supervision on August 31, 1988, 86% were ages 13 to 17, and 74% were male. United Nations High Commissioner for Refugees, Resettlement Service, Indochinese Unaccompanied Minors/Statistics (Sept. 1988) (on file with author).

their own, in order to avoid conscription or in search of better educational opportunities.<sup>215</sup>

Two aspects of unaccompanied adolescents' behavior also support the finding of a magnet effect in Southeast Asia. One is their fairly frequent age falsification in order to bring themselves within the age criterion of the unaccompanied minor definition,<sup>216</sup> which demonstrates a certain amount of knowledge about the unaccompanied minors program and its requisites.<sup>217</sup> The other, personally observed by the author while working in the unaccompanied minors tracing program along the Thai-Cambodian border in 1981, is the reluctance of adolescents residing in refugee camps in Thailand to rejoin parents who had traveled from inside Cambodia to claim them.<sup>218</sup>

Statistics on family reunion are not dispositive one way or the other of the question of the existence of an anchor syndrome. Of the 8,069 children who entered the ORR unaccompanied minors program after 1979, 13.3% (1,071) subsequently were reunited with family members in the United States.<sup>219</sup> Since ORR does not regard children coming to join parents or other relatives as "unaccompanied,"<sup>220</sup> it is fair to assume that in the vast majority of these reported reunions the family member arrived after the child. There are several ways to read this figure. If one regards 13% as a fairly low rate of reunion, it would suggest that the anchor syndrome is nonexistent or weak. On the other hand, given the difficulties for families in securing permission to leave Vietnam, Laos, and Cambodia, the dangers of flight to asylum countries, and the fact that not all who do flee have access to United States refugee processing or

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215. Pask & Jayne, *supra* note 141.

216. *Id.* at 539.

217. It is possible that the notion of age falsification first came to these adolescents after arrival in camps, and that they had no prior knowledge of the unaccompanied minors' program. If that were largely the case, however, it would be more likely that observers would be reporting age changes within the camps rather than initial falsification. Since there is mail communication with Southeast Asian refugee-producing countries, in addition to an oral grapevine, it is not implausible to conclude that word of the unaccompanied children's program does reach families and children still within their native countries.

218. One teenage girl hurriedly married an older man rather than joining her mother in Cambodia and foreclosing the chance for resettlement. It took several attempts to persuade an adolescent boy to reunite with his mother at the border, and once there he excoriated her for insisting on his return and thwarting his plans to "become a doctor in America." Other Cambodian adolescents flatly refused family reunion when it meant return to their homeland.

219. U.S. Dep't of Health and Human Services, Office of Refugee Resettlement, *supra* note 106, at 50.

220. *Supra* text accompanying note 96.

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are eligible for refugee resettlement, one might conclude that a reunion rate of 13% is fairly substantial. Further, these difficulties in reaching the United States may mean that many family members who would like to rejoin the child in the United States are dissuaded from attempting the journey or are stuck somewhere en route. The fact that none of the children resettled in the United States returned to their country of origin for reunion and less than 20 joined relatives in other resettlement countries<sup>221</sup> indicates something of the perceived attractiveness of this country. But in evaluating the absence of reported repatriations the difficulties of re-entering the country of origin must be taken into account.<sup>222</sup>

While the family reunion statistics themselves do not seem to resolve the question of whether family separation is promoted by resettlement policies toward unaccompanied children, they are not inconsistent with that possibility. But they must be considered together with the observations of those who have worked directly with these children,<sup>223</sup> including officials at the INS and State Department, who have recognized the anchor syndrome in their policy and procedures for unaccompanied minors. On balance, although the extent of the "magnet effect" and "anchor syndrome" may not be clearly established, there is a significant possibility that the totality of policies affecting unaccompanied children does stimulate parents and children to separate, and that some of these separations are at least influenced by the hope that the unaccompanied child will be joined later in the United States by some family members.

Somewhat ironically, admission of a child's relatives for family reunion does not guarantee that the relative will resume or assume custody of the child. ORR keeps open the possibility of family reunion by discouraging adoption by foster parents, "since family reunion is the objective of the program."<sup>224</sup> Reunion often takes place without dispute by the foster parents after the relatives' arrival. For

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221. Telephone interview with William Eckhof, *supra* note 127.

222. For a discussion of international recommendations to remove obstacles to re-entry for family reunion, see *supra* note 201.

223. *Supra* text accompanying note 217-18. See also Baker, *Substitute Care for Unaccompanied Refugee Minors*, 61 *Child Welfare* 353, 356 (1982).

224. 45 C.F.R. § 400.115(c) (1987): "In certain rare cases, adoption may be permitted pursuant to adoption laws in the State of resettlement, provided a court finds that: (1) adoption would be in the best interest of the child; and (2) there is termination of parental rights (for example, in situations where the parents are dead or missing and presumed dead) as determined by the appropriate State court." To the extent that these regulatory requirements for states receiving federal support for child welfare services differ from state adoption law, it is unlikely that they would prevail because INA § 412, 8 U.S.C. § 1522 (1982 & Supp. IV 1986), does not purport to preempt state adoption law. In fact, § 412(d)(1)(B)(ii) requires the Director to attempt to arrange for placement under the "laws of the States."

those that are contested, custody determinations are the province of state courts,<sup>225</sup> which apply their traditional parent-third party child custody standards.<sup>226</sup> A 1983 study concluded that “[r]efugee parents have generally been successful in regaining custody, but a return of custody is not automatic.”<sup>227</sup> By contrast, when relatives other than parents seek custody “courts are less likely to disturb the existing arrangements for the child than when a parent seeks custody.”<sup>228</sup> Thus, unity within the original family may not be restored even through federal family reunion oriented refugee admissions and child welfare policies.

### C. *International and Domestic Effects*

The admission of unaccompanied children may affect United States foreign policy interests and domestic welfare. The foreign policy concerns include burden-sharing with countries of first asylum, assistance to families with prior or present United States connections, sanctuary from persecution, discouragement of military recruitment of adolescents, and influence on the public image of the United States and other nations. The most significant possible domestic effects of admitting unaccompanied children are the financial cost, the strains imposed by their integration into American society, and the impact on American inter-country adoption. Historically, the numbers of children accepted have been small enough that neither the positive nor negative impact on foreign or domestic interests has been of overriding significance.<sup>229</sup> But any policy toward unaccompanied children should take account of the consequences

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225. *Huynh Thi Anh v. Levi*, 586 F.2d 625, 632-34 (6th Cir. 1978); *Le Thi Sang v. Levi*, 426 F. Supp. 971, 972 (E.D. Cal. 1977). See also 45 C.F.R. § 400.115 (1987).

226. Many jurisdictions hold for the parent in custody disputes as against any third party, as long as the parent is fit, no matter how close the psychological relationship between the child and the third party might have been. Under this test, the third party's only recourse is to attack the parent's current fitness, a difficult task. Other jurisdictions have held that there is a preference for the natural parent, but that this preference may be overcome by a finding of “detriment to the child” or the presence of “extraordinary circumstances,” showings which then trigger the use of the “best interests of the child” test. See generally H. Clark, *The Law of Domestic Relations in the United States* 529-35 (2d ed. 1987).

227. Durkee, *supra* note 92, at 210.

228. Durkee, *supra* note 92, at 211.

229. This does not mean they have been of no significance. For example, opposition to the Wagner-Rogers Children's Bill appears to have been motivated, at least in part, by Depression-era fears of job competition. *Supra* text accompanying note 36. Conversely, the favorable reception given the proposal to accept British children during World War II was influenced by a desire to aid that nation's war effort. *Supra* text accompanying note 39.

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for national interests, especially where child protection and family unity concerns may be in relatively equal balance.

Admission of unaccompanied children can further several distinct foreign policy objectives. First, it can help alleviate the burden of providing their care on countries of first asylum. This goal has played a part in the decision to relocate unaccompanied children in several crises.<sup>230</sup> But it is not clear that unaccompanied children add significantly to the burden created by a refugee population in general. A major justification for burden-sharing with first asylum countries is to encourage their continued acceptance of asylum-seekers.<sup>231</sup> But with unaccompanied children this goal may conflict with that of family unity, if their relatively unqualified resettlement in aid of the asylum country stimulates further family separation to take advantage of that resettlement opportunity.<sup>232</sup> In any event, burden-sharing or encouragement of first asylum may not necessitate special admissions for unaccompanied children; these policies may be as well served by their acceptance on equal terms with the rest of the refugee population.

Second, a policy of admitting the children of persons with prior United States ties serves to encourage parents to assist American governmental and private endeavors, by protecting children from possible later retaliation based on their parents' activities. Acceptance of those children who have been separated from parents with prior United States connections is a sensible extension of the present grant of derivative status to children of such refugee adults who are accompanying or following their parents.<sup>233</sup> If the parents are unable to precede or accompany their children, especially if they are unable to leave their country of origin due to their prior United States connections, their children ought to be afforded the same benefits of refugee selection they would otherwise have received.

Third, evacuation of children may serve to assist nations or factions that the United States favors during times of war by relieving their parents of their care and of anxiety about their well-being. These aims may have contributed to American willingness to accept

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230. See *supra* text accompanying note 63.

231. See, e.g., Pub. L. No. 100-204, §§ 906(a), 904(a)-(b), 1987 U.S. Code Cong. & Admin. News (101 Stat.) 1331 ("the preservation of first asylum for those fleeing persecution is one of the primary objectives of the United States refugee program"; "given the serious protection problem in Southeast Asian first asylum countries and the need to preserve first asylum in the region, the United States should continue its commitment to an ongoing, generous admission and protection program").

232. See discussion of the "magnet effect," *supra* text accompanying notes 202-23.

233. *Supra* note 135.

British children during World War II, though British authorities quickly concluded that their removal undermined rather than enhanced civilian morale.<sup>234</sup> This kind of evacuation makes the most sense in conflicts where participants' children may be endangered by their family relationship.

Fourth, both humanitarian and foreign policy interests are furthered by offering sanctuary to children who reasonably fear persecution. Indeed, children are often in more need of protection from persecution than adults, in light of their greater vulnerability and more limited ability to cope. That children can be persecuted for reasons of race, religion, nationality, political opinion, or social group membership is a matter of historical fact.<sup>235</sup> Serious harm directed at children as such can amount to persecution on the basis of their membership in the social group of minors.<sup>236</sup> Apart from the protection which asylum from persecution provides the children themselves, their admission for this purpose furthers the humanitarian foreign policy objectives that motivate, at least in part, the overseas refugee program.<sup>237</sup>

Furthermore, even where they may not qualify as refugees, the acceptance of adolescent boys by the United States can prevent their military recruitment. This is a particularly worthwhile goal in light of international norms which disapprove the recruitment of children under 15 years of age and urge "oldest first" recruitment of those

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234. Paper Walls, *supra* note 10, at 121.

235. Boothby, *supra* note 168. The frequency of persecution has prompted Amnesty International to launch a special Children's Campaign.

236. The Board of Immigration Appeals, in Matter of Acosta, A-24159781, Interim Dec. # 2986 30 (B.I.A. 1985), has taken the position that the phrase "membership in a particular social group" should be construed "in a manner consistent" with the other grounds of persecution in the Refugee Act; that is, race, religion, nationality, and political opinion. *Id.* Reasoning that "[e]ach of these grounds describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed." *Id.* at 30-31. The Board interprets the phrase "to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic." *Id.* The Board goes on to state: "The shared characteristic might be an innate one such as sex, color, or kinship ties" or, in some circumstances, it might be "shared past experience such as former military leadership or land ownership." *Id.* See also *Ananeh-Firempong v. I.N.S.*, 766 F.2d 621, 626 (1st Cir. 1985). The Board's definition thus appears to encompass children as a particular social group. Minority status is obviously as immutable as sex or color, and children are treated as a distinct social group in a wide range of social and domestic legal matters.

237. See Anker & Posner, *supra* note 15, at 37-39, 88.

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15 to 18.<sup>238</sup> Because conscription of boys under 15 is so widespread,<sup>239</sup> however, such acceptance would need to be selective. One category of candidates might be children exposed to especially dangerous assignments or brutal treatment within the military.<sup>240</sup>

There are, then, several legitimate foreign policy objectives that can be furthered by admission of unaccompanied children, depending upon the circumstances. Others, such as the resettlement of children to embarrass or create sympathy for foreign nations or to drain their populations,<sup>241</sup> should be rejected unless consistent with other proper purposes such as the protection of children or family unity. Acceptance of unaccompanied children in contravention of these goals can negatively effect the United States image abroad, as was probably the case with Operation Babylift.<sup>242</sup> Actions resembling child abduction are likely to produce international disapproval.

Admitting unaccompanied children to the United States may also have a domestic impact. One aspect is the expense, which is now borne entirely by the federal government.<sup>243</sup> According to the director of the unaccompanied children's program within ORR, the cost of maintaining an unaccompanied refugee child ranges from approximately \$6,500 to \$12,000 a year, depending on the state of residence, with the average being about \$9,200 a year.<sup>244</sup> Their foster care, health and other services are at least as expensive as for

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238. Protocol I, *supra* note 161, at art. 77(2); Protocol II, *supra* note 160, at art. 4(3)(c). See also Draft Convention on the Rights of the Child, *supra* note 163.

239. UNICEF Executive Board, Overview: Children in Especially Difficult Circumstances, *supra* note 1, at 10 ("review of how these provisions [Protocols I and II] are being applied in different conflict zones around the world indicates that, for the most part, they are widely ignored").

240. For example, Iranian children have been sent ahead of troops as human mine-sweepers. Irandokhte, Children of War in Iran, in Children and War 97, 98 (M. Kahnert, D. Pitt & I. Taipale eds. 1983).

241. See *supra* note 32.

242. Unaccompanied Children, *supra* note 2, at 73:

The International Committee of the Red Cross declared that foreign adoptions violated a Geneva Convention requirement that war orphans, whenever possible, must be educated within their own culture; and Caritas, the Vatican's relief organization, called the airlift "a deplorable and unjustified mistake." The International Union of Child Welfare called the airlift "an error of judgment to be avoided." The airlift was described by others as kidnapping; as the taking of war souvenirs; as misdirected humanitarian concern motivated by guilt for the war, as a governmental manipulation to stimulate public support for the war; and as an unethical act that depleted Vietnam's needed human resources.

See also Abrams, The Vietnam Babylift, 103 *Commonweal* 617 (1976).

243. *Supra* text accompanying notes 80-84.

244. Telephone interview with William Eckhof, Program Analyst, Office of Refugee Resettlement (July 29, 1988).

non-refugee children in comparable placements.<sup>245</sup> Since this support continues until at least age 18 or until a parent or other adult assumes support, the total cost for each child is some multiple of the yearly amount.<sup>246</sup>

While the fear expressed in opposition to the Wagner-Rogers Bill that foreign children traumatized by violence or persecution would never assimilate<sup>247</sup> has subsided, the ability of unaccompanied children to integrate and become productive participants in society and the economy must also be considered. Studies of unaccompanied children from Southeast Asia suggest that, despite the difficulties experienced in resettlement discussed above, their overall social adaptation has been positive and is inclined to improve significantly over time.<sup>248</sup> There is nothing in the available literature indicating that the integration of unaccompanied children from past crises presents a significant reason to bar their acceptance in the future. By the same token, there is no particular reason to use the resettlement of unaccompanied minors as a source of "new seed" immigration—the admission of motivated and productive newcomers into the United States. This is so both because of the family separation it may entail and because these children usually lack the education, English language facility, work experience, and present self-sufficiency that proposals for "new seed" immigration emphasize.<sup>249</sup>

Adoption of foreign children by United States citizens is a third possible domestic factor bearing on policy toward unaccompanied children. Present law permits the adoption by United States citizens of orphans who have experienced the death or disappearance of both parents or whose sole surviving parent is incapable of providing proper care and who has released the child for adoption.<sup>250</sup> While there is no reason why United States immigration law should

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245. *Id.*

246. Since most children in the program since 1979 arrived in their teens the multiple would range in the low single digits.

247. One opponent of that bill put it this way: "No society, no state can successfully assume the tremendous responsibility of fostering thousands of motherless, embittered, persecuted children of undesirable foreigners and expect to convert these embattled souls into loyal, loving American citizens." *Quoted in Forbes & Fagen, supra* note 10, at 5.

248. See Daly & Carpenter, *supra* note 181, at 974; Sokoloff, Carlin & Phan, *supra* note 181, at 568-69.

249. See S. 2104, 100th Cong., 2d Sess., 134 Cong. Rec. S1563 (1988), proposing to revise the sixth preference, INA § 203(a)(6), 8 U.S.C. § 1153(a)(6) (1982), to require random selection of independent immigrants whose eligibility would be established by a point system. The point system favors aliens between the ages of 21 and 35, and those with education, English language ability, and occupational training and work experience.

250. See *supra* text accompanying note 27.

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not facilitate inter-country adoption in general, crisis areas should not be treated as an adoption resource, since doing so would only further disrupt societies already in turmoil. The orphan adoption provision therefore ought to be applied sparingly, if at all, to certain countries during periods of upheaval.<sup>251</sup> American adoption should not be the aim of United States policy toward unaccompanied children in crisis areas, though it may be one end result of their acceptance.<sup>252</sup>

### IV. Recommendations

The United States response toward unaccompanied children must be approached in the context of both the scope of the problem and of the other possible means of response. War, civil strife, persecution, and displacement currently affect far more children than can be brought to this country, even temporarily. Careful selection is thus an unavoidable necessity.

Children who are already separated from their families are found in much smaller numbers than children in general who are exposed to crisis conditions. These children, however, often have other sources of assistance. It is not only we who, in James Fenton's phrase, decide "whether they sink or swim."<sup>253</sup> A number of international instruments direct that the children be among the first to receive protection and relief in times of crisis and that social and governmental authorities extend care to children without families.<sup>254</sup> In past crises other family members, unrelated individuals and families, local governments, voluntary agencies, and international organizations have all provided care and continue to do so. The United States government has supported local governments, voluntary agencies, and international organizations in these efforts, most of which take place in the locales where the children are first found.<sup>255</sup>

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251. Mary E. McLeod contends that proper application of the orphan adoption legislation should virtually always bar its use for refugee children, "[g]iven the difficulties of finding parents of refugees, the importance of the parent-child bond, and the desirability of leaving open the possibility of family reunification." McLeod, *supra* note 96, at 13. See also Carlson, *Transnational Adoption of Children*, 23 *Tulsa L.J.* 317, 350-51 (1988).

252. See *supra* note 224.

253. Fenton, *supra* note 7, at 36.

254. See, e.g., Declaration of the Rights of the Child, *supra* note 163, at Principles 6, 8. See also Draft Convention on the Rights of the Child, *supra* note 163, at arts. 6, 10, 11 *bis*: Unaccompanied Children, *supra* note 2, at 221-23, 246-48, 251-55, 260-61.

255. Unaccompanied Children, *supra* note 2, at 121-23, 126-29.

The United States should adapt its immigration and refugee selection policies to admit children from crisis areas by themselves only in narrowly drawn circumstances. The following are some general guidelines derived from the review of our history and the preceding discussion of the possible policy bases for such decisions. These guidelines are premised on the belief that unaccompanied children should be accepted where necessary to preserve or restore family unity, or where their protection or legitimate foreign policy concerns clearly outweigh family unity.

Recognizing that the balance of these factors will depend on the circumstances of each particular situation, the guidelines nevertheless attempt to suggest some general rules. In cases of evacuation from areas of danger or persecution, at least one parent, and preferably both, should be admitted along with their children. For a child already separated from his or her parents, there are four circumstances warranting admission: (1) when the parents, or in their absence other close relatives, have preceded the child to the United States; (2) when the child has become part of a foster family which itself is being admitted; (3) as part of, and on equal terms with, the child's refugee population group; and (4) when necessary to protect the child from exceptional risks or harm, or to ensure adequate age-appropriate care.

#### *A. Evacuation*

Only in the rarest circumstances should children be evacuated from areas of danger or persecution without at least one accompanying family member. Most situations endangering children are likely to endanger adults as well, particularly their family members, suggesting that families be evacuated together, if at all. Evacuation of children alone, though perhaps serving as an effective short-term means of protection, separates them from their parents, their other relatives and their native environment. As discussed above, it traumatizes the children, often alienates them from their culture, and sometimes creates obstacles to later family reunion.<sup>256</sup>

Even if children face exceptional danger that warrants their evacuation, such as abduction or forced military recruitment, at least one parent, and preferably both, should be accepted with them. This approach would avoid total family separation and would provide evacuated children with a trusted, familiar adult while they establish

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256. See *supra* text accompanying notes 150-54.

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themselves in the United States.<sup>257</sup> The 1987 Amerasian Homecoming Act constitutes a model for family-unity-oriented child-evacuation legislation in its inclusion of the child's parents (or those who have acted in their stead), as well as siblings and spouses.<sup>258</sup> Expansion of the derivative status rules contained in existing refugee legislation would facilitate evacuation of the parents along with child refugees. At present, children and spouses of adults who qualify as refugees are entitled to the same admission status if accompanying or following to join the refugee, parent, or spouse, and if the child or spouse is otherwise admissible as an immigrant.<sup>259</sup> Such derivative status should be extended to parents when the child qualifies as a refugee but they do not.

The only exception to this recommendation against the evacuation of children by themselves is when there are serious reasons to remove children, such as persecution or physical danger, but their parents are unable to accompany or follow them. In such circumstances acceptance of the children by themselves would be justified.

Two major objections to this relatively restrictive approach to evacuation must be acknowledged. First, without legally sanctioned evacuation, parents in areas of crisis may attempt to send their children to the United States independently, as, for example, students,<sup>260</sup> asylum seekers,<sup>261</sup> or undocumented illegal entrants. That is, the parents may act individually to "evacuate" their children. An influx of asylum seekers is, to some degree, beyond United States control, since anyone reaching the United States can make a claim for political asylum.<sup>262</sup> The absence of an organized evacuation program thus may encourage parents and children to seek asylum in this country. Political asylum at present, for the most part, operates

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257. The findings of a study of Vietnamese Amerasian children admitted to the United States support this recommendation. Those who came as unaccompanied children experienced almost twice the frequency of discipline problems outside of the home (e.g., truancy, fighting, school discipline, substance abuse, arrest) as those who immigrated with a primary caregiver. Only one out of three unaccompanied minors was found to be making a "problem-free" adjustment, and the percentage of Amerasian children having "serious" adjustment problems was found to be twice as high for unaccompanied children as for those who came with family members. In *Our Father's Land*, *supra* note 50, at 63, 66-67.

258. See *supra* text accompanying note 196.

259. INA § 207(c)(2), 8 U.S.C. § 1157(c)(2) (1982); 8 C.F.R. § 207.1(e) (1987).

260. INA § 101(a)(15)(F)(i), 8 U.S.C. § 1101(a)(15)(F)(i) (1982).

261. INA § 208, 8 U.S.C. § 1158 (1982).

262. Application may be made by an alien physically present in the United States or at a land border or port of entry, irrespective of the alien's status. *Id.* See also INA § 243(h), 8 U.S.C. § 1253(h) (1982) (withholding of deportation).

independently of overseas refugee processing,<sup>263</sup> and the existence of this alternative route into the United States does not militate in favor of evacuation of children by themselves from their countries of origin any more than it does for other groups. Similarly, the possibility that children will come to the United States illegally does not by itself constitute a reason to admit them legally.

The second objection is that acceptance of parents along with evacuated children possibly would reduce the number of children who could enter within a numerically limited evacuation program, as the parents of some children fill slots that might otherwise be available to other children. Conceivably, the inclusion of adults could sabotage an evacuation plan entirely, if decision makers who were sympathetic to child victims were far less favorably inclined toward their adult compatriots. Apprehensions of this nature seem to have influenced those who proposed the Wagner-Rogers Children's Bill in 1939.<sup>264</sup>

Except with the few hundred children evacuated from Great Britain in World War II, however, pressure to accept parents of evacuated children for reunion purposes has usually resulted in the parents' ultimate admission, sometimes after years of separation.<sup>265</sup> Historically, parents of evacuated children have generally been admitted either simultaneously with the children or subsequently. If eventual reunion within the United States is the usual practical consequence, then family unity and its attendant psychological support suggest the former choice.<sup>266</sup> As for the political problem that children are more sympathetic figures than adults, it may be that the refugee decision makers, including Congress, are more sophisticated on this point than they once were; the evolution of United States policy toward Amerasians lends some support to that conclusion.<sup>267</sup> If some group of children were truly going to be barred if their parents accompanied them, one partial solution would be to accept adolescents, but not younger children, without parents. Finally, to the extent that parents took "slots" that would otherwise be

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263. Anker, *supra* note 135, at 42-43, 66-67.

264. *See supra* note 32.

265. *See supra* text accompanying notes 192-96.

266. *See supra* text accompanying note 150-53.

267. *See supra* text accompanying notes 194-96. It may be suggested that Amerasians are a special case because of their American parentage and this country's "responsibility" for their plight, and, indeed, their existence. But any instance of organized evacuation of children from their homeland is likely to be a "special case" of one kind or another.

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used for child evacuees, the number of admittees could be expanded. In most situations not all children facing danger or persecution could be accepted anyway. Indeed, that is one further reason why child evacuation schemes are, at most, partial solutions.

### *B. Admission of Already Unaccompanied Children*

The objective of family unity ordinarily dictates that the first priority for children found unaccompanied is to locate, or, as it is commonly called, "trace," their parents or other family members and attempt to reunite the children with them.<sup>268</sup> There are four general situations in which the admission of children who are already separated from their families is either consistent with the objective of family unity, or where protection or foreign policy concerns may reasonably outweigh that objective.

First, when the parents are already living in the United States, the children should be permitted to join them here. The INA does this by allowing for unrestricted immigration by children of United States citizens,<sup>269</sup> for derivative status for children of lawful permanent resident aliens,<sup>270</sup> and for second preference immigration by unmarried sons or daughters of lawful permanent residents.<sup>271</sup> In addition, the child of an accepted refugee is entitled to the same status as the refugee parent if following to join that parent; the child need not independently qualify as a refugee and is not barred by his or her "firm resettlement in another country."<sup>272</sup> Further, the Worldwide Priorities for refugee selection include in Priority Three the sons, daughters, and minor grandchildren of citizens, lawful permanent residents, refugees, and asylees already within the United

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268. "'Tracing' is the term generally used for the process of locating and communicating with missing family members. Tracing can occur in two directions: searching for family members on behalf of the child or for the child on behalf of the parents." *Unaccompanied Children*, *supra* note 2, at 323.

269. INA §§ 201(b), 101(b)(1); 8 U.S.C. §§ 1151(b), 1101(b)(1) (1982).

270. *See supra* text accompanying note 208.

271. INA § 203(a)(2), 8 U.S.C. § 1153(a)(2) (1982).

272. In general, refugees may not be admitted from overseas if they are "firmly resettled" in a foreign country. INA § 207(c)(1), 8 U.S.C. § 1157(c)(1) (1982). "Firm resettlement in a third country has served as a statutory bar to refugee status under various post-World War II refugee legislation including the Refugee Act of 1980." Anker, *supra* note 135, at 60. In the words of the Supreme Court, the "central theme" of United States refugee legislation has been the "creation of a haven for the world's homeless people." *Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 55 (1971). Exempting those who are "firmly resettled" elsewhere thus serves to preserve refugee admissions for those most in need. In the interest of family unity, however, INA § 207(c)(2), 8 U.S.C. § 1157(c)(2) (1982) permits children to join their refugee parents in the United States even if the children have been "firmly resettled" in another country. *See also* 8 C.F.R. § 207.1(e) (1987).

States.<sup>273</sup> Unaccompanied minors from Southeast Asia who fail to meet the refugee definition are considered for humanitarian parole.<sup>274</sup> The only unaccompanied children who currently would be unable to be admitted for parental reunion would be those whose parent(s) lacks legal status within the United States.<sup>275</sup> If the child's parents are deceased or incapable of being located but other close relatives live in the United States, acceptance may also be justified. Although possibilities for entry under normal immigration procedures are limited,<sup>276</sup> the refugee selection priorities provide opportunity for admission to join other relatives.<sup>277</sup>

For a variety of reasons, family reunion in the United States or anywhere else may not be possible. This can happen, for example, because no parent or relative can be located or communicated with; or because the parents, relatives, or child do not desire reunion; or because the country of origin will not accept repatriation; or because reunion is inappropriate due to the possibility of persecution, abuse, or neglect. In such cases, it is generally recommended that a satisfactory interim living arrangement be established within the child's community, often a refugee camp.<sup>278</sup> It is these children who are generally considered for overseas refugee selection.

Selection criteria for these children should seek to protect them and, if appropriate, further United States foreign policy interests,<sup>279</sup> without creating incentives for family separation by other parents and children. A much more subsidiary concern is the minimization of the cost of support for unaccompanied children resettled in the

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273. See *supra* note 135.

274. See *supra* text accompanying note 136. This policy implements UNHCR recommendations that "States should facilitate the admission to their territory of at least the spouse and minor or dependent children of any person to whom temporary refugee or durable asylum has been granted," Executive Committee of the UNHCR Programme, Conclusions on the International Protection of Refugees, *supra* note 146, at No. 15, § (e), and that "joining close family members should in principle be granted the same legal status . . . as the head of the family who has been formally recognized as a refugee." *Id.* at No. 24, § 8.

275. See *supra* note 208. The lack of an immigration provision for parent-child reunion for undocumented aliens is clearly constitutional after *Fiallo v. Bell*, 430 U.S. 787 (1977).

276. See *supra* note 208.

277. See *supra* note 135.

278. The choice of this placement, though quite important, is beyond the scope of this article. See generally *Unaccompanied Children*, *supra* note 2, at 190-205, 312-21.

279. See *supra* text accompanying notes 230-40.

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United States. Though the expense is greater than for adult refugees, it is a relatively small proportion of overall refugee resettlement<sup>280</sup> and is justified when other legitimate objectives dictate acceptance.

The second recommendation for already accompanied children—acceptance of children who are in the care of a family unit which is being resettled—is designed to promote the continuation of ongoing attachments between an unaccompanied child and a foster family that have been established after the child's separation from his or her natural family. The aim is to preserve the unity of the newly formed foster family relationship. This may present some practical difficulty, because those making the decision, often during processing in a refugee camp, need to determine the existence and strength of the foster relationship.<sup>281</sup> Their task would be somewhat easier if those assisting unaccompanied children in countries of first asylum documented the foster family placement.<sup>282</sup> Experience has shown that foster family relationships may dissolve after resettlement,<sup>283</sup>

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280. The 1987 fiscal year cost of refugee movement to and resettlement in the United States was \$541.3 million. U.S. Coordinator for Refugee Affairs, Proposed Refugee Admissions for Fiscal Year 1988, 37 (1987).

281. Cf. McLeod, *supra* note 96, at 15:

For those [children] attached to non-parental units in the country of refuge and/or with relatives in the country of resettlement, . . . complex assessments need to be made. How close is the attachment of the child to the persons with whom he is proposed to be placed? Are they likely to be able adequately to meet his physical, emotional and social needs? Or is the child's relationship with the proposed placement family so troubled or tenuous that placement in third-party care may be the better solution? Answering these questions calls for sophisticated psychological and social work judgments. The countries of refuge, the international organizations, and resettlement countries need to ensure that individuals with such expertise are involved to the maximum extent possible in making decisions about the placement of children. Their expertise needs to be brought to bear both in resettlement processing operations in the countries of first asylum and in the territories of resettlement countries to screen proposed placements of children with relatives who have already been resettled.

282. Unaccompanied Children, *supra* note 2, at 339-40.

283. Because unaccompanied children resettling with a non-parental adult fall outside of ORR's definition of unaccompanied children, see *supra* note 80 & text accompanying note 96, statistics on the breakdown of these foster family relationships are not available. But those working in the field with whom this author has spoken confirm that a significant number of foster-family relationships, often with relatives, come apart after resettlement. The State Department's efforts to monitor these placements and to assure legally established guardianship and custody arrangements have been motivated by this behavior pattern, see *supra* text accompanying notes 98-102. In general, failure of initial foster placements has been a significant problem with all resettled Southeast Asian unaccompanied children. See N. Schulz & A. Sontz, *supra* note 177, at 40, 63-65; Unaccompanied Children, *supra* note 2, at 191 (40-50% of placements break down within 3 to 5 years). A reflection of the extent of the problem can be seen from the recent imposition by ORR of guidelines for unaccompanied minors' programs which require that no more than 30% of the programs' existing caseloads have had more than two placements, and

but that possibility should not necessarily negate this recommendation, especially if some effort is made to assess the durability of the relationship and to impress its significance upon the foster parents before resettlement.<sup>284</sup> The child should not be resettled with a foster family, though, if doing so would obstruct an impending reunion with a natural parent or another suitable adult relative.<sup>285</sup>

The third recommendation—resettlement of unaccompanied children as part of, and on equal terms with, their population group—recognizes that some refugee populations are resettled as a group.<sup>286</sup> This may occur in order to relieve the burden on the country of asylum, or as the only available durable solution for that group. Assuming that their family reunion through repatriation is impossible, unaccompanied children should be resettled as part of the larger population of which they are members. This serves the relevant foreign policy objectives—e.g., burden sharing, support for a particular political faction—and provides whatever protection acceptance to the United States is capable of affording. It assures that unaccompanied children are not left behind in circumstances made more precarious by the departure of their fellow refugees. By the same token, admission on terms equal to those for adults and children with families avoids especially favorable treatment which may draw other children to the country of asylum alone and thereby ultimately increase the number of unaccompanied children.

The fourth circumstance in which unaccompanied children should be considered for admission is when protection from exceptional danger or adequate placement cannot be assured in their place of refuge. Protection includes freedom from harm or exploitation, as well as the provision of such basic necessities as food, shelter, clothing, and medical care. Initial efforts should be directed

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that no more than 10% of the existing caseload have had more than 3 placements. Office of Refugee Resettlement, *supra* note 82, at 38,152.

284. The Department of State is considering a plan to require private agencies currently assisting in refugee processing to evaluate nonparental foster family relationships prior to deciding whether to resettle the child as part of the family unit or by himself. McLeod, *supra* note 96, at 19.

285. The INS/State Policy, *supra* note 128, at § 3(B)(2) directs that “[m]inors who have reasonable expectations of being joined by relatives within a relatively short period of time should not be considered unaccompanied.”

When the child has been in foster care for a substantial period of time, however, reunion with an unfamiliar relative may not necessarily be in the child’s best interests. Unaccompanied Children *supra* note 2, at 235-36, 326-30.

286. 8 C.F.R. § 207.5 (“Refugees or groups of refugees may be selected . . . in a manner that will best support the policies and interests of the United States”); cf. National Security Decision Directive on Refugee Policy and Processing Refugees from Indochina, *supra* note 126.

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toward protecting unaccompanied children in the country of first asylum,<sup>287</sup> but where they remain exposed to greater danger or deprivation than other children or the general population, resettlement should be considered.<sup>288</sup> Where the peril extends to the entire population or to all children equally, unaccompanied children should be included in whatever resettlement is made available to the entire group, as discussed above.

Clearly, all children—with or without families—are often exposed to a greater risk of harm within refugee camps than are adults.<sup>289</sup> Theoretically this might suggest removal and resettlement of children from refugee camps *en masse*, but there are two substantial reasons not to do so. First, since refugee children comprise approximately one-half of the world's refugee population,<sup>290</sup> the practical and political obstacles to such a response would be enormous. Second, removal of all children would cause family separation on a monumental scale. For these reasons, recent international efforts have focused on improving conditions for children within the camps.<sup>291</sup>

There is a growing recognition that placements for unaccompanied children should be found or established within the refugee community.<sup>292</sup> If this priority is followed, the need to use resettlement as a means of giving age-appropriate care should be rare. "Resettlement of unaccompanied children from asylum situations to provide placements is thus the last resort after all means to create

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287. The Executive Committee of the UNHCR Programme, Conclusions on Refugee Children *supra* note 129, at § (e), has recently called for national and international action to prevent the exposure of refugee children to physical violence and other violations of their basic rights and to assist the victims. See also UNHCR, Note on Refugee Children, *supra* note 146, at 17-22, 61.

288. These considerations might well justify a one-time program admitting unaccompanied children currently subject to long-term refugee camp confinement. Having their resettlement take place on a non-recurring basis would remove those now at risk while minimizing the attraction of such a special program to children in the relevant population who are still with their families. A relevant analogy is the one-time legalization program of certain aliens residing in the United States in 1987-1988. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 201, 1986 U.S. Code Cong. & Admin. News (100 Stat.) 3359, 3394.

289. See *supra* text accompanying note 166.

290. UNHCR, Note on Refugee Children, *supra* note 146, at 1.

291. See UNHCR, Guidelines on Refugee Children, *supra* note 129. UNHCR, Note on Refugee Children, *supra* note 146. See also Executive Committee of the UNHCR Programme, Conclusions on the International Protection of Refugees, *supra* note 146, at No. 14, § (e).

292. UNHCR, Guidelines on Refugee Children, *supra* note 129, at §§ 139-42; Unaccompanied Children, *supra* note 2, at 312-13, 338-40.

adequate placements within the local community have been exhausted."<sup>293</sup> Only if it is impossible to provide adequate foster care or group placements within that community does resettlement present a more attractive alternative.

These, then, are the limited circumstances in which already unaccompanied children should receive special preference in admission to the United States. The recommendations attempt to provide the maximum amount of protection for unaccompanied children at the least cost to family unity. Expansion of resettlement opportunities beyond those suggested here runs the risk of attracting children away from their families to take advantage of the exceptional opportunities to emigrate to the United States that would result.

### *C. Conclusion*

These recommendations necessarily mean that only a small proportion of all children in circumstances of war, revolution, persecution, or displacement will be accepted by the United States. They also imply that some children already separated from their families will be denied resettlement. But admission in either case is only one means of response, and the United States can take other steps to ameliorate their plight. It can, and does, support local efforts on their behalf, and, through the broad spectrum of its foreign policy, can pursue other means to minimize the impact of these crises on children and their families.

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293. Unaccompanied Children, *supra* note 2, at 340.