THE BEST OF BOTH "OPEN" AND "CLOSED" ADOPTION WORLDS: A CALL FOR THE REFORM OF STATE STATUTES

INTRODUCTION

Critics have accused the American adoption process[1] of assigning economic roles to participants: biological parents as manufacturers, adoptive parents as customers and babies as merchandise.[2] This macroeconomic parallel illustrates the effect of supply and demand on adoption. As the number of mothers opting for adoption has declined in recent years, requests for healthy infants have outstripped supply.[3] Like any commodity of which the government wishes to encourage production, states[4] need to offer incentives if they want "manufacturers"—unwed mothers—to place their "merchandise" on the market.

States have a strong interest in encouraging unwed mothers to offer babies for adoption. Such adoptions simultaneously combat the social problems of illegitimacy and childlessness.[5] States historically have ignored the needs and wants of unwed mothers, however, and have structured adop-

1. The National Committee for Adoption, the nation's largest organization exclusively devoted to adoption, defines adoption as
   > a legal procedure in which a person or couple takes a child that is not their offspring . . . and raises the child as their own; this child may be unrelated to either adoptive parent, may be the child of one member of the couple, or may be related in some other way to the adoptive parents. Adoption severs all legal ties between the adoptee and his or her birth parents except when one birth parent is a member of the adopting couple, and establishes such ties between the adoptee and the adoptive parents. Legally, the adoptee has the same status with respect to his or her adoptive parents as do any nonadopted siblings.

   NATIONAL COMMITTEE FOR ADOPTION, ADOPTION FACTBOOK: UNITED STATES DATA, ISSUES, REGULATIONS AND RESOURCES 10 (1985) [hereinafter cited as ADOPTION FACTBOOK].
2. *See* L. MCTAGGART, THE BABY BROKERS 339 (1980). Adoption also has been analyzed as a problem of supply and demand:
   > Where adopters are well-served, in the sense that they can choose the child of their dreams and adopt it without too much fuss, there is sure to be a large supply of unwanted children, most of whom will never be adopted. Where the children are well-served, with a large enough supply of possible parents so that the right ones can be selected for each child, there are bound to be many disappointed would-be adopters.

   M. BENET, THE POLITICS OF ADOPTION 215 (1976).
3. In the United States in 1982, 50,720 healthy infants were available for adoption by parents with no blood relation to the child. In addition, 91,141 children were adopted by couples in which one parent was related by blood to the child. *See* ADOPTION FACTBOOK, *supra* note 1, at 13. Many adoptions between relatives occur when a child's parent remarries and the parent's new spouse legally adopts the child. *See* A. SOROSKY, A. BARAN & R. PANNOR, THE ADOPTION TRIANGLE: THE EFFECTS OF THE SEALED RECORD ON ADOPTEES, BIRTH PARENTS AND ADOPTIVE PARENTS 47 (1978). Meanwhile, in 1984 two million U.S. couples waited to adopt children, preferably healthy, white infants. *See* Leepson, *Issues in Child Adoption*, EDITORIAL RESEARCH REP. 859 (1984).
4. State law and state courts control adoption in the United States. Federal laws preempt state laws concerning adoption of American Indian children. *See* 25 U.S.C. § 1915 (1982). The adoption of foreign children is controlled by U.S. immigration law. *See* 8 U.S.C. § 110(b)(1)(F) (1982).
5. *See* A. SOROSKY, A. BARAN & R. PANNOR, *supra* note 3, at 47. *But see* Bean, *Introduction: Adoption—Some Reflections and Considerations*, in ADOPTION: ESSAYS IN SOCIAL POLICY, LAW, AND SOCIOLOGY 1, 9-10 (P. Bean ed. 1984) (although adoption policies traditionally have attempted to meet the needs of the childless, adoption never has been a solution for most childless couples, primarily because there never have been enough babies).

tion to serve the adoptive parents.[6] While liberalization of state abortion laws has decreased the number of potential adoptees,[7] studies[8] show that the increasing tendency of unwed mothers to raise their children might play a greater role in the decline.[9] As society increasingly accepts unwed parenthood,[10] single mothers keep more babies.[11] Meanwhile, adoption waiting lists grow longer.[12]

Different circumstances surround every pregnancy. The values and ethics of some unwed mothers allow them to opt for abortion. But many who find abortion unacceptable wrestle with whether to keep their babies or offer

6. A major by-product of this emphasis has been the sealing of adoption records and the issuance of new birth certificates for adoptees, a practice common in the United States since the 1930s. *See* W. FEIGELMAN & A. SILVERMAN, CHOSEN CHILDREN: NEW PATTERNS OF ADOPTIVE RELATIONSHIPS 193 (1983). Supporters argue that closed adoption records benefit all parties in the adoption triangle: adoptive parents, adoptees and birth parents. Sealed records have been thought to offer adoptive parents privacy and family unity, adoptees a better attachment to their new parents and biological parents anonymity. *Id.* at 194. *See also* Comment, *The Arizona Adoption Records Statute: A Call for Reform*, 1979 ARIZ. ST. L.J. 469, 473 (to preserve the adoption process, adoptive parents must have assurance that the birth status of the adoptee will not be revealed).

7. The number of abortions in the United States increased from 744,600 in 1973 to 1,573,900 in 1982. *See* BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1985, at 67 (105th ed. 1984).

   The United States Supreme Court granted broad protection for the right to have an abortion in Roe v. Wade, 410 U.S. 113 (1973). The Court held that the due process clause of the fourteenth amendment limits state power to regulate abortion through criminal statutes. During the first trimester, the woman's right to privacy includes a right to terminate pregnancy that the state cannot override. During the second trimester, the state has a compelling interest in promoting the health of the mother, and the state may reasonably regulate abortion procedures to protect maternal health. After the fetus reaches viability, the state has a compelling interest in protecting the potential human life. At this point, the state may regulate or prohibit abortions, except those medically necessary to preserve the life or health of the mother. *Id.* at 163-64. The Supreme Court recently reaffirmed the general principles of *Roe* in Thornburgh v. College of Obstetricians and Gynecologists, 54 U.S.L.W. 4618, 4621 (U.S. June 10, 1986) (No. 84-495).

8. No U.S. government agency has routinely collected statistics about adoption and related services since 1975. *See* ADOPTION FACTBOOK, *supra* note 1, at 9. Recent data comes from private agencies interested in adoption policy. The National Committee for Adoption's *Adoption Factbook*, published in November 1985, is the most ambitious effort made in recent years to collect comprehensive adoption data. Much of the *Factbook's* data is from 1982. *See id.* at 5, 13.

9. *See* Leynes, *Keep or Adopt: A Study of Factors Influencing Pregnant Adolescents' Plans for Their Babies*, 11 CHILD PSYCHIATRY & HUM. DEV. 105 (1980); Musick, Handler & Waddill, *Teens and Adoption: A Pregnancy Resolution Alternative?*, CHILDREN TODAY, Nov.-Dec. 1984, at 24, 26; Resnick, *Studying Adolescent Mothers' Decision Making About Adoption and Parenting*, SOC. WORK, Jan.-Feb. 1984, at 5, 7; ADOPTION FACTBOOK, *supra* note 1, at 19.

10. Although many young women find their parents initially angry about unwed pregnancy, acceptance follows almost invariably. One study found that "within all groups, there are very few familial, peer or community sanctions against keeping a baby." Musick, Handler & Waddill, *supra* note 9, at 26.

11. The National Committee for Adoption estimates 715,000 unmarried women gave birth in 1982, and more than 500,000 of them chose to keep their children. *See* ADOPTION FACTBOOK, *supra* note 1, at 13, 18.

   In March 1984, 3,130,000 children under age 18 lived with their never-married mothers. About 381,000 of those never-married mothers were 15 to 19 years old. Another 958,000 were 20 to 24 years old. *See* U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REP., SERIES P-20, NO. 330, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1984, at 52 (1985).

12. Many potential adoptive parents face a five- to seven-year wait. *See* Leepson, *supra* note 3, at 859; Bean, *supra* note 5, at 10. Although adoption waiting time has increased dramatically in recent years, potential adoptive parents in years past did not face much better prospects:

   > [For] adopters in Western countries the availability of children has never been sufficient. While a lot of the literature suggests that traditional adoption policies were directed to meeting the needs of the childless . . . adoption has never been a solution for the majority of childless people. Even when non-parental adoptions were at their height in the 1960s there were more would-be adopters than available children.

   Bean, *supra* note 5, at 10.

them for adoption. In such cases, the decision whether to offer an infant for adoption may rest on whether the woman can secure an adoption under acceptable terms.

This note suggests that states develop flexible adoption statutes that will accommodate the concerns of unwed mothers. After examining the state interest in adoption as a resolution for unwed pregnancy, the note examines the status of adoption laws in the United States. The note concludes that current laws fail to meet the needs of many unwed mothers because the statutes do not allow flexibility concerning the degree of confidentiality under which the adoption is granted. Finally, the note points to areas in which statutory reform could improve adoption.

THE STATE'S INTEREST

In setting policy, states must decide whether to promote abortion, adoption or single parenthood as the preferred solution[13] for unwed pregnancy.[14] Abortion represents the most cost-efficient solution to unplanned pregnancy.[15] It leaves the woman without a dependent child, thus reducing her potential need for government financial assistance.[16]

The state has interests, however, beyond economics. States are permitted to encourage live birth over abortion by subsidizing childbirth costs, according to the Supreme Court's decision in *Maher v. Roe*.[17] The Court

13. The state may wish to solve the problem of unplanned pregnancy before conception by offering and encouraging the use of family planning and contraception. No system of family planning, however, can eliminate all cases of unplanned pregnancy. This note deals with such pregnancies.

14. Because unmarried mothers are the most likely to relinquish babies for adoption, this note limits its discussion to babies born out of wedlock. Births to unmarried teens have quadrupled since 1940. In 1980, unwed mothers gave birth to almost one-fifth of all babies born in the United States. *See* CONGRESSIONAL RESEARCH SERVICE, POOR CHILDREN: A STUDY OF TRENDS AND POLICY, 1969-1984, Briefing Papers at 2 (1985).

15. Costs vary, but in 1981 the cost of a first-trimester clinic abortion averaged $190 in the United States. The inflation-adjusted cost of abortion decreased 28% between 1975 and 1981. *See* Henshaw, *Freestanding Abortion Clinics: Services, Structure, Fees*, 14 FAM. PLAN. PERSP. 248, 249-56 (1982).

In contrast, a 1982 survey of costs associated with childbirth showed the average cost of a hospital stay in the United States was $1,420 for a usual delivery in a birthing room and $1,450 for a usual delivery with labor and delivery rooms. Professional services for a usual delivery averaged $642. The average cost of a basic layette, including baby wardrobe and nursery items, was $851. Maternity wardrobe cost an estimated $235. *See* U.S. DEPARTMENT OF AGRICULTURE, FAM. ECON. REV., July 1984, at 19.

16. Four basic federal welfare programs are available for families with children: Aid to Families With Dependent Children, food stamps, Medicaid and subsidized housing. *See* CONGRESSIONAL RESEARCH SERVICE, SUMMARY OF POOR CHILDREN: A STUDY OF TRENDS AND POLICY, 1968-1984, at 15 (1985). Many never-married mothers who rely on those benefits still find their families below the poverty line. *See id.* at 1, 18-22. At any rate, unwed mothers are hard-pressed to cover the costs of raising a child. A 1984 government study showed the cost of raising a child from birth to age 18 in a husband-wife family with no more than five children in an urban area ranged, in 1984 dollars, from $86,845 in the North Central region to $96,484 in the West. *See* U.S. DEPARTMENT OF AGRICULTURE, FAM. ECON. REV., April 1985, at 32. Costs for raising rural, nonfarm children ranged from $80,996 in the North Central region to $100,821 in the West. *See id.* at 33.

In addition to reducing government aid payments to single parents, abortion also may eliminate some of the burden on government to provide foster care. *See* D. DAY, THE ADOPTION OF BLACK CHILDREN 11 (1979) (the availability of abortion and the resulting decrease in the number of adoptable, healthy, white infants increase the odds that older and harder-to-place children, who otherwise would require foster care, will be adopted).

17. 432 U.S. 464, 466-68 (1977). In *Maher*, Connecticut residents eligible for medical assistance under Connecticut's Medicaid plan and who were denied financial assistance for desired nontherapeutic abortions, brought an equal protection challenge to state regulations that limited such assistance to

found childbirth subsidy "a rational means of encouraging childbirth."[18] Before *Maher*, all but four states allocated Medicaid funds to pay for elective abortions.[19] Within 100 days of the Court's decision, a majority of states discontinued payments for most abortions,[20] choosing to promote childbirth over abortion.

Whether or not states decide to promote live birth as a policy matter, they still must address the issue of childbirth because an increasing number of unwed mothers exercise that option.[21] About 514,700 of the 686,600 unmarried American women who gave birth in 1981 were under age twenty-five,[22] and at least four-fifths of those unwed young mothers kept their babies.[23]

In great part, the social stigma surrounding young, unwed mothers has

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abortions certified as medically necessary by a doctor. *Id.* at 466-68. Finding abortion and childbirth to be "simply two alternative medical methods of dealing with pregnancy" within the framework of *Roe v. Wade* (*see supra* note 7) and Doe v. Bolton, 410 U.S. 179 (1973), the Court ruled the equal protection clause does not require a state participating in the Medicaid program to pay elective abortion expenses simply because the state has made a policy choice to pay expenses incident to childbirth. 432 U.S. at 479-80.

In the companion case of Beal v. Doe, 432 U.S. 438 (1977), the Court noted that when Congress passed Title XIX of the Social Security Act in 1965, nontherapeutic abortions were illegal in most states. *Id.* at 447. In view of prevailing state law in 1965, the Court found the plaintiffs did not prove that Congress intended to require—rather than permit—participating states to fund nontherapeutic abortions. *Id.*

18. 432 U.S. at 479. The majority also noted that the state's interest in future state population could, in some circumstances, "constitute a substantial reason for departure from a position of neutrality between abortion and childbirth." *Id.* at 478 n.11. The Court ruled that states need not prove a "compelling" interest in childbirth in order to fund childbirth but not abortion "any more than a State must so justify its election to fund public but not private education." *Id.* at 477.

In the companion case of *Beal v. Doe*, the Court noted that *Roe v. Wade* recognized a strong state interest in protecting the potentiality of human life. 432 U.S. at 446. While that interest does not become sufficiently compelling to usurp a woman's privacy right until the third trimester of pregnancy, the state has "significant" interest in encouraging childbirth throughout the course of pregnancy. *Id.*

19. In February 1976, Indiana, Louisiana and Ohio restricted Medicaid coverage to "therapeutic" or "medically necessary" abortions in all trimesters. In addition, Arizona had no operative Medicaid program. *See* Alan Guttmacher Institute, *Medicaid Pays for Abortion in Most States*, 5 FAM. PLAN./POP. REP. 11 (1976).

20. The Supreme Court announced its decision in *Maher v. Roe* on June 20, 1977. 432 U.S. at 464. By September 25, 30 states had discontinued payment for abortions in most instances. *See* Alan Guttmacher Institute, *Governors Veto Restrictions on State Funds for Abortion*, 6 FAM. PLAN./POP. REP. 57, 58-59 (1977).

In fiscal year 1979, 16 states and the District of Columbia provided state funds for all abortions or for all "medically necessary" abortions. Policy in 24 states mirrored the federal standard (abortions funded by Medicaid only in cases of rape or incest, or when the life or physical health of the mother was endangered). Nine states allowed the use of state funds for abortions only when the life of the mother was endangered. *See* Alan Guttmacher Institute, *States Spent $74.7 Million for Family Planning Services Under Medicaid Program in FY 79*, 10 FAM. PLAN./POP. REP. 32, 36-37 (1981).

21. Even after *Roe v. Wade*, the number of illegitimate births increased. There were 585,600 births to unmarried women in 1982 and 398,700 such births in 1972. *See* BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1985, at 64 (105th ed. 1984).

In 1980, when almost one-fifth of all babies born in the United States were illegitimate, 48% of all black babies and 11% of all white babies born had unwed mothers. *See* CONGRESSIONAL RESEARCH SERVICE, POOR CHILDREN: A STUDY OF TRENDS AND POLICY, 1969-1984, Briefing Papers at 2 (1985).

22. *See* BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1985, at 64 (1984). About 267,800 of those births were to mothers under 20 years old. *Id.*

23. *See* Leepson, *supra* note 3, at 860.

dissipated in recent years.[24] Nonetheless, society has not readily accepted the practice of relinquishing their babies for adoption.[25] Peers and relatives pressure young mothers to keep babies.[26] Many social workers admit they do not present adoption as an option to unwed mothers for fear of alienating or upsetting their clients.[27]

Unwed mothers who keep babies tend to be of lower socioeconomic status, and they are more likely to require government assistance to support their children.[28] Compared with peers who offer babies for adoption, unwed mothers who keep their babies are more likely to come from broken or unhappy homes, lack self-confidence and exhibit neurotic traits on personality tests.[29] Moreover, research shows single parenthood places undue stress upon the parent, thereby increasing the likelihood of child abuse.[30] Furthermore, unwed mothers often fall into child abuse-prone demographic categories, such as low education level,[31] low social class,[32] low income[33]

24. *See* Leynes, *supra* note 9, at 105; Leepson, *supra* note 3, at 860. Contributing to the trend have been the human rights movement, increased presentation in the media of explicit sexual material and the decline of traditional marriage. Resnick, *supra* note 9, at 7.
25. Increased reports of battered children in recent years may indicate that parents who wish to relinquish their children feel compelled not to do so. *See* M. BENET, *supra* note 2, at 215-16.
26. *See* L. MCTAGGART, *supra* note 2, at 331. Unwed minority mothers tend to face greater pressure than their white counterparts to keep their babies. At one Detroit adoption agency, no more than 10% of black clients choose abortion, and no more than one percent opt for adoption. Resnick, *supra* note 9, at 7.

    Regardless of race, mothers who give up babies often suffer from feelings of grief and shame for some time after relinquishing their babies. *See* Leynes, *supra* note 9, at 112.
27. Some social workers admit they never raise the subject of adoption. Others present adoption briefly, as one item on a list of pregnancy alternatives. Many social workers are uncomfortable with the idea themselves, and their ambivalence unnerves clients considering adoption as an alternative. Musick, Handler & Waddill, *supra* note 9, at 27.
28. *See* D. GILL, ILLEGITIMACY, SEXUALITY AND THE STATUS OF WOMEN 88-89, 95-96 (1977); Leynes, *supra* note 9, at 108-09. The availability of welfare funds makes it financially feasible for unwed mothers to keep their children. *See* Leepson, *supra* note 3, at 860 n.2; ADOPTION FACTBOOK, *supra* note 1, at 19. Some social welfare observers maintain that welfare rules may make it very difficult to collect benefits in two-parent families, thus actually discouraging marriage. *See* CONGRESSIONAL RESEARCH SERVICE, SUMMARY OF POOR CHILDREN: A STUDY OF TRENDS AND POLICY, 1969-1984, at 17-18 (1985).

    Indeed, unwed mothers in the most destitute of situations may believe that they have the most to gain by keeping their children. The Rev. Bruce Ritter, who operates Convenant House, a home for teenage runaways in New York City, told students at the University of Notre Dame that no pregnant teen at Covenant House had ever offered her baby for adoption. According to Ritter, the young woman who visits Covenant House wants to keep her child, since having a baby is the most important thing she has ever done. It gives her someone who will love her and depend on her. In addition, the baby qualifies the mother for welfare payments and an apartment of her own. Adoption, Ritter observed, is an alternative mostly used by unwed women from middle class homes. Address by the Rev. Bruce Ritter at the University of Notre Dame (Jan. 31, 1986).
29. *See* D. GILL, *supra* note 28, at 88-89; Leynes, *supra* note 9, at 107-09; Resnick, *supra* note 9, at 6. Unwed mothers with little education and who report difficulty getting along with their parents are also more likely to keep their babies. *See* D. GILL, *supra* note 28, at 95-96; Resnick, *supra* note 9, at 6.
30. *See* J. LEAVITT, CHILD ABUSE AND CHILD NEGLECT: RESEARCH AND INNOVATION 170 (1983).
31. *See* Pelton, *Child Abuse and Neglect: The Myth of Classlessness*, in THE SOCIAL CONTEXT OF CHILD ABUSE AND NEGLECT 23, 28 (L. Pelton ed. 1981). A 1984 study found that only 53.5% of never-married mothers in the United States were high school graduates. U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-20, NO. 33, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1984, at 52 (1985).
32. *See* Pelton, *supra* note 31, at 26; J. LEAVITT, *supra* note 30, at 170; Gil, *The United States' Versus Child Abuse*, in THE SOCIAL CONTEXT OF CHILD ABUSE AND NEGLECT 291, 298 (L. Pelton ed. 1981); Elmer, *Traumatized Children, Chronic Illness and Poverty*, in THE SOCIAL CONTEXT OF CHILD ABUSE AND NEGLECT 185, 186 (L. Pelton ed. 1981).
33. In 1983, 75.1% of all families headed by never-married women fell below the poverty threshold,

and poor housing conditions.[34] Youth also makes unwed mothers more likely to be child abusers.[35] Clinical studies also show the psychological imbalances exhibited by many unwed mothers who keep their children lead to child abuse.[36] In addition to being physically harmed, child abuse victims often carry lifelong mental scars.[37]

Adoption may be the best solution for mother and child in many cases of unwed pregnancy.[38] Even in cases where parent does not abuse child, lawmakers should recognize that poverty *itself* is harmful to the development of children.[39] The challenge before legislators is to encourage adoption of those children otherwise destined to be poverty-cycle victims in an era in which many unwed mothers are rejecting adoption.

ADOPTION IN THE UNITED STATES

Adoption has existed since the formation of organized communities.[40]

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the highest poverty rate of any type of family. CONGRESSIONAL RESEARCH SERVICE, POOR CHILDREN: A STUDY OF TRENDS AND POLICY, 1969-1984, Briefing Papers at 5 (1985). Of the 13.8 million U.S. children living below the poverty line in 1983, 1.8 million were in families headed by never-married mothers. *Id.* at 1. Studies show that the more extreme the poverty conditions in which a family lives, the greater the incidence and severity of child abuse. *See* Pelton, *supra* note 31, at 28-30. In addition, the vast majority of deaths from child abuse come from poor families. *See id.* at 29-30; R. GELLES & C. CORNELL, INTIMATE VIOLENCE IN FAMILIES 56 (1985); Gil, *supra* note 32, at 298-99.

34. *See* R. GELLES & C. CORNELL, *supra* note 33, at 57; D. GILL, *supra* note 28, at 298-99.

35. Young adults are more likely to abuse their children than are older parents. *See* R. GELLES & C. CORNELL, *supra* note 33, at 56.

36. Unresolved identity conflicts, depression, feelings of worthlessness and inadequate self-esteem are common factors among child abusers. *See* S. PALLONE & L. MALKEMES, HELPING PARENTS WHO ABUSE THEIR CHILDREN 10-11 (1984). The basic sense of mistrust found in abusive parents makes it difficult for them to form effective relationships with other adults; instead they turn to their children to gratify needs. *See id.* at 11-13. Abusive parents transfer their sense of mistrust to their children and interpret normal child behavior, such as bed-wetting and crying, as a sign of rejection. *Id.* at 12-13.

37. Children cannot understand their parents' resort to abuse, and the confusion may affect the child for life:

> Abuse from a parent or other caretaker must be one of the most hurtful of all insults, because it combines physical pain with the psychological blow of being attacked by one's protector. The child has no way of judging the meaning of what is happening. His or her perspective on adult behavior toward children is limited, and it is easy to believe that all parents severely spank, beat, or do other violence to their offspring. Or the child may justify the abusing parent's behavior by assuming the guilt of being bad and therefore deserving of the blows.
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> . . . [T]he boy or girl grows up not only risking physical damage, but also holding a distorted view of parent-child relationships, including a first-hand lesson in aggression between family members.

Elmer, *supra* note 32, at 185-86.

38. Indeed, recent investigations reinforce the conventional wisdom among adoption agency personnel that adolescents who place children for adoption are psychologically better adjusted and would make better parents than adolescents who choose to keep their children. *See* Resnick, *supra* note 9, at 6.

39. Poverty produces stress in family life and creates health and safety hazards for children, regardless of abuse. *See* Pelton, *Introduction* to THE SOCIAL CONTEXT OF CHILD ABUSE AND NEGLECT 1, 13 (L. Pelton ed. 1981). As one professor of social work put it:

> [P]oor children, like their parents, must live among poor people. . . . Among other things this means living where public transportation is erratic and undependable, garbage is picked up only spasmodically, and the streets are more full of litter than they are elsewhere. Private housing is outrageously expensive and falling apart. Danger lurks everywhere, from the broken steps to the glass on the sidewalk to the young toughs of the neighborhood who exact tribute from younger children.

Elmer, *supra* note 32, at 208-09.

40. It was not uncommon for a couple to take in and care for a pregnant woman with the understand-

Until the nineteenth century, adoption was most often arranged informally by mutual acquaintances of the biological and adoptive parents.[41] Such an ad hoc system was prone to abuse, however, and reports of adopted children being used as cheap labor gave rise to the first legal regulations on adoption.[42]

As states began to more closely regulate the adoption process,[43] adoption procedures changed. Modern procedures emphasize protecting the confidentiality of adoption parties who wish to have their identities concealed. Today almost all states require that public agency adoption records remain confidential, at least until the adoptee reaches majority.[44] In confidential (or closed) adoptions, biological and adoptive parents never meet. A new birth certificate is issued for the child bearing the adoptive parents' names, and all records identifying the biological parents are sealed.[45]

In a nonconfidential (or open) adoption, adoptive and biological parents exchange identifying information. In fact, biological parents can meet potential adoptive parents and participate in the selection of the couple that will raise their baby.[46] The agreement provides the adoptee with the names

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ing that they would adopt her child after its birth. *See* Baran, Pannor & Sorosky, *The Concept of Open Adoption*, 45 AM. J. ORTHOPSYCHIATRY 196 (1975).

For an account of the history of adoption as far back as the ancient Romans, see M. LEAVY & R. WEINBERG, LAW OF ADOPTION (4th ed. 1979).

41. *See* Baran, Pannor & Sorosky, *supra* note 40, at 197.

42. *See* A. SOROSKY, A. BARAN & R. PANNOR, *supra* note 3, at 31.

43. All states had enacted adoption statutes by 1931. *See* Heffner, *Adoption: New Ways to Build Families*, STATE LEGISLATURES, May-June 1984, at 13.

44. Forty-nine states require that adoption records be sealed at birth. ALA. CODE § 26-10-5 (1975); ALASKA STAT. § 25.23.150(b)(Supp. 1983); ARIZ. REV. STAT. § 36-326.01 (Supp. 1985); ARK. STAT. ANN. § 56-141 (Supp. 1985); CAL. CIV. CODE § 227 (West Supp. 1986); CAL. HEALTH & SAFETY CODE § 10435 (West 1975); COLO. REV. STAT. § 25-2-113 (Supp. 1985); CONN. GEN. STAT. ANN. §§ 7-53, 45-68m (West 1981 & Supp. 1985); DEL. CODE ANN. tit. 13, § 923 (1981); FLA. STAT. ANN. § 382.22 (West Supp. 1985); GA. CODE ANN. § 74-417 (Supp. 1985); HAWAII REV. STAT. § 578-14 (Supp. 1984); IDAHO CODE § 39-258 (1985); ILL. ANN. STAT. ch. 40, § 1522 (Smith-Hurd 1980); IND. CODE ANN. § 31-3-1-5 (West Supp. 1985-86); IOWA CODE ANN. § 600.13 (West 1981); KY. REV. STAT. § 199.570 (Baldwin 1985); LA. REV. STAT. ANN. § 41:72 (West Supp. 1985-86); ME. REV. STAT. ANN. tit. 19, § 533 (Supp. 1985-86); MD. HEALTH-GEN. CODE ANN. § 4.211 (1982); MASS. ANN. LAWS ch. 46, § 13 (Michie/Law. Co-op. 1983); MICH. STAT. ANN. § 27.3178(555.67) (Callaghan Supp. 1985-86); MINN. STAT. ANN. § 144.1761 (West Supp. 1985); MISS. CODE ANN. §§ 93-17-25, -31 (1973); MO. ANN. STAT. § 453.135 (Vernon Supp. 1986); MONT. CODE ANN. § 40-8-126 (1985); NEB. REV. STAT. § 43-113 (Supp. 1985); NEV. REV. STAT. § 127.140 (1981); N.H. REV. STAT. ANN. § 170B:19 (1978 & Supp. 1985); N.J. STAT. ANN. § 9:3-51 (West Supp. 1985-86); N.M. STAT. ANN. § 40-7-53 (Supp. 1985); N.Y. DOM. REL. LAW § 114 (McKinney 1977 & Supp. 1986); N.C. GEN. STAT. § 48-29 (1984); N.D. CENT. CODE § 14-15-16 (Supp. 1985); OHIO REV. CODE ANN. § 3107.17 (Page Supp. 1984); OKLA. STAT. ANN. tit. 10, § 57 (West 1966); OR. REV. STAT. ANN. § 432.415 (1981); PA. STAT. ANN. tit. 23, § 2905 (Purdon Supp. 1985); R.I. GEN. LAWS § 8-10-21 (1985); S.C. CODE ANN. § 20-7-1780 (Law. Co-op. 1985 & Supp. 1985); S.D. CODIFIED LAWS ANN. § 25-6-15 (Supp. 1985); TENN. CODE ANN. § 36-1-129 (1984); TEX. FAM. CODE § 11.17 (Vernon 1975 & Supp. 1986); UTAH CODE ANN. § 78-30-15 (1977); VT. STAT. ANN. tit. 15, §§ 449, 451 (Supp. 1985); VA. CODE §§ 63.1 - .235 (Supp. 1985); WASH. REV. CODE ANN. § 26.33.330 (Supp. 1985-86); W. VA. CODE § 16-5-16 (1985); WIS. STAT. ANN. § 48.93 (Supp. 1985-86); WYO. STAT. § 1-22-104 (1977).

45. *See, e.g.*, ARIZ. REV. STAT. § 36-326.01 (Supp. 1985).

46. *See* L. MCTAGGART, *supra* note 2, at 328. Such arrangements, however, can have disastrous results:

> One risk is that a birth parent, having knowledge of the adoptee's whereabouts, will interfere with the adoptee and his relationship to his adoptive family at a time during the adoptee's development when the adoptee may be adversely affected. . . .
>
> . . . A friendly visit by the birth mother to an infant unable to understand the distinction between birth parents and adoptive parents is different from the hostile visit of a birth mother to a teenage adoptee in which the birth mother angrily declares that she is the

of his or her biological parents and may even allow contact with the biological parents.[47]

Proponents of confidential adoption believe confidentiality facilitates closer bonding in the adoptive family.[48] Advocates also argue that preventing the reappearance of biological parents makes the adoptive parents more secure in their parental role.[49] The unity of the adoptive family, however, becomes a less crucial state interest after adoptees reach majority and assert legal independence.[50] Two states allow adoptees access to their original birth certificates when the adoptees reach the age of majority.[51] The other forty-eight states, however, keep adoption records under seal after adoptees reach majority.[52]

Most social workers and state adoption agency personnel support confidential records and believe adoption records should be opened only on a case-by-case basis.[53] Some states requiring confidential adoption allow adoptees to acquire limited information about their biological parents.[54] To

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adoptee's *real* mother. Adoptive parents' tolerance of interference from birth parents may change as the children pass from infancy through childhood and into adolescence.

Schur, *The ABA Model State Adoption Act: Observations from an Agency Perspective*, 19 FAM. L.Q. 131, 139-40 (1985).

47. The Supreme Court of Massachusetts has held that an adoption agreement in which the adoptive parents grant the biological mother the right "to see and visit her said child at any and all reasonable times" is an enforceable contract. *In re* Adoption of a Minor, 291 N.E.2d 729, 731 (Mass. 1973).

48. *See supra* note 6 (discussing the benefits of sealed adoption records during the adoptee's minority).

49. In *In re* Christine, 121 R.I. 203, 397 A.2d 511 (1979), the Supreme Court of Rhode Island protected the state's interest in seeing that adoptive relationships " 'bloom and grow forever,' free of the threat of . . . the appearance of a natural, well-intended parent who just wishes to drop by and see or talk to his or her offspring." 397 A.2d at 513. Christine, a biological mother, sought court permission to have a guardian ad litem contact the adoptive parents of Christine's biological child to determine if they would allow Christine to contact the child. *Id.* at 511-12. The supreme court quashed a lower court order that had granted Christine's request:

> The peek permitted by the court's order casts a cloud of uncertainty upon the minds of all adoptive parents who now realize that some day a court attache may be at their doorstep acting as a courier for a parent whose right to visit with or talk to the adoptive couple's child was supposedly terminated.

Id. at 513-14.

50. Stating that "[i]t is too often forgotten that an adopted child eventually grows up," one judge suggested that courts use a sliding scale based on the age of an adoptee to determine whether to grant the adoptee's request to see original birth records. *See* Application of Maples, 563 S.W.2d 760, 767 (Mo. 1978) (Seiler, J., concurring). At the time of adoption, the sliding scale would give greatest weight to the desire of biological and adoptive parents to have sealed records. *Id.* at 767. As the adoptee grows older, however, the situation changes:

> [T]he interest of the adoptee advances . . . in contradistinction to those of the natural and adopted parents, which recede. The adoptee's interests become of greater import as he or she grows, to the point where, as an adult, they predominate over those interests which once had a superior claim.

Id. at 767-68 (footnote omitted).

51. ALA. CODE § 26-10-4 (1975) (sealed records opened by court order or upon demand of adoptee after the adoptee reaches age 19); KAN. STAT. ANN. § 65-2423 (1985) (supplementary birth certificate is filed with original birth certificate; records available for inspection with court order, or adoptee may demand to see the documents upon reaching legal age).

52. *See* statutory provisions cited *infra* notes 55 and 56.

53. Many social workers see such practices as consistent with general policies of client confidentiality. In addition, sealed records policies posit greater power and authority in the hands of the social service professional. L. MCTAGGART, *supra* note 2, at 224; Leepson, *supra* note 3, at 872.

54. *See, e.g.*, FLA. STAT. ANN. § 63.162 (West 1985) (court may issue order allowing access to relevant nonidentifying information); N.H. REV. STAT. ANN. § 170-13:19 (1978 & Supp. 1985) (adoptee over age 21 may request nonidentifying background information and health history); N.M. STAT. ANN. § 40-7-53 (Supp. 1985) (adoptee over age 18 may receive nonidentifying physical descriptions and information about health, medical history and background); N.C. GEN. STAT. § 48-26

examine information that could identify natural parents, however, adoptees in forty-eight states must have a court order,[55] which often may be obtained only upon a showing of "good cause."[56]

THE ADOPTION RECORDS BATTLE

After decades of tacit acceptance, opposition has mounted to the sealed-records system.[57] With an estimated two million couples waiting to adopt,[58] critics want to restrike the balance to better accommodate the needs of adoptees[59] and biological parents who wish to reunite. Organizations such

(1984) (adoptee over age 21 may receive nonidentifying information concerning heritage, general physical appearance and health); PA. STAT. ANN. tit. 23, § 2905 (Purdon Supp. 1985) (adoptee may receive nonidentifying information at judge's discretion); S.D. CODIFIED LAWS ANN. § 25-6-15.2 (Supp. 1985); WIS. STAT. ANN. § 48.93 (Supp. 1985-86) (adoptee over age 18 may receive medical and genetic information, as well as nonidentifying social history).

55. ARIZ. REV. STAT. § 8-120 (Supp. 1985); CONN. GEN. STAT. ANN. § 45-68m (West 1981) (court order allowed for "the health or medical treatment" of the adoptee); DEL. CODE ANN. tit. 13, § 924 (Supp. 1984) (court may allow inspection of only that part of adoption record necessary to protect the adoptee's health "or the health of any blood relative of the adopted individual"); GA. STAT. ANN. § 74-417 (Supp. 1985); IDAHO CODE § 39-258 (1985); ILL. ANN. STAT. ch. 40, § 1522 (Smith-Hurd 1980); IOWA CODE ANN. § 600.16 (West 1981) (court may open records if shown to be necessary to save the life of or prevent irreparable physical harm to an adoptee or the adoptee's offspring, but court must make every effort to protect the anonymity of the biological parents); KY. REV. STAT. ANN. § 199.570 (Baldwin 1985); LA. REV. STAT. ANN. § 40:73 (West Supp. 1986) (court may issue order after a showing of compelling reasons and only to the extent necessary to satisfy such compelling necessity); ME. REV. STAT. ANN. tit. 19, § 524 (Supp. 1985-86); MD. FAM. LAW CODE ANN. § 5-329 (1984) (court may issue order upon finding "the individual needs the medical information for the health of the individual or a blood relative of the individual," but in no case may the identity or location of biological parents be revealed); MINN. STAT. ANN. § 259.31 (West Supp. 1985); MO. ANN. STAT. §§ 193.135,453.120 (Vernon Supp. 1986); NEV. REV. STAT. § 127.140 (1981); N.C. GEN STAT. § 48-26 (1984) (court order upon finding that disclosure is in the best interest of the adoptee or public); OHIO REV. CODE ANN. § 3107.17 (Page Supp. 1984); OR. REV. STAT. § 432.420 (1981); R.I. GEN. LAWS § 8-10-21 (1985); S.D. CODIFIED LAWS ANN. § 25-6-15 (Supp. 1985); TENN. CODE ANN. § 36-1-131 (Supp. 1985) (court order may issue if judge finds disclosure of information in best interest of the adoptee or public); W. VA. CODE § 16-5-16 (1985). *See also* statutory provisions cited *infra* note 56.

56. ALASKA STAT. § 25.23.150(b) (Supp. 1983); ARK. STAT. ANN. § 56-141(c) (Supp. 1985) (court order in exceptional cases where court finds, "by clear and convincing evidence, that good cause exists for inspection"); CAL. HEALTH & SAFETY CODE § 10439 (West Supp. 1986) ("good and compelling cause"); COLO. REV. STAT. § 19-4-104 (1978); FLA. STAT. ANN. § 63.162(d) (West 1985) (statute presents list of factors judge may consider in determining whether "good cause" exists); HAWAII REV. STAT. § 578-15 (1976); IND. CODE ANN. § 31-3-1-12 (West Supp. 1985-86) (emergency medical need or similar good cause); MASS. ANN. LAWS ch. 210, § 5C (Michie/Law. Co-op. 1983); MICH. STAT. ANN. § 27.3178(555.67) (Callaghan Supp. 1985-86); MISS. CODE ANN. §§ 93-17-25, -31 (1973); MONT. CODE ANN. § 40-8-126 (1985); NEB. REV. STAT. § 43-113 (Supp. 1985); N.H. REV. STAT. ANN. § 170-13:19 (1978 & Supp. 1985); N.J. STAT. ANN. § 40-7-53 (Supp. 1985); N.M. STAT. ANN. § 40-7-53 (Supp. 1985); N.Y. DOM. REL. LAW § 114 (McKinney 1977 & Supp. 1986); N.D. CENT. CODE § 14-15-16.11 (Supp. 1985) (court order "for good cause shown in exceptional circumstances"); OKLA. STAT. ANN. tit. 19, § 57 (West 1966); PA. STAT. ANN. tit. 23, § 2905 (Purdon Supp. 1985); S.C. CODE ANN. § 20-7-1780 (Law. Co-op. 1985); TEX. FAM. CODE § 11.17 (Vernon 1975 & Supp. 1986); UTAH CODE ANN. § 78-30-15 (1977); VT. STAT. ANN. tit. 15, §§ 451, 452 (Supp. 1985); VA. CODE § 63.1-236 (1980); WASH. REV. CODE ANN. § 26.33.330 (Supp. 1985-86); WIS. STAT. ANN. § 48.93 (Supp. 1985-86); WYO. STAT. § 1-22-104 (1977).

57. Among those criticizing the state of adoption are sociologists, psychiatrists, physicians and members of the legal profession. *See* Levin, *The Adoption Trilemma: The Adult Adoptee's Emerging Search for his Ancestral Identity*, 8 BALT. L. REV. 496, 497-501 (1979).

58. Leepson, *supra* note 3, at 859.

59. One study found that many adoptees feel isolated and alienated "due to the break in the continuity of life through the generations that their adoption represents. For some, the existing block to the past may create a feeling that there is a block to the future as well." Sorosky, Baran & Pannor, *The Reunion of Adoptees and Birth Relatives*, 3 J. YOUTH & ADOLESCENCE 195 (1974).

as Concerned United Birthparents,[60] Adoptees' Liberty Movement Association[61] and Orphan Voyage[62] have led the fight for access to sealed adoption records by using legislative and legal channels.[63]

Out of frustration caused by slow progress in legislative chambers and courtrooms, the adoption reformers have set out to help themselves. Many have established registration networks through which parties to a confidential adoption can register their desire to re-establish contact years later. The determination of group members who have launched such programs has focused attention on the plight of adoptees. As American voters and legislators have become more sympathetic to the concerns of adoptees, so have adoption laws. The number of states recently passing registration provisions exemplifies this trend.[64]

Most states with registration systems have mutual-consent registries, which allow adoptees and biological parents to register their desire to meet, provided the adoptee has reached a certain age, usually eighteen.[65] Typi-

60. Concerned United Birthparents, Dover, N.H., was founded in 1976 by biological parents and others who support adoption reform. CUB seeks to open birth records to adoptees and biological parents and allow legal recognition of the biological parents' ongoing concern about adoptees.

61. Adoptees' Liberty Movement Association, New York, N.Y., was founded in 1971 and reports membership of 50,000 adoptees, biological parents and adoptive parents. ALMA's main objective is to provide assistance to biological parents seeking adoptees and to adoptees seeking their biological parents.

62. Orphan Voyage, Cederedge, Colo., was founded in 1953 by adoption reform pioneer Jean Paton. The group, made up of adoptees, as well and biological parents and adoptive parents, assists in establishing relationships between adult adoptees and their biological parents. Orphan Voyage also attempts to inform adoptive parents of the needs of adoptees before the children reach majority and to give guidance to surrendering biological parents.

63. Adoptees have unsuccessfully tried several legal theories in attempting to obtain access to original adoption records:

In Application of Maples, 563 S.W.2d 760 (Mo. 1978), the adoptee argued Missouri's sealed records policy violated her first amendment right to receive information and her rights of liberty, privacy and equal protection. *Id.* at 762-65.

In Matter of Roger B., 85 Ill. App. 3d 1064, 407 N.E.2d 884 (1980), *aff'd*, 84 Ill. 2d 323, 418 N.E.2d 751 (1981), *cert. denied*, 454 U.S. 806 (1981), an adoptee argued Illinois' sealed records policy violated his right to receive information. 407 N.E.2d at 886-87. The adoptee also argued the policy violated his ninth amendment fundamental right to an identity and his rights of privacy, due process and equal protection. *Id.* at 886-89. Finally, the adoptee asserted his status as an adult should, in itself, constitute good cause for allowing access to his adoption records. *Id.* at 889.

In Yesterday's Children v. Kennedy, 569 F.2d 431 (7th Cir. 1977), *cert. denied*, 437 U.S. 904 (1978), a group of adoptees argued that they should be considered a "suspect classification" and that the Illinois adoption law violated their equal protection rights. 569 F.2d at 432-34. The adoptees also argued their right "to acquire useful information" as protected by a penumbra of rights emanating from the first, fifth, ninth and fourteenth amendments of the Constitution was violated. *Id.* at 432-34. Finally, the adoptees argued their thirteenth amendment right to be free from involuntary servitude was violated. *Id.* at 433-34.

For an exploration of the constitutional issues involved in adoption records cases, see Note, *The Adult Adoptee's Constitutional Right to Know His Origins*, 48 S. CAL. L. REV. 1196 (1975).

64. Since September 1984, 10 states—Arkansas, Idaho, Illinois, New Hampshire, New Mexico, Ohio, Pennsylvania, South Carolina, South Dakota and Tennessee—have established adoption registration systems. *See* statutory provisions cited *infra* notes 65 and 66.

65. ARK. STAT. ANN. § 56-144 (Supp. 1985) (adult adoptee, each adoptive parent and each biological parent must place his or her name in the registry before any disclosure can be made); CAL. CIV. CODE § 224(5)(b) (Supp. 1986) (at time of relinquishment, the biological parents are asked whether they would like to participate in a registry that discloses biological parents' names to adoptees who make a request after reaching 21); COLO. REV. STAT. § 25-2-113.5 (Supp. 1985) (registry allows relatives of deceased biological parents and adoptees to register); FLA. STAT. ANN. § 382.51 (West Supp. 1985) (adoptees, biological parents and adoptive parents can file information about themselves and specify persons to whom such information should be released); IDAHO CODE § 39-259A (1985); ILL. ANN. STAT. ch. 40, § 1522.3 (Smith-Hurd Supp. 1985) (biological parent files statement at time of adoption about whether information is to be released; adoptee may regis-

cally, when an adoptee registers his or her consent to exchange identifying information, state adoption personnel check their files to see whether the biological parents have filed affidavits consenting to the release of information. If they have, information from the adoptee's original birth certificate is released.[66]

The most progressive state registry programs contain search-and-consent provisions, which notify the biological parents when the adoptee has registered.[67] While procedure varies among states, search-and-consent statutes commonly require an adoption agency employee to make direct, discrete contact with biological parents to notify them of the adoptee's wish to have access to identifying information. Biological parents may refuse to release any information, but the adoptee receives assurance that they are aware of the request.[68] For biological parents, a search-and-consent provision operates like a mutual-consent registry—biological parents can register their consent to release information at any time, but they cannot initiate a search for the adoptee.

Mutual-consent and search-and-consent registries are popular because

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ter at age 21, or earlier with consent of his or her adoptive parents); KY. REV. STAT. § 199.575 (Baldwin 1985) (applies only to pre-adoptive brother-sister relationships; each sibling, upon reaching age 18, may file information for release to siblings); LA. REV. STAT. ANN. § 40:91-93 (West Supp. 1986) (adoptees and biological parents can register at any time after the adoptee reaches age 25; registration must be renewed every five years); ME. REV. STAT. ANN. tit. 22, § 2706-A (1980) (adoptee must be over age 18 to register); MICH. STAT. ANN. § 27.3178(555.68) (Callaghan Supp. 1985-86) (for adoptions in which biological parents' rights terminated after September 12, 1980, information is automatically released to requesting adoptee over 18 unless either biological parent files a written request that no information be released); NEB. REV. STAT. §§ 43-124, -130 (1984 & Supp. 1985) (adoptee must be over age 25 to register; adoptive parent or parents may at any time sign a notice of nonconsent stating that no information on the adoptee's original birth certificate is to be released before the death of the adoptive parent or parents); NEV. REV. STAT. § 127.007 (1979) (adoptee must be over age 18 to register); N.H. REV. STAT. ANN. § 170-8:19 (1978 & Supp. 1985) (adoptee must be over 21 to register; biological parents are asked to reaffirm their desire to be contacted before information is released); N.M. STAT. ANN. § 40-7-53 (Supp. 1985) (adoptee must be over 18 to register); OHIO REV. CODE ANN. §§ 3107.40, .41 (Page Supp. 1984) (adoptee must be over 21 to register); OR. REV. STAT. ANN. §§ 109.450 to .500 (adoptee must be over 21 to register; biological parents can register earlier but must renew registration when the adoptee turns 21); PA. STAT. ANN. tit. 21, § 2905 (Purdon Supp. 1985) (adoptee over age 18 can petition to have court contact biological parents and request consent; court may refuse to do so at its discretion); S.C. CODE ANN. § 20-7-1780 (Law. Co-op. Supp. 1985) (adoptee must be over 21 to register; biological parents have 30 days to reconsider release of information after adoptee makes request); S.D. CODIFIED LAWS § 25-6-15.3 (Supp. 1985) (consenting biological parents and adoptee indicate to whom the information may be released).

66. *See, e.g.*, ILL. ANN. STAT. ch. 40, § 1522.3 (Smith-Hurd Supp. 1985) (biological parent files statement as to whether information is to be released at time of adoption; adoptee may register at age 21 or earlier with consent of adoptive parents).

67. CONN. GEN. STAT. ANN. § 45-68j (West 1981) (adoptee can petition court to have biological parents contacted to see if they consent to release of identifying information; consent is also required from living adoptive parents); MINN. STAT. ANN. § 259:49 (West 1982 & Supp. 1986) (after adoptee over age 21 requests search, state tries to locate biological parents; when located, biological parents have 120 days to request that no disclosure be made); N.D. CENT. CODE. § 14-15-16 (Supp. 1985) (after adoptee over age 21 registers, biological parents are located and given 60 days to file affidavit requesting no disclosure); TENN. CODE ANN. § 36-1-141 (Supp. 1985) (after adoptee over age 25 requests search, birth parents are located and asked whether they consent to release of information); WIS. STAT. ANN. § 48.433 (Supp. 1985-86) (after adoptee over age 21 requests search, biological parents are found and asked whether they consent to release of information).

68. *See, e.g.*, WIS. STAT. ANN. § 48.433 (Supp. 1985-86) (after adult adoptee requests identifying information, biological parents are notified of request and asked to submit a consent form if they wish to have information revealed).

they carve out an exception to adoption confidentiality requirements when biological parents and child, as consenting adults, want to share information.

LEARNING FROM INDEPENDENT ADOPTION

Because circumstances surrounding unwed pregnancies vary, biological parents have different ideas about how much personal information they want made available to children they offer for adoption. Woman *A*, for example, wants to preserve her privacy and avoid any repercussions of adoption in her later life.[69] Because she lives in Alabama, a state requiring that identifying information about birth be made available to an adult adoptee,[70] Woman *A* finds a state-sponsored adoption unacceptable. She opts for abortion.

In contrast, Woman *B* struggles with the thought of giving away her baby and never knowing what has happened to her child. She lives in a state that permanently seals adoption records.[71] Her only state-sanctioned adoption option would force her to spend a lifetime wondering about the welfare of her child.[72] Woman *B* decides to keep her baby.

Woman *A* and Woman *B* could structure adoptions to meet their needs if their states allowed independent adoption.[73] An independent (or private) adoption is a contractual agreement between biological and adoptive parents concerning legal rights to a child.[74] Attorneys[75] normally draft these agreements to satisfy the participating parties. The flexibility offered by independent adoption has made the procedure popular in the United States. In 1982, one-third of the 50,720 adoptions by non-relatives in the United States were independently arranged.[76] Perhaps the most notable result of the flexibility of independent adoption is that interested parties can use it to structure nonconfidential adoptions, even where state adoption agencies are forbidden to offer nonconfidential adoptions. In addition, independent

69. For an exploration of constitutional issues involved, see Note, *Sealed Adoption Records and the Constitutional Right of Privacy of the Natural Parent*, 34 RUTGERS L. REV. 451 (1982).

70. ALA. CODE § 26-10-4 (1975). Kansas law would beget the same result. KAN. STAT. ANN. § 65-2423 (1985).

71. Most states will open the adoption records of an adult adoptee, but only by court order, which requires a showing of "good cause" to examine the records. *See supra* notes 55-56 and accompanying text.

72. Consider *In re* Christine, 121 R.I. 203, 397 A.2d 511 (1979), where an unwed, minor mother executed consent for adoption shortly after the birth of her child. For the next 11 years, Christine contacted on numerous occasions the adoption agency and family court to seek information about the child and to request permission to visit the child. *Id.* The Rhode Island Supreme Court ruled against a petition by Christine for access to the names and addresses of her child's adoptive parents. 397 A.2d at 514. *See supra* note 49.

73. At least six states bar independent adoptions by requiring that a state agency be used in legal adoptions. *See* CONN. GEN. STAT. ANN. § 45-63 (West 1981); DEL. CODE ANN. tit. 13, § 904 (Supp. 1984); MASS. ANN. LAWS ch. 210, § 2A (Michie/Law. Co-op. 1981); MICH. STAT. ANN. § 27.3178(555.26) (Callaghan Supp. 1985-86); MINN. STAT. ANN. § 259.22 (West Supp. 1981); N.D. CENT. CODE § 50-12-17 (1982).

74. *See* Note, *Surrogate Mothers: The Legal Issues*, 7 AM. J.L. & MED. 323, 329 (1981).

75. Where state law allows, independent adoptions also can be arranged by doctors and clergymen. *See* Heffner, *supra* note 43, at 14.

76. *See* ADOPTION FACTBOOK, *supra* note 1, at 104. One estimate is that independent adoptions made up 50% of all adoptions by nonrelatives in 1983. *See* Leepson, *supra* note 3, at 862.

adoptions have had laudable success in placing special-needs children.[77] Independent adoptions also save tax money because expenses—including the biological mother's living expenses—are covered privately.[78]

Independent adoption does have disadvantages. First, state agency adoptions usually cost less.[79] Second, an attorney arranging the independent adoption has an overriding economic interest in seeing the adoption go through.[80] In contrast, the sole interest of state adoption personnel is to ensure that the baby will have a good home.[81] In addition, some states allow attorneys to arrange independent placements without any counseling for the biological mothers[82] and to provide for immediate placement of the child after birth.[83] Biological mothers may be unduly pressured to approve the adoption. They may not have sufficient time after the birth to reconsider their decisions.[84]

State laws routinely require public adoption agencies to give biological parents a breathing period to reconsider consent to adoption.[85] State stat-

77. Also referred to as "hard-to-place" children, special-needs adoptees are older, minority, foreign and mentally or physically disabled children. *See* L. MCTAGGART, *supra* note 2, at 328.

78. Many states allow an adopting couple to pay interim costs of the biological mother. *See* Note, *supra* note 74, at 323, 330. *See also, e.g.*, ARIZ. REV. STAT. ANN. § 8-126(c) (1974); CAL. PENAL CODE § 273(a) (West 1970).

79. Adoption fees vary greatly. State agency fees range from no charge to more than $10,000. In 1985, adoptive parents paid an average of more than $6,000. ADOPTION FACTBOOK, *supra* note 1, at 23. The actual cost of a normal state agency adoption is estimated at $11,300, but most agencies keep costs down through fund-raising, subsidies, volunteer services and, when possible, taking advantage of insurance benefits. *Id.* at 24. Independent adoptions also vary greatly in cost, ranging from less than $2,000 to more than $10,000. *Id.* at 25. Attorneys' fees and medical expenses for the biological mother can total more than $20,000 in an independent adoption. Leepson, *supra* note 3, at 863, 869.

80. The attorney's fee agreement may be contingent upon the successful completion of the adoption. Whenever a party has a pecuniary interest in adoption there may be cause for concern.

> In a world in which people act fairly and honestly, governmental protection and regulation of the adoption field would be unnecessary. In a world in which desperate people will do anything to get a baby and in which unethical suppliers are willing to meet the demand, it is reasonable to expect abuses.

Schur, *supra* note 46, at 139-40.

81. Even where states do not require adoption agencies to make pre-placement studies, adoption agencies can lose their licenses for failure to do so. Practitioners of independent adoptions bear no risk for assisting in inappropriate placements. *See* Schur, *supra* note 46, at 138.

82. Counseling is valuable because each biological parent must understand the finality of a decision for adoption. Some adoption agency personnel counsel biological parents to refuse to relinquish children "if there is *any thought* in their minds that they might at some future date seek return of the child." *Id.* at 137 (emphasis in original).

83. Many state statutes do not allow public adoption agencies to place children for a period of time after consent for adoption is granted to allow the biological parents time to reconsider. *See, e.g.*, GA. STAT. ANN. § 74-404 (Supp. 1985) (consent may be executed only after birth and may be withdrawn within 10 days). Independent adoptions are not bound by many such provisions, but some commentators suggest that unlicensed adoption intermediaries should be required to grant equal protection to biological parents. *See* Schur, *supra* note 46, at 140.

84. *See* L. MCTAGGART, *supra* note 2, at 336.

85. ALASKA STAT. § 25.23.180(b)(1) (Supp. 1985) (consent may be withdrawn within 10 days of signing or birth, whichever is later); ARIZ. REV. STAT. § 8-107(B) (Supp. 1985) (consent may not be given until 72 hours after birth); ARK. STAT. ANN. § 56-208 (Supp. 1985) (consent may be executed any time after birth); CAL. CIV. CODE § 226(a) (West 1982) (consent may only be withdrawn by court determination that it would be in adoptee's best interest); COLO. REV. STAT. § 19-4-103 (1978 & Supp. 1985) (consent may be withdrawn only upon showing of fraud or duress); CONN. GEN. STAT. ANN. § 45-61I (West 1981) (consent may be withdrawn until any time before adoption decree issued); DEL. CODE ANN. tit. 13, § 909 (Supp. 1984) (consent may be withdrawn by court permission if petition for withdrawal is filed within 60 days); FLA. STAT. ANN. § 63.082 (West 1985) (consent may only be executed after birth); GA. STAT. ANN. § 74-404 (Supp. 1985) (consent may be executed only after birth and may be withdrawn within 10 days); HAWAII REV.

utes are also likely to require thorough examination of potential adoptive parents to determine whether they are likely to make good parents.[86]

Critics of independent adoption argue that without neutral supervision and implementation, independent adoptions do not pass the rigid scrutiny that state agencies impose on the process.[87] Private adoption proponents argue that a ban on independent adoption would create a "black market" in which desperate couples would offer exorbitant sums of money to acquire children.[88] Also, proponents allege that a ban on independent adoption

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STAT. § 571-61 (1976 & Supp. 1984) (consent may be given any time after mother's sixth month of pregnancy); IDAHO CODE § 16-1504 (1976 & Supp. 1985) (consent may be withdrawn with court permission); ILL. ANN. STAT. ch. 40, § 1511 (Smith-Hurd 1980) (consent may not be given until 72 hours after birth); IND. CODE ANN. § 31-3-1-6 (West Supp. 1985-86) (consent may be executed any time after birth); IOWA STAT. ANN. § 600.7 (West 1981) (consent may be withdrawn before issuance of adoption decree); KAN. STAT. ANN. § 59-2102 (1983) (consent may be withdrawn if fraud or duress is shown); KY. REV. STAT. § 199.500 (Baldwin 1985) (consent may be withdrawn before birth); LA. REV. STAT. ANN. §§ 9:422.6.11 (West Supp. 1986) (consent may not be given until five days after birth; it may be withdrawn within 30 days); ME. REV. STAT. ANN. tit. 19, § 532 (1981 & Supp. 1985-86) (consent revocable if fraud or duress is shown); MD. FAM. LAW. CODE ANN. §§ 5-311, -314 (1984) (consent may be withdrawn before issuance of decree of adoption); MASS. ANN. LAWS ch. 210, § 2 (Michie/Law. Co-op. 1981) (consent may not be executed until four calendar days after birth); MICH. STAT. ANN. § 27.3178(555.29) (Callaghan Supp. 1985-86) (irrevocable consent executed before a judge after investigation and explanation of consequences); MINN. STAT. ANN. § 259.24 (West 1982) (consent may be withdrawn within 10 working days of execution); MISS. CODE ANN. § 93-17-9 (1973) (consent may not be given until three days after birth); MO. ANN. STAT. § 453.030 (Vernon Supp. 1986) (consent may be given any time after birth); MONT. CODE ANN. §§ 40-8-109, 111, 112 (1985) (state counselor must interview consenting biological parent before adoption is allowed); NEB. REV. STAT. § 43-106 (1984) (consent must be given before an officer authorized to acknowledge deeds); NEV. REV. STAT. §§ 127.053 (1979), 127.070 (1981) (consent may be given any time after birth); N.H. REV. STAT. ANN. §§ 170-B:7, :9, :10 (1979 & Supp. 1985) (consent may not be given until 72 hours after birth); N.J. STAT. ANN. § 9:3-41 (West Supp. 1985-86) (consent must be acknowledged by court officer); N.M. STAT. ANN. § 40-7-38 (Supp. 1985) (consent may not be given until 72 hours after birth); N.Y. DOM. REL. LAW § 115b (McKinney 1977 & Supp. 1986) (consent must be executed before a court officer); N.C. GEN. STAT. §§ 48-7, -11 (1984) (consent becomes irrevocable after adoption decree issued); N.D. CENT. CODE §§ 14-15-07, -08 (1981) (consent may be given any time after birth); OHIO REV. CODE ANN. §§ 3107.08, .09 (Page 1980) (consent may not be given until 72 hours after birth); OKLA. STAT. ANN. tit. 10, §§ 60.5, .10 (West 1966) (consent becomes irrevocable upon issuance of adoption decree); OR. REV. STAT. § 418.270 (1981) (consent revocable only if fraud or duress is shown); PA. STAT. ANN tit. 23, §§ 2501, 2502 (Purdon Supp. 1985) (consent may be executed after adoptee has been in custody of an adoption agency for a minimum of three days); R.I. GEN. LAWS § 15-7-5 (Supp. 1985) (consent revocable only if fraud or duress is shown); S.C. STAT. ANN. §§ 20-7-1710, -1720 (Law Co-op. 1985 & Supp. 1985) (consent becomes irrevocable when decree of adoption is issued); S.D. CODIFIED LAWS ANN. §§ 25-6-4, -4.1 (1984) (consent revocable only if coerced or compelled); TENN. CODE ANN. §§ 36-1-114, -117 (1984) (consent revocable until issuance of adoption decree); TEX. FAM. CODE § 15.03 (Vernon 1975 & Supp. 1986) (consent may be executed any time after birth); UTAH CODE ANN. § 78-30-4 (Supp. 1985) (consent irrevocable unless fraud or duress shown); VT. STAT. ANN. tit. 15, § 432 (Supp. 1985) (consent must be given in writing); VA. CODE § 63.1-225 (1980) (consent may not be executed until 10 days after birth); WASH. REV. CODE ANN. § 26.33.160 (Supp. 1985-86) (consent cannot become operative until 48 hours after birth); W. VA. CODE §§ 48-4-3, -4, -5 (Supp. 1985) (consent may not be given until 72 hours after birth); WIS. STAT. ANN. §§ 48.42, .835, .837 (Supp. 1985-86) (adoption petition must include petition to terminate biological parents' parental rights); WYO. STAT. § 1-22-109 (1977) (consent irrevocable unless fraud or duress is shown).

86. *See, e.g.*, MONT. CODE ANN. § 40-8-109 (1985) (requires state officials to examine the child, conduct interviews with biological and prospective adoptive parents and report to the court that the parties understand all ramifications of adoption).

87. At least one critic has suggested the banning of independent adoption.

> To ban non-agency adoptions may seem . . . to discriminate against the poor and those who practice informal adoption. But by funneling everyone through the same system, it may help to ensure that the system operates responsibly and fairly—if the well-off and articulate must use it like everyone else, they will not allow it to deteriorate.

M. BENET, *supra* note 2, at 213-14.

88. A banning of independent adoption has been compared with Prohibition.

would reduce the number of adoptions. Connecticut, for example, suffered an almost fifty percent decrease in total adoptions the year after its 1959 ban on private adoptions.[89] The Connecticut experience demonstrates that private adoption, with its flexibility for structuring confidential and nonconfidential adoptions, appeals to unwed mothers considering adoption.[90]

RECOMMENDATIONS

State legislatures should enact statutes flexible enough to accommodate confidential and nonconfidential adoption.[91] In doing so, legislators should study the extent to which unwed mothers have used independent adoption to plan for the futures of children they give up for adoption.[92] States should then enact laws that leave the parties free to contract for provisions such as visitation rights and information exchange between adoptee and biological parents.

If states continue to offer only confidential or nonconfidential adoption, only independent adoption will work for those dissatisfied with a state's particular form of adoption. But independent adoption is not legal in all states,[93] and, even where available, its cost excludes some potential adoption parties.[94]

Although injecting the flexibility of independent adoption into state-sponsored adoption is a laudable goal, each state's adoption package also should permit independent adoption. Private adoption has proved its value by placing thousands of children each year.[95] Independent adoption also provides another source through which would-be adoptive parents can locate a child. The independent process is prone to abuse, however, and states should amend their adoption laws to regulate it. Among the requirements that states should apply to independent adoptions are mandatory pre-adoption counseling for biological and adoptive parents, provisions that allow

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> The most compelling argument against ending legal private adoption is that it will only worsen the problems it attempts to solve. As America discovered in its experiment with Prohibition, the state can outlaw supply but cannot eliminate demand. The desire—the *need*—to have a child cannot possibly be regulated by law. Adopting couples know that attorneys are the best and fastest source of babies, and, as far as these couples are concerned, it's the end result—the son or daughter—that counts. The only effect of prohibition on private adoption will be to create a genuine black market, where all semblance of procedure and legality is abandoned, where children not legitimately adopted are only further penalized, where deals grow ever more furtive, subterfuges multiply, prices skyrocket.
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> L. MCTAGGART, *supra* note 2, at 329.

89. *Id.* The adoption rate remained stable in other states in which the law did not change during that period. *Id.*

90. As one independent adoption advocate has stated:
> [O]utlawing private adoption would . . . deprive young women of the only means by which they themselves can plan for the future of children they must give up and prevent them from choosing adoptive parents from among people they know. It would also penalize many private grass-roots adoption movements . . . [that place] foreign and "hard-to-place" children with far better track records than many agencies.
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> *Id.* at 328.

91. For a proposed statute that allows adoption parties to determine whether the adoption should be confidential or nonconfidential, see Comment, *supra* note 6, at 481-84.

92. *See supra* notes 46-47 and accompanying text.

93. *See supra* note 73 and accompanying text.

94. *See supra* note 79 and accompanying text.

95. *See* L. MCTAGGART, *supra* note 2, at 328-29.

biological parents to deliberate before consenting to adoption and restrictions on amounts paid by adoptive parents to cover legal and medical expenses for independently arranged adoptions.

Mandatory pre-adoption counseling for biological and adoptive parents would fulfill the role of pre-adoption studies that are required for state adoptions. A determination that potential adoptive parents would make good parents would give the biological parents peace of mind and would protect the state's interest in finding a fit home for the child. In addition, counseling for the biological parents should not be overlooked. The decision to offer a child for adoption has lifelong ramifications; biological parents should be counseled to make sure they know its legal and emotional effects.[96]

Provisions requiring biological parents to deliberate before consenting to adoption would ensure that each biological parent has carefully considered the decision. Currently, some states allow no time period for reconsideration of an adoption consent, but better statutes require a reconsideration period.[97] States also vary as to when consent may be executed by the biological parents.[98] The best statutes do not allow a biological parent to give consent until several days after birth. This allows the reality of birth to set in before a parent must relinquish a child.[99]

Restrictions on the amount payable by adoptive parents to cover legal and medical expenses for independently arranged adoptions would prevent desperate would-be adopters from paying "black market" rates for children. Some states already have such restrictions.[100] The cost of unregulated independent adoption forces many potential adoptive parents out of the market. This may not seem tragic because adoption applications far exceed the number of available healthy infants. It is tragic, though, when an otherwise deserving couple is denied an equal chance to adopt a child simply because other couples are financially better off. If state adoption offered the same advantages as independent adoption, all potential adoptive parents would receive equal consideration. When state adoption alternatives fall short, affluent would-be adoptive parents find private means to accomplish adoption.[101] The less wealthy are left with an incomplete solution,[102] and an

96. *See id.* at 335 (survey found two-thirds of those biological mothers who planned to give up their children for adoption had doubts during their pregnancies, and more than 80% would like to have had counseling).

97. *See supra* note 85 and accompanying text. *See also* L. MCTAGGART, *supra* note 2, at 335.

98. *See* L. MCTAGGART, *supra* note 2, at 335.

99. *See, e.g.*, GA. STAT. ANN. § 74-404 (Supp. 1985) (consent may be executed only after birth and may be withdrawn within 10 days); LA. REV. STAT. ANN. §§ 9:422.6-.11 (West Supp. 1986) (consent may not be given until five days after birth and may be withdrawn within 30 days); MASS. ANN. LAWS ch. 210, § 2 (Michie/Law. Co-op. 1981) (consent may not be executed until four calendar days after birth); MISS. CODE ANN. § 93-17-9 (1973) (consent may not be given until three days after birth); VA. CODE § 63.1-225 (1980) (consent may not be executed until 10 days after birth).

100. *See, e.g.*, MICH. STAT. ANN. § 27.3178(555.54) (Callaghan 1980) (except for charges and fees approved by a court, no person may give or receive any money or other consideration in connection with any aspect of adoption). *See also* Doe v. Kelley, 106 Mich. App. 169, 307 N.W.2d 438, *cert. denied*, 459 U.S. 1183 (1981) (holding that the Michigan code's prohibition precludes payment to surrogate mothers).

101. *See* L. MCTAGGART, *supra* note 2, at 329.

102. *See id.*

incomplete solution is often no solution.

Even if costs are regulated, independent adoptions will cost more than agency adoptions. Thus, the most significant improvement to state adoption law would be the creation of public agency adoptions with the flexibility of independent adoption so parties can structure adoptions to meet specific needs.

Adoption parties must be able to rely on the state to protect adoption agreements, particularly when confidentiality is promised. Adoption statutes must view confidential adoptions as contracts not subject to alteration at a later date to attract potential adoption parties who desire confidentiality for life.

Registry provisions, however, do not jeopardize the privacy of biological parents who choose confidential adoptions. In most states, identifying information cannot be released at any time without the birth parents' consent.[103] Mutual-consent registries, as well as search-and-consent registries, allow for flexibility in cases where biological parents later change their minds about contact with their offspring. All current registry provisions require that the adoptee reach the age of majority before registering. Such age provisions protect state interests in the unity of the adoptive family while the adoptee is growing up. Once the adoptee reaches majority, though, registry provisions recognize that the interests of the adoptee should take precedence over the interests of the adoptive parents.[104] Legislators should enact search-and-consent registries because such provisions aggressively serve the adult adoptee's legitimate interest but do not compromise the right of confidentiality promised biological parents.

CONCLUSION

States have an interest in promoting the welfare of children born in potentially harmful situations. The living conditions provided by many young, unwed mothers often prove to be such situations. Children of unwed mothers are more likely to be abused, and they are likely to be trapped in

103. In recent years, some states have reversed the normal presumption and have enacted statutes that release identifying information about biological parents to requesting adult adoptees unless the biological parents file notice of nonconsent. Michigan, for example, operates a traditional mutual-consent registry for adoptees whose biological parents' rights were terminated before September 12, 1980 (that is, a biological parent must file an affidavit consenting to the release identifying information before any such information may be given to a requesting adult adoptee). For adoptees whose biological parents' rights were terminated after September 12, 1980, however, identifying information about biological parents will be given to a requesting adult adoptee unless either biological parent has filed a written request that information not be released. The provision, in effect, establishes a mutual-consent registry in which biological parents automatically consent to release of information unless they file an affidavit stating otherwise. *See* MICH. STAT. ANN. § 27.3178(555.68) (Callaghan Supp. 1985-86).

Minnesota operates a search-and-consent provision that places the burden of filing an affidavit on the biological parent who wishes to maintain confidentiality. Within six months of receiving a request for identifying information from an adoptee over age 21, state adoption personnel personally notify each biological parent of the request. A biological parent then has 120 days to file an affidavit stating that information on the original birth certificate should not be released. If no action is taken, the information is released on the 121st day. *See* MINN. STAT. ANN. § 259:49 (West 1982 & Supp. 1986).

104. *See supra* note 50 and accompanying text.

the poverty cycle.[105] Adoption certainly is not the answer for all unwed mothers, but in many cases adoption enhances the child's welfare. The state has a responsibility to make adoption a viable alternative for as many unwed mothers as possible.

That few young, unwed mothers in the United States have found adoption an attractive option for pregnancy resolution in recent years indicates that current state adoption statutes have failed to meet unwed mothers' needs. Although several states have experimented with adoption statutes in recent years, none has enacted a statute allowing the parties participating in a state-sponsored adoption to choose whether the confidentiality of adoption parties should be maintained. Such flexibility is available in independently arranged adoptions. State adoptions should offer the same choice. If one accepts the thesis that biological parents have different needs regarding the confidentiality of adoption, then no current public adoption program can meet the needs of all biological parents who may choose adoption. States should reform adoption law to meet these needs.

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105. *See supra* notes 25-39 and accompanying text.

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