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The Effect of Transaction Costs on the Market for Babies

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I. Introduction

Among the more controversial ideas advanced by prominent United States Circuit Court Judge and law professor Richard Posner is his suggestion that a market in babies would rectify many of the problems of the adoption system.[1] His concept has, to say the least, provoked a tremendous reaction in various segments of American society.[2] His critics proclaimed that sales of children would serve to demean the children and their mothers, relegating

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1 The original paper was co-authored by Elizabeth Landes. Elizabeth Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978). Posner has also written specifically regarding the adoption market. *See* Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59 (1987) [hereinafter Posner, *Regulation*]; as well as the various editions of his textbook, ECONOMIC ANALYSIS OF LAW. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 5.3, at 139-44 (3d ed. 1986); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 5.4, at 149-54 (4th ed. 1992) [hereinafter POSNER, 4th ed.].

2 *See, e.g.*, John J. Donohue III & Ian Ayres, *Posner's Symphony No. 3: Thinking About the Unthinkable*, 39 STAN. L. REV. 791 (1987) (reviewing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed.) (1986)); Ronald A. Cass, *Coping with Life, Law and Markets: A Comment on Posner and the Law-and-Economics Debate*, 67 B.U. L. REV. 73 (1987); Jane Maslow Cohen, *Posnerism, Pluralism, Pessimism*, 67 B.U. L. REV. 105 (1987); Tamar Frankel & Francis H. Miller, *The Inapplicability of Market Theory to Adoptions*, 67 B.U. L. REV. 99 (1987); Mark Kelman, *Consumption Theory, Production Theory and the Ideology of the Coase Theorem*, 52 S.CAL. L. REV. 669, 688 n.51 (1979) (discussing the effect of the black market in babies); J. Robert S. Prichard, *A Market for Babies?*, 34 U. TORONTO L.J. 341 (1984); Robin West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449 (1986); Paul M. Barrett, *Influential Ideas: A Movement Called 'Law and Economics' Sways Legal Circles*, WALL ST. J., Aug. 4, 1986, at 1, 16; Anne McDaniel, *Free-Market Jurist*, NEWSWEEK, June 10, 1985, at 93-94 (providing a brief biography of Judge Posner at a time when it was rumored he was being considered for a position on the United States Supreme Court); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1449, 1486 n.198 (1992) (citing Lincoln Caplan, *Meet Richard Posner, The Judge Who Would Sell Homeless Babies*, WASH. POST NAT'L WKLY. ED., Oct. 29, 1984, at 23).

them to the status of mere commodities.[3] Unscrupulous but wealthy parents might purchase children solely to abuse them.[4] "Baby-selling" became a code word for the foolish extreme to which its proponents could carry law-and-economics.[5]

The truth is that an adoption market already exists, however distasteful that may seem.[6] As Posner aptly described it, there is already a regulated price for babies.[7] States have set the price so low that the demand for adoptable infants vastly exceeds their supply.[8] Because of the discrepancy between supply and demand, a black market has evolved in which the price is extremely high simply because baby selling is illegal.[9]

Posner suggests that legalization of compensation would benefit most of the players in the adoption market, because the supply

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[3] Cohen, *supra* note 2, at 154-55; Frankel & Miller, *supra* note 2, at 100-01.

[4] This was anticipated, and dismissed, by Landes & Posner, *supra* note 1, at 343.

[5] Donohue & Ayres, *supra* note 2, at 791-93 (analogizing the baby market and rape portions of Posner's book to the erratic work produced by composer Franz Liszt). The authors maintained that "Posner . . . does not always manifest a proper appreciation of such limits on economic analysis. Unfortunately, this shortcoming may deter many from reading his otherwise valuable book or improperly discredit the entire realm of law and economics." *Id.* at 793.

[6] *See, e.g.*, Cass, *supra* note 2, at 75-76, 85-90 (asserting the existence of a market which enables American couples to buy babies from mothers in other countries as a result of this country's domestic adoption restrictions); Prichard, *supra* note 2, at 343-45 (reporting that black market prices for babies are increasing due to the perpetually intense interest of childless couples). Like Posner, I have previously written about delicate subjects. *See* Margaret F. Brinig & Douglas W. Allen, *Sex, Property Rights and Divorce* (Working Paper, 1994) (sexual intercourse during marriage); Margaret F. Brinig, *Rings and Promises*, 6 J.L., ECON. & ORGANIZATION 203 (1990) (breach of promise to marry and engagement rings); Margaret F. Brinig & Steven M. Crafton, *Opportunism in Marriage*, 23 J. LEGAL STUD. 859 (forthcoming 1994) (spouse abuse).

[7] Posner, *Regulation*, *supra* note 1, at 64-65, makes the observation that a "high black market price [is] conjoined with an artificially low price for babies obtained from adoption agencies and through lawful independent adoptions."

[8] *Id.* at 65; Prichard, *supra* note 2, at 343. One commentator has reported that between 20 and 40 couples may compete for every infant placed for adoption. Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 918 n.7 (1991) (citations omitted). Dickson discusses the popular interest in adoption. *Id.* at 918 n.10. The wait before placement can take from two to ten years. NATIONAL COUNCIL FOR ADOPTION, ADOPTION FACTBOOK 175 (1991) [hereinafter ADOPTION FACTBOOK]. *See also* Natalie Haag Wallisch, Note, *Independent Adoption; Regulating the Middleman*, 24 WASHBURN L.J. 327, 327-28 (1985) (three to five years) (citations omitted).

[9] For a detailed description of this market, see Margaret V. Turano, Comment, *Black-Market Adoptions*, 22 CATH. LAW. 48 (1976). *See generally* PETER REUTER, THE ORGANIZATION OF ILLEGAL MARKETS: AN ECONOMIC ANALYSIS (1985); Prichard, *supra* note 2, at 343 (prices as high as $40,000 for newborns).

of adoptable babies will increase given a legal market price.[10] Adoptive parents will acquire the children they so badly desire. The suffering inherent in giving a child up for adoption will decrease since natural mothers will be compensated for bearing the children.[11] The market will provide incentives for the pregnant women to take better care of themselves so the children will be healthier.[12] Arguably fewer women will terminate unplanned pregnancies by abortion.[13] Finally, the children will go to the parents who value them most.

Perhaps the greatest problem with Posner's market theory remains largely unexplored. Courts, legal theorists, and economists invariably focus discussions about children upon the rights of the related adults. While child custody statutes and decisions begin with a "best interests of the child" standard,[14] they end with choosing the interests of one parent or one set of parents.[15] Sometimes

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10 POSNER, 4th ed., *supra* note 1, at 152-53; Prichard, *supra* note 2, at 345.

11 Prichard, *supra* note 2, at 346 (at which the author puts forth the proposition that financial incentives would cause women considering adoption to take better care of the unborn child and would also cause them to be more careful in choosing sexual partners); *see also* Cass, *supra* note 2, at 79-80 n.23 (where the author proposes that financial incentives for placing children for adoption "do not seem inherently more likely to regret the decision than women who make different choices"). Surrendering a child causes great and prolonged grief to the birth parent. *See* Eva Y. Deykin et al., *The Postadoption Experience of Surrendering Parents*, 54 AM. J. ORTHOPSYCHIATRY 271, 278-80 (1984).

12 Landes & Posner, *supra* note 1, at 329-30; Prichard, *supra* note 2, at 345-46.

13 Landes & Posner, *supra* note 1, at 329-30. *See also* Cass, *supra* note 2, at 79 (noting that women who are financially compensated for putting their children up for adoption are not more likely to regret the decision than women who opt for other alternatives).

14 *See, e.g.*, ALASKA STAT. § 25.24.150(c) (1993); ARIZ. REV. STAT. ANN. § 25-332A (1993); ARK. CODE ANN. § 9-13-101 (Michie 1993); CAL. CIV. CODE § 4600(d) (West 1992); JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1979); Robert F. Cochran, *The Search for Guidance in Determining the Best Interests of the Child at Divorce*, 20 U. RICH. L. REV. 1, 2 (1985); Elizabeth S. Scott, *Pluralism, Parental Preference and Child Custody*, 80 CAL. L. REV. 615 (1992); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1992); Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (determining, *inter alia*, that a child does not have a constitutionally protected right to a familial relationship with both birth father and mother's husband); Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981) (preference given to primary caretaker in custody dispute involving unmarried couple).

15 *See Michael H.*, 491 U.S. at 122 (in recognizing that nature does not generally allow for "dual parenthood," Court upheld a California statute that created a presumption that a child born to a married woman while living with her husband, who is not the natural father, is a child of the marriage. Thus the putative father has no

judges and legal academic writers accomplish this sleight-of-hand by presumption.[16] Other times the rationale is more explicit.[17] Frequently the child suffers.[18]

For example, although Posner briefly addresses concerns about abusive adoptive parents[19] and a potential oversupply of older or handicapped children[20] that may result from implementation of his ideas, he concentrates his discussions on the benefits to parents of a market price. Although the adoption market would have many buyers and sellers, it would remain regulated by the agencies screening adoptive parents. These institutions would re-

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parental rights); *In re* Baby M., 537 A.2d 1227 (N.J. 1988) (proclaiming the illegality of surrogacy contracts while recognizing the visitation rights of surrogate mother who contracted with the natural father and his wife to give birth to the child). *See also* Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11 (1994) (advocating greater legal deference for the perspectives of children in those legal disputes that most significantly influence their lives).

16 *See, e.g., Michael H.*, 491 U.S. at 117-19; Parham v. J.R., 442 U.S. 584 (1979); Santosky v. Kramer, 455 U.S. 745 (1982); Gary Crippen, *Stumbling Beyond the Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427 (1990).

17 *See* May v. Anderson, 345 U.S. 528 (1953). The Court focused the issue before them as follows:

> Separated as our issue is from that of the future interests of the children, we have before us the elemental question whether a court of a state, where a mother is neither domiciled, resident nor present, may cut off her immediate right to the care, custody, management and companionship of her minor children without having jurisdiction over her *in personam*. Rights for more precious to appellant than property rights will be cut off if she is to be bound. . . .

Id. at 533.

18 *See* Scarpetta v. Spence-Chapin Adoption Serv., 269 N.E.2d 787 (N.Y.), *cert. denied*, 404 U.S. 805 (1971) (ordering return of child to natural mother after she had already surrendered the child for adoption because there was the existence of evidence that she lacked sufficient mental and emotional stability at the time of relinquishment as well as the fact that she sought revocation within three weeks of surrender); *Baby M.*, 537 A.2d at 1227.

19 Landes & Posner, *supra* note 1, at 343.

20 POSNER, 4th ed., *supra* note 1, § 5.4, at 153; Posner, *Regulation*, *supra* note 1, at 65; Cass, *supra* note 2, at 75, 82; Cohen, *supra* note 2, at 169-71; Prichard, *supra* note 2, at 354. Each of these authors discuss the problem briefly from the children's standpoint. Prichard, in particular, notes that:

> [I]t can be argued that the purpose of the existing process is not to meet the desires of childless couples for children, but rather to take care of a limited number of unwanted newborns, with the merely incidental side effect of bringing great joy and happiness to childless couples. . . . The success of the mechanism should therefore be judged in terms of the welfare of the unwanted newborns, not that of childless couples.

Id.

duce the chance that parents would acquire children to abuse them.[21] Agencies could also match birth and adoptive parents, reducing search costs for both parties to the transaction.[22]

Although he is keenly aware of the costs of regulation in other contexts,[23] Posner does not spend much time discussing the welfare losses caused by adoption agency regulation. These costs are by no means unique to Posner's adoption market. They also represent part of what makes the current adoption system so frustrating. In the current system, agencies rather than price act to ration the scarce resource of adoptable children among the many potential parents who want them.[24] In Posner's system, price would be the primary mechanism for allocating children, and agencies would serve a licensing function.

Although agencies serve to guard against abuse by adoptive parents, they also increase transactions costs for both sets of parents. Agency investigations are not only expensive and annoying, but they also greatly increase the time required for adoption.[25] Because only the final order of adoption prevents the natural parents from revoking consent,[26] the six-month-minimum waiting period adds uncertainty to the transaction.

The transaction costs added by legislatures to protect natural

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21 Posner, *supra* note 1, at 66 (noting that child abuse laws apply with equal force whether the child lives with natural or adoptive parents). Posner offers additional argument to support his thesis that the establishment of a free market in the area of adoption would serve to certify and investigate prospective "purchasers" who would pay the price of the service. Prichard, *supra* note 2, at 353-54 (proposing a licensing system for adoptive parents which would be based upon fitness criteria).

22 Prichard, *supra* note 2, at 346.

23 *See, e.g.*, Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974) (discussing both the costs and various theories of regulation). The various theories of economic regulation, including Posners', are further scrutinized in GEORGE J. STIGLER, THE CITIZEN AND THE STATE: ESSAYS ON REGULATION 114-45 (1975).

24 Agencies, therefore, prefer two parent homes, middle-aged couples (who have relatively higher incomes), heterosexuals, and persons with conventional religious practices. Lisa J. Trembly, Note, *Untangling the Adoption Web: New Jersey's Move to Legitimize Independent Adoptions*, 18 SETON HALL LEGIS. J. 371, 372 (1993).

25 For example, Arlington County, Virgina, requires three home visits scheduled over at least a six-month period after placement of the child in the adoptive home. Virtually all states require visits before and during placement. ADOPTION FACTBOOK, *supra* note 8, at 22-33.

26 In some states, as will be discussed later, all consents may be revoked until the final order. In most states, consents may be revoked prior to the final order in cases of fraud and duress.

parents' custodial rights and ensure suitability of adoptive couples hurt more children than they assist. Virtually all couples trying to adopt children are suitable.[27] Because there is no real way to predict what kind of parents most childless couples will make, agencies make both Type I (overinclusion) and Type II (underinclusion) errors. As Posner was quick to note, we have no *ex ante* checks on parents outside the adoption system.[28]

The reason for the miscalculation leading to agency involvement with adoption relates to the fundamental premise of this paper. As a society, we strongly presume that natural parents are the best custodians for their children.[29] Others, by definition, are not as qualified. Nonparents' motivations are questionable, and third party experts may judge them. The emphasis on parental right to custody is essential to the discussion. Here parents' rights, as opposed to the right of children in general to be raised by the best custodian, are stressed. This principle has led courts and legislatures to second guess the parental consent for adoption.

Birth mothers are not allowed to give binding consent until after children are born.[30] This universal rule seems wise in light of the tremendous and overwhelming bonding between parent and child that occurs at and shortly after childbirth.[31] But even after arrival of the child and a recovery period, courts scrutinize consent to adoption more fervently than virtually any other transaction. Looking at this judicial behavior charitably, natural parents placing children will feel tremendous regret,[32] a loss that Posner's compensation might alleviate at least in part. It is more likely, however, that we allow revocation of this transaction despite unquestionable

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27 ADOPTION FACTBOOK, *supra* note 8, at 22-33.

28 There are *ex post* checks if parents are unfit. Furthermore, newborns are occasionally removed from homes where parents have abused older siblings.

29 Pennsylvania *ex rel.* Holland-Moritz v. Holschuh, 292 A.2d 380 (Pa. 1972); State v. Meyers, 183 S.E.2d 42 (Ga. 1971); Mullen v. Mullen, 49 S.E.2d 349 (Va. 1948); Dickson, *supra* note 8, at 982 (where the author notes that "our system enshrines the biological tie and assumes that children belong with their biological parents at almost any cost").

30 *See, e.g.*, VA. CODE ANN. § 63.1-220.3(C)(1) (Michie Supp. 1993) (birth child must be at least 10 days old). *See generally* Susan Yates Ely, *Natural Parents' Right to Withdraw Consent to Adoption: How Far Should the Right Extend*, 31 U. LOUISVILLE J. FAM. L. 685 (1992-93) (further evaluating the concept of delayed revocation).

31 *See* Johnson v. Cupp, 274 N.E.2d 411 (Ind. Ct. App. 1971).

32 *See generally* Deykin et al., *supra* note 11.

harm to the promisee adoptive parents,[33] and frequently the child as well. This situation is justified by the inordinate weight accorded parental rights. Although revocation does not happen in a tremendous proportion of cases,[34] the uncertainty it introduces into the transaction is very significant.[35] Uncertainty creates major effects in the adoption market in much the same way that the very small risk of catastrophe dominates the insurance market and many people's thinking about nuclear power.[36]

This paper looks at the transactions costs imposed by parental revocations and their effect on the current adoption market. The focus, therefore, veers away from natural parental rights and moves toward what is in most cases *de facto*, rather than preemptively, best for children. Section II discusses parental rights to custody in a variety of contexts. Section III presents parental rights to revoke consent to adoption and shows how courts treat placement agreements differently from other contracts. Section IV discusses empirical tests of the model using state adoption data and an analysis of

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33 *See, e.g.*, Engstrom v. Iowa, 461 N.W.2d 309 (Iowa 1990). *Engstrom* involved a situation where an adoption agency negligently told pre-adoptive parents that the natural father was dead when in fact he lived in California and wanted custody of the child. The court, while ruling in favor of the birth parents, displayed its sympathy for the pre-adoptive parents in acknowledging that "[t]he circumstances which led plaintiffs to commence this suit are, indeed, tragic." *Id.* at 320. *See also* Dickson, *supra* note 8, at 980-83 (acknowledging the "special need for finality" in adoption proceedings) (citation omitted).

34 The exact proportion is unknown. *See, e.g.*, ADOPTION FACTBOOK, *supra* note 8, at 170 (citing a California television survey that placed the figure as high as 15%). *See also* David K. Leavitt, *The Model Adoption Act: Return to a Balanced View of Adoption*, 19 FAM. L.Q. 141, 153 (1983) (less than two percent of California cases); Dickson, *supra* note 8, at 967 n.258 (four percent of California cases).

35 Of course, the impact on the child may be devastating because of an infant's need for stability. GOLDSTEIN ET AL., *supra* note 14, at 31-38. Dickson, *supra* note 8, at 977, notes that California courts have refused to set time limits for birth mothers to decide whether or not to give their consent to an adoption. Said courts have, however, held that where adopting parents move to terminate the rights of a natural mother who has not given consent, the grounds most typically employed is abandonment, which cannot be established until the mother and child have been separated for at least six months.

36 For a discussion of this type of insurance, see Jon D. Hanson & Kyle D. Logue, *The First Party Insurance Externality: An Economic Justification for Enterprise Liability*, 76 CORNELL L. REV. 126, 168 n.37 (1990) (citing Milton Friedman & L.R. Savage, *A Utility Analysis of Choices Involving Risk*, 56 J. POL. ECON. 279, 290 (1948)); ROBERT JERRY, UNDERSTANDING INSURANCE LAW 11-15 (1987); EJAN MACKAAY, THE ECONOMICS OF INFORMATION AND LAW 173-74 (1982). For nuclear power, see Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 85-86 (1978).

state revocation statutes. Section V broadens the discussion to include other ways in which transaction costs deflect consideration of what is in children's best interests. There is also a brief discourse on consent revocation in the context of more general enforcement of promises.

II. Parental Rights to Custody

The fact that Posner and other students of adoption overlook children's rights is hardly surprising, given the history of parental supremacy. Cases involving child custody almost invariably invoke the "best interest of the child" standard.[37] However, perhaps because the two contestants are parents or would-be parents, the court considers their interests rather than those of the child.[38] A related reason for the focus on parental rights is the presumption, irrebuttable except in the case of unfitness, that parents act in their children's best interests.[39] Finally, to speak of "best interests" is somewhat inappropriate. A more accurate standard is the placement that will cause the child the least harm—the "least detrimental alternative."[40] "Best interests" cannot always function because a home with two loving parents is the best placement for children—any other situation is always second best.

Until relatively modern times, children were the property of their parents. Parents, and especially fathers,[41] made an initial de-

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37 *See, e.g.* IOWA CODE ANN. § 600.1 (West 1981)("welfare of the person to be adopted shall be the paramount consideration"); TENN. CODE ANN. § 36-1-101 (1991) ("When the interests of a child and those of an adult are in conflict, such conflict should be resolved in favor of the child"); Michael H. v. Gerald D., 491 U.S. 110 (1989); UNIF. MARRIAGE AND DIVORCE ACT § 402 (1979); Robert Mnookin, *Child Custody Adjudication: Judicial Functions in the Fact of Indeterminacy*, 39:3 LAW & CONTEMP. PROBS. 226, 236 (1975).

38 Lawyers represent parents, although American Bar Association disciplinary regulations suggests they must act as advocates for children as well. *See* Kim J. Landsman & Martha L. Minow, Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126, 1134-37 (1978).

39 Parham v. J.R., 442 U.S. 584 (1979). *See also In re* Spence-Chapin Adoption Service v. Polk, 274 N.E.2d 431, 436 (N.Y. 1971) (except when disqualified or displaced by extraordinary circumstances, parents are generally best qualified to care for their own children and therefore are entitled to do so).

40 GOLDSTEIN ET AL., *supra* note 14, at 53-64.

41 JOHN R. SUTTON, STUBBORN CHILDREN: CONTROLLING DELINQUENCY IN THE UNITED STATES 1640-1981, at 13 (1988); Charles W. Thomas & Shay Bilcsh, *Criminal Law: Prosecuting Juveniles In Criminal Courts, a Legal and Empirical Analysis*, 76 J. CRIM. L. & CRIMINOLOGY 439, 447 (citing Lee Teitelbaum & Leslie J. Hauers, *Some Historical*

cision whether their offspring would survive at all. After a very brief infancy, children began to contribute to the household or farm. Their labor was their parents', and any outside income generated during minority also belonged to the father.[42] When the child became self-sufficient—wielding arms, learning a trade, marrying into another's family[43]—he or she moved out of the parent's home and into the new household. Only at that time could the "child" claim independent rights. Until that time, rights, as well as possessions, were held in trust by the child's father.[44] The child owed the parent not only income, but also obedience. The father had the duty to educate his children, provide religious instruction and example[45] and support them financially. Discipline was carried out in the home—if the child was a problem, the remedy was the chastisement of the father.[46] Alternatively, the parent could force the child to enter the priesthood or military service or could apprentice the child, collecting wages *ex ante*. Even very young children came to the United States as indentured servants[47] or served in the military as cabin boys or drummers. Orphaned children were wards of the parish, frequently growing up in workhouses in Dickensonian misery.

Perspectives on the Government Regulation of Children and Parents in POLICY AND CONTROL: STATUS OFFENDERS IN THE JUVENILE COURT 1 (Lee Teitelbaum & Adrian R. Rough, eds. 1977)).

42 In medieval times, children of wealthy families were often sent to "foster" in another home. In part this practice arose because of high infant mortality, as well as to give both parents the freedom to perform their accustomed functions. *See, e.g.*, PHILIPPE ARIES, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE (1962). Less wealthy children, particularly boys, were apprenticed by age 10 to learn trades. Jamil S. Zainaldin, *The Emergence of a Modern American Family Law 1706-1851*, 73 NW. U. L. REV. 1038 (1979). They could also be indentured "solely because of the parents' poverty." Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 435 (1983); Yasuhide Kawashima, *Adoption in Early America*, 20 J. FAM. L. 677, 682-83 (1981-82).

43 In ancient Rome, adoption prevented the extinction of a bloodline. Zainaldin, *supra* note 42, at 1041 (tracing the status of adoption back to its origins in early civilization). *See also* Leo A. Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 74 (1956) (noting that "adoption is one of the oldest and most widely employed of legal fictions") (citation omitted).

44 *See generally* Comment, *The Rights of Children: A Trust Model*, 46 FORDHAM L. REV. 669 (1978).

45 MICHAEL GROSSBERG, GOVERNING THE HEARTH 5 (1985); Zainaldin, *supra* note 42, at 1052-68.

46 SUTTON, *supra* note 41, at 11; Lawrence Sidman, *The Massachusetts Stubborn Child Law*, 6 FAM. L.Q. 33 (1972).

47 GROSSBERG, *supra* note 45, at 260-61.

The idea that custody might be less of a right and more of a trust developed during the mid-nineteenth century. By this time, childhood itself was viewed as a separate stage of growth.[48] Education outside the home was common, and most children no longer worked in factories. A series of American cases suggested that if parents were abusive, children could be placed elsewhere with adoptive parents.[49] Despite the possibility that the state might act in *parens patriae*,[50] the idea that children might have independent rights took another hundred years to develop. As recently as 1953,[51] the Supreme Court decided a case involving child custody jurisdiction, noting that the parent's right to custody was a personal right more precious than alimony. The children's interest was never mentioned at all.[52]

The first real suggestion of autonomy came in the 1960s, when the Supreme Court indicated that school children had independent First Amendment rights.[53] By the next decade, minor's rights included the right to seek contraception and abortion without parental consent.[54] A separate opinion in a Supreme Court case involving compulsory education suggested that minors might possess

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48 ARIES, *supra* note 42, at 32.

49 Zainaldin, *supra* note 42, at 1061-64. The first statute to provide for adoption was the Act to Provide for the Adoption of Children, MASS. REV. STAT. ch. 324 (1851). Dickson, *supra* note 8, at 924 n.34. Before this, children were frequently "adopted" through private legislation. Zainaldin, *supra* note 42, at 1043. This practice closely resembles the legislative divorce, a detailed description of which appears in Lawrence Friedman, *Rites of Passage: Divorce Laws in Historical Perspective*, 63 OR. L. REV. 649, 651-54 (1984).

50 The state began to replace the parent's educational function beginning in the late nineteenth century with compulsory education laws. For a discussion of compulsory education, see Wisconsin v. Yoder, 406 U.S. 205, 226 (1972). *See generally* Zainaldin, *supra* note 42, at 1050.

51 *See* May v. Anderson, 345 U.S. 528 (1953).

52 *Cf.* Perry v. Ponder, 604 S.W.2d 306, 313 (Tex. Civ. App. 1977) (child's domicile plus that of one parent provides the basis for a custody action).

53 *See* Tinker v. Des Moines Ind. Sch. Bd., 393 U.S. 503 (1969) (overturning a regulation by a local school board which prohibited students from wearing black armbands to protest the Vietnam War. The Supreme Court held that such a regulation would be invalid where there was no indication beforehand that the prohibited conduct would reasonably lead school administrators to conclude that substantial disruption or material interference with school activities was likely to occur).

54 *See* Carey v. Population Servs., 431 U.S. 678 (1977) (birth control); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976); Belotti v. Baird, 443 U.S. 622 (1979) (mature minors). For further discussion on this area, see generally Comment, *Adjudicating What Yoder Left Unresolved-Religious Rights for Minor Children After* Danforth *and* Carey, 126 U. PA. L. REV. 1135 (1978).

independent religious rights as well.[55]

Meanwhile, states were changing their adoption and custody laws. As children approached the age of reason, their preference of custodians was to be an important factor.[56] Frequently, in cases involving termination of parental rights, states provided for guardians *ad litem* to represent the children's interests.[57] A uniform law made the child's home state, not either parent's domicile, the appropriate forum in nearly all custody cases.[58]

The next decade saw still further extension of children's rights. Now, according to some courts, minors could exert a privacy interest in their own homes and possessions.[59] Statutes gave them the right to independently seek medical care where they might wish to keep the information private.[60] They could sue their parents in tort for unintentional wrongs[61] or those so "extreme and outrageous" as to violate the essential bonds between parent and child.[62]

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55 *See* Wisconsin v. Yoder, 406 U.S. 205, 249 (1972) (Douglas, J., dissenting).

56 *See, e.g.*, Sanford Katz et al., *Emancipating Our Children — Coming of Legal Age in America*, 7 FAM. L.Q. 211, 216-17 (1973); Carol Sanger & Eleanor Willemsen, *Minor Charges: Emancipating Children in Modern Times*, 25 U. MICH. J.L. REF. 239 (1992) (providing a full discussion of the range of options which become available to a person upon reaching the age of majority).

57 For a discussion on the authority vested in a guardian *ad litem* and the desirability of providing separate representation to a child involved in family litigation, see Stanley v. Fairfax County Dept. Social Servs., 395 S.E.2d 119 (Va. Ct. App. 1990); Landsman & Minow, *supra* note 38 at 1129-34.

58 The UNIFORM CHILD CUSTODY JURISDICTION ACT, now adopted by Congress in the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1990).

59 *See, e.g., In re* Scott K., 595 P.2d 105 (Cal. 1979) (parent of minor cannot consent to search of minor's locked toolbox over objection of minor); State v. Douglas, 498 A.2d 363 (N.J. Super. Ct. App. Div. 1985) (to determine validity of consent to search of minor's room, state must prove that defendant's mother possessed sufficient interest in the premises for which the search is authorized).

60 *See, e.g.*, VA. CODE ANN. § 54.1-2969(D) (Michie Supp. 1993) (conferring authority to consent to treatment to minor separated from custody of parent in certain specifically enumerated circumstances); WALTER WADLINGTON, CASES AND MATERIALS ON DOMESTIC RELATIONS 683 (2d ed. 1991); Walter Wadlington, *Minors and Health Care: The Age of Consent*, 11 OSGOODE HALL L.J. 115 (1973).

61 Abrogation of immunity began with automobile accident cases where there was insurance, *see* Goller v. White, 122 N.W.2d 193 (Wisc. 1963), but has spread to include many household accidents as well. *See generally* Reid H. Hamilton, Comment, *Defining the Parent's Duty After Rejection of Parent-Child Immunity*, 33 VAND. L. REV. 775 (1980). Parental immunity apparently originated with the intentional tort case of Hewlett v. George, 9 So. 885, 887 (Miss. 1891).

62 Mahnke v. Moore, 77 A.2d 923 (Md. 1951) (holding that a child could maintain a tort action against a parent where tortious acts committed by parent evinced a total

A few custody cases were now couched in terms of the child's right to parental custody rather than the converse.[63] However, in adoption and termination cases, courts have extended the power of natural parents.[64] As a result of the difficulty in proving permanent parental unfitness,[65] coupled with the exponential growth of the social work caseload,[66] infertile couples have experienced increasing adversity in their effort to adopt children. The number of potential adoptive parents has grown as more women have entered the labor force and delayed pregnancy, but this tendency is counteracted to some extent by technological progress in the area of infertility. Probably the most important change in the supply of children for the adoption market is the ready availability of abortion.[67]

The 1990's have seen the first obvious attempts by children to secure their own custodial placement.[68] Although Gregory Kingsley was ultimately unsuccessful in divorcing his birth parents so that

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abandonment of the parental relationship). *See also* Burnett v. Wahl, 588 P.2d 1105 (Or. 1978) (psychological and physical abuse leading to emotional harm held not to present a viable cause of action).

63 *See, e.g.*, Malpass v. Morgan, 192 S.E.2d 794 (Va. 1972) (holding that evidence showing tension between divorced natural parents leading to some reaction on part of child was not sufficient to show that natural father's refusal to consent to adoption of child by natural mother's husband was contrary to best interest of child without proof that continuing relationship between child and natural father would be detrimental to child's welfare).

64 *See* Stanley v. Illinois, 405 U.S. 645 (1972) (invalidating state statute which permitted state agency to terminate an unmarried father's parental rights without a hearing, while mandating such a hearing before termination of parental rights of divorced parents or unmarried mother).

65 *See* Santosky v. Kramer, 455 U.S. 745 (1982) (holding that due process requires state to prove parental unfitness in termination proceedings by the "clear and convincing" evidence standard); Lassiter v. Department Social Servs., 452 U.S. 18 (1981) (holding that while due process does not require appointment of counsel for indigent parents in all termination proceedings, such appointment is necessary in situations of strong parental interest and weak governmental interest where the risk of error is great).

66 This has occurred in part because of the increase in drug usage by parents and in part because of the new abuse reporting requirements. *See, e.g.*, VA. CODE ANN. § 2.1-380 (Michie 1993) (mandating investigation of any abuse complaint).

67 ADOPTION FACTBOOK, *supra* note 8, at 96 (noting that in 1986, there were only 15.5 infant adoptions for every thousand abortions). The right of a woman to terminate a pregnancy was deemed to be protected by a constitutional right of privacy in Roe v. Wade, 410 U.S. 113 (1973).

68 This practice, however, was not unheard of prior to this decade. For an earlier example, see Polovchak v. Meese, 774 F.2d 731 (7th Cir. 1985) (minor Russian immigrant sought asylum in United States after his parents returned to Soviet Union).

he could be adopted by his foster family,[69] Kimberly Mays did succeed in preventing visitation by her natural parents.[70] However, the third well-publicized case, *In re Clausen*,[71] (the Baby Jessica Case), illustrates the expanded power of natural parents, particularly unwed fathers, to withhold consent for adoption. Despite more than two years' placement in a suitable adoptive home, Jessica was returned to her natural parents. This return was compelled despite the fact that it was Jessica's mother's deception that created the loophole which voided adoption.[72] In a Supreme Court case,[73] a conclusive presumption of legitimacy ultimately meant that an unwed natural father had no custodial rights to the daughter he sired in an affair with a married woman. This was another case in which the majority de-emphasized the rights of the child as compared to the warring adults in her life.[74]

Thus courts, as well as legislators and economists, tend to place greater emphasis on parental rights than on those of the chil-

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69 Kingsley v. Kingsley, 623 So.2d 780 (Fla. Dist. Ct. App. 1993). In this well publicized "parental divorce" case, the natural parents' parental rights were terminated because of their neglect, but through state intervention rather than the initiation by Gregory himself.

70 Twigg v. Mays, No. 88-4489-CA-01, 1993 WL 330624 (Fla. Cir. Ct. Aug. 18, 1993). This rather bizarre case began when the Mays' and Twiggs' children were switched at birth in a Florida hospital. The Twiggs' parental rights to Kimberly were never severed. The mistake was not uncovered until the child raised by the Twiggs became ill and died. Post-mortem examination revealed that the Twiggs were not the parents of the child they had raised. Upon discovery of the identity of the child they had parented, they attempted to establish a relationship with Kimberly, who was then 10 years old. Until that time, Kimberly had lived her entire life believing that Robert Mays was her natural father.

71 502 N.W.2d 649 (Mich. 1993).

72 The court ruled that "[w]hile a child has a constitutionally protected interest in family life, that interest is not independent of its parents' in the absence of a showing that the parents are unfit." *Id.* at 652. The dissent argued that

> The superior claim of the child to be heard in this case is grounded not just in law, but in basic human morality. . . . This Court, by ignoring obvious issues concerning the welfare of the child and by focusing exclusively on the concerns of competing adults, as if this were a dispute about the vesting of contingent remainders, reduces the PKPA [Parental Kidnapping Prevention Act] to a robot of legal formality with results that Congress did not intend.

Id. at 670-71 (Levin, J., dissenting).

73 Michael H. v. Gerald D., 491 U.S. 110 (1989).

74 *Id.* at 132-34 (Stevens, J., concurring). This point was not missed by Milton Regan in FAMILY LAW AND THE PURSUIT OF INTIMACY 135 (1993).

dren they purport to help.[75] Mindful of this situation, we turn finally to revocation of consent for adoption. Again it will be seen that courts show a pattern of concern for natural parents' rights even when these conflict with those of the child.

III. Rights to Revoke Consent

Although some children enter the adoption market when their parents are found unfit, the vast majority begin the process after their parents voluntarily relinquish parental rights. This relinquishment procedure is also called "voluntary consent to adoption."[76] Because there is no federal regulation or even federal court review of child custody matters,[77] each state has adopted its own scheme. Accordingly, the result is the tremendous variation in practice which is typical of family law.

Although adoption itself is a creature of statute,[78] (which, consequently, compels each state to spell out the requirement of parental consent), the conditions for revocation are not always explicit. In these states, the general consent law has been interpreted by judicial decisions. Some state adoption systems treat consent for adoption much like an agreement to any other contract. In these states, once a parent has given valid consent, the transaction becomes irrevocable.[79] The rationale underlying the system in these states, to the extent that such is available, is typified by the Mississippi case of *C.C.I. v. Natural Parents.*[80] In this case, the

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[75] As the New York Court of Appeals stated in Bennett v. Jeffreys:

> This shifting [of emphasis] reflects the more modern principle that a child is a person, and not a subperson over whom the parent has an absolute possessory interest. A child has rights too, some of which are of constitutional magnitude. . . . Earlier cases . . . emphasized the right of the parent superior to all others, to the care and custody of the child.

356 N.E.2d 277, 281 (N.Y. 1976) (citations omitted).

[76] ADOPTION FACTBOOK, *supra* note 8, at 34. One must guard against the possibility that consent may in some cases occur when a parent is threatened with termination of rights in a child already in foster care. Conversation with Victor Flango, Center for the Study of State Courts.

[77] Ankenbrandt v. Richards, 112 S. Ct. 2209 (1992) (restating general principle that federal courts do not have jurisdiction over family related causes of action).

[78] *See, e.g.,* Clarkson v. Bliley, 38 S.E.2d 22, 26 (Va. 1946); *see generally* Zainaldin, *supra* note 42, at 1084.

[79] The three states are: Massachusetts, MASS. GEN. LAWS ch. 210, § 2 (West 1987); Mississippi, MISS. CODE ANN. § 93-17-9 (1990); C.C.I. v. Natural Parents, 398 So. 2d 220 (Miss. 1981); and Utah, UTAH CODE ANN. § 78-30-4.3 (1989).

[80] 398 So. 2d at 226 (unrestricted right to challenge surrender would result in

Mississippi Supreme Court held that:

> If a parent is allowed an unrestricted right to challenge his act of surrender, uncertainty and confusion among adoption agencies would undoubtedly result, making placement more difficult which would be detrimental to the children involved as well as to the public welfare. The statutory safeguards are themselves sufficient to guard against a hastily made decision.[81]

On the spectrum running from child's to natural parents' rights, the next group of states lists short time periods for revocation, running from ten to thirty days after valid consent is given.[82] This gives some time for the natural parent to have a change of heart,[83] but the time period is short enough that neither the child nor the adoptive parents will be greatly injured by revocation. As one state court put it recently:[84]

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uncertainty and confusion among parties involved in adoption transaction, making placement more difficult, to the detriment of children and the public welfare).

81 *Id.* at 225-26 (where the court determined that revocation was possible where legal grounds supporting revocation were established by clear and convincing evidence). *See also* Golz v. Children's Bureau of New Orleans, Inc., 326 So.2d 865, 869 (La. 1976) (noting that where parents are fully aware of the content and effect of the instrument the consent represents a free and deliberate exercise of will and must be given full legal effect).

82 Eight states fit into this category. These are: Alaska, ALASKA STAT. § 25.23.070 (1991) (10 days if in best interests); Arkansas, ARK. CODE ANN. § 9-9-209 (Michie 1993) (10 days); Delaware, DEL. CODE ANN. tit. 13, § 909 (Michie 1993) (10 days); Georgia, GA. CODE ANN. § 19-8-26 (Michie 1991) (10 days); Kansas, Treiber v. Strong, 617 P.2d 114 (Kan. Ct. App. 1980); Maryland, MD. FAM. LAW CODE ANN. § 5-311 (Michie 1991) (30 days); Michigan, MICH. COMP. LAWS § 710.29 (West 1993) (20 days prior to placement if in best interests of child); *In re* Blankenship, 418 N.W.2d 919 (Mich. Ct. App. 1988); and Oklahoma, OKLA. STAT ANN. tit. 10, § 60.10 (West 1987) (30 days if in best interests).

83 These changes of heart, or at least regret, are nearly inevitable for natural parents who relinquish their children. As an Indiana judge said in Johnson v. Cupp:

> [S]uch consents [before the birth of the child] fail to allow for one of nature's strongest instincts. Who knows what the reaction will be of a mother once she sees *her* baby? . . . To deny the mother's natural desire to keep her baby is in derogation of the purpose of our statute to preserve the natural family relationship to the fullest extent possible.

274 N.E.2d 411 (Ind, Ct. App. 1971) (Buchanan, J., dissenting) (citations omitted). Regret occurs even when the fact that the child will be placed for adoption is known before conception, as can be seen from recent surrogacy cases. *See In re* Baby M., 537 A.2d 1227 (N.J. 1988) (emphasizing birth mother's attachment to child as made evident from the moment of birth); Johnson v. Calvert, 851 P.2d 776, 778 (Cal. 1993) (finding that woman who carried to term another woman's fertilized egg pursuant to a surrogacy agreement had no parental rights to child).

84 *Blankenship*, 418 N.W.2d at 922 (citations omitted).

> After petitioners voluntarily released their child for adoption, they did not have an absolute right to revoke the release for a mere change of heart; the release could be set aside only in the sound discretion of the probate judge, based on the best interests of the child.[85]

Another group of states has very strict revocation requirements, but does not make consent irrevocable. These state statutes provide that there can be no revocation except in cases where consent was obtained by fraud, duress or coercion.[86] In such cases, the consent

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[85] *Id.* The dissenting opinion in this case argued that before placement, petitions for revocation are made prior to the creation of any parental rights in prospective adoptive parents. As such,

> the real parties in interest at the time of the rehearing are the State . . . and the parents of the child. The state's interest is to see that the child's basic needs are met. The parents' interest encompasses their obligation to provide for the many needs of their child. The interests of the state and the parents are therefore not necessarily in conflict and the judge's revocation of a parental release, if done within the time allowed by law, may very well serve the interests of both parents and the state. Further, as no rights of prospective adoptive parents have accrued at the time of the petition, a strong presumption must exist that at rehearing the child's best interest would be served by allowing the parents to exercise their parental rights and obligations.

Id. at 924 (Kirwan, J., dissenting).

[86] These 20 states include Alabama, ALA. CODE § 26-10A-14 (1992) (fraud or mistake); Connecticut, CONN. GEN. STAT. § 17a-112 (1992); Bailey v. Mars, 87 A.2d 388 (Conn. 1952) (fraud or coercion and in best interests); Florida, FLA. STAT. ANN. § 63.082 (West 1992) (fraud or duress); Idaho, IDAHO CODE § 16-1504 (1993) (fraud, duress or undue influence); *In re* Steve D.B., 723 P.2d 829 (Idaho 1989); Illinois, ILL. ANN. STAT. ch. 50, para. 11 (Smith-Hurd 1993) (within 12 months if fraud or duress); Maine, *In re* David, 256 A.2d 583 (Me. 1969) (fraud, duress, mistake and final decree not entered); Minnesota, MINN. STAT. ANN. § 259.24(6)(a) (West 1992) (fraud); Missouri, MO. REV. STAT. § 453.056 (1986) (for cause); *In re* Mayernick, 292 S.W.2d 562 (Mo. 1956); Nebraska, NEB. REV. STAT. § 43-104 (1986) (reasonable time before accepted); Kellie v. Lutheran Fam. Serv., 305 N.W.2d 874 (Neb. 1981); Nevada, NEV. REV. STAT. ANN. § 127.080 (Michie 1993) (fraud); Blanchard v. Nevada Welfare Dep't, 542 P.2d 737 (Nev. 1975); New Jersey, N.J. STAT. ANN. § 9:2-16 (West 1992) (fraud, duress or misrepresentation); New Mexico, N.M. STAT. ANN. § 32A-5-17 (Michie 1993) (involuntary or fraud before final decree); *In re* Kira M., 864 P.2d. 803 (N.M. Ct. App. 1993); Rhode Island, R.I. GEN. LAWS § 15-7-6 (1988) (misrepresentation); *In re* Julie, 334 A.2d 212 (R.I. 1975); South Carolina, S.C. CODE ANN. § 20-7-1720 (Law. Co-op. 1992) (before final decree if in best interests and fraud or duress); Johnson v. Horry Co., 380 S.E.2d 830 (S.C. 1989); Vermont, VT. STAT. ANN. tit. 15, § 432(b) (1989) (fraud, duress, coercion or undue influence); *In re* M. & G., 321 A.2d 19 (Vt. 1974); Virginia, VA. CODE ANN. § 63.1-225 (Michie Supp. 1993) (before final order upon fraud or duress; after placement only upon mutual consent); Washington, WASH. REV. CODE § 26.23.160 (1992) (within one year for fraud, duress, or incompetence); West Virginia, W. VA. CODE § 48-4-5 (Michie 1992) (fraud or duress); Wisconsin, WIS. STAT.

itself is involuntary. The extent to which such states look to the best interests of children in rapid and certain placement depends upon their definition of fraud, duress or coercion. If the states require a standard similar to the commercial contracts definition of fraud, for example, the defrauding conduct would have to induce performance, would have to involve a material fact, and would have to be performed by the other party to the transaction.[87] In adoption cases this is usually a state agency, but in direct placement cases it might be the adoptive parents themselves. This restrictive definition of the conditions in which revocation is possible tends to value children's rights as opposed to those of the natural parents. In fact, those statutes that provide for no revocation except in cases of fraud and coercion have restrictive definitions. For example, in *Bailey v. Mars*,[88] the court noted that:

> In the absence of fraud, coercion or other cause rendering the mother's consent inoperative, the fact that after signing an adoption agreement she has changed her mind and attempted to withdraw her consent would not relieve her of her agreement. This would, however, become a very vital fact for the consideration of the Probate Court in determining whether under all of the circumstances the adoption would be for the best interest of the child and so should be approved.[89]

Those states that permit revocation before the final decree lie on the opposite end of the parents' rights spectrum.[90] Since the adop-

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ANN. § 48.46 (West 1990) (involuntary consent); *In re* D.L.S., 332 N.W.2d 293 (Wis. 1983); Wyoming, WYO. STAT. § 1-22-109(d) (1988) (fraud); *In re* T.R. & J.S., 777 P.2d 1106 (Wyo. 1982) (duress).

87 Laidlow v. Organ, 15 U.S. 178, 195 (1817) (seller of tobacco witheld information that would have affected price buyer was willing to pay). *See generally* Anthony Kronman, *Mistake, Disclosure, Information and the Law of Contracts*, 7 J. LEGAL STUD. 1 (1978); Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67 (1973).

88 87 A.2d 388 (Conn. 1952). *See also In re* Steve B.D., 723 P.2d 829, 835 (Idaho 1978) (holding that in an absence of fraud, duress or undue influence, "the general rule favoring natural parents is inoperative and rather a judicial inquiry is triggered [to determine] the best interest of the child").

89 *Bailey*, 87 A.2d at 392.

90 There are 12 "natural parent's rights" states. Note the relatively large amount of appellate litigation surrounding these statutes, which is generally believed to be a strong indication of uncertainty. For further examination of this principle, see George L. Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). The relevant states are: Arizona, ARIZ. REV. STAT. ANN. § 8-538 (West 1991); Webb v. Charles, 611 P.2d 562 (Ariz. Ct. App. 1980) (upon parent's withdrawal); Indiana, IND. CODE ANN. § 31-3-1-6(f) (West 1989) (before final decree if in

tion process may take years, and usually must take at least six months, bonds between the child and adoptive parent are almost certain to form.[91] In such states, a typical case will allow revocation in circumstances that would not suffice for revocation of a commercial contract. For example, commercial contracts allow revocation for duress only when there is a threat by the other party to the contract.[92] The threat must usually be of a severe physical sort that would clearly cause a

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best interest of the child); Rhodes v. Shirley, 129 N.E. 60, 64 (Ind. 1955); Iowa, IOWA CODE ANN. § 660.7 (West 1981) (prior to final decree upon filing of consent to withdraw); Kentucky, KY. REV. STAT. ANN. § 199.540 (Michie/Bobbs-Merril 1991) (before final judgment; not after two years thereafter except for ethnology); Montana, MONT. CODE ANN. § 40-6-135(6) (1993) (before final placement if social services joins); *In re* Termination of Parental Rights of L.A.C. & D.S.C., 718 P.2d 660 (Mont. 1986); New Hampshire, N.H. REV. STAT. ANN. § 170-B:1 (1990); Adoption of Baby C., 480 A.2d 101 (N.H. 1984) (before final decree if in best interests); New York, N.Y. DOM. REL. LAW § 111 (McKinney 1994) (in best interests before final decree); Dickson v. Lascaris, 423 N.E.2d 361 (N.Y. 1981); North Carolina, N.C. GEN. STAT. § 48-11 (Michie 1993) (within 30 days of interlocutory decree); *In re* Kasim, 293 S.E.2d 247 (N.C. Ct. App. 1982); North Dakota, N.D. CENT. CODE § 14-15-08 (Michie 1991) (before final decree if in best interest of child); Oregon, OR. REV. STAT. § 109.312(2) (1993) (before final decree; also may sign special form making consent irrevocable except for fraud or duress); Small v. Andrews, 530 P.2d 540 (Or. Ct. App. 1975); Pennsylvania, 23 PA. CONS. STAT. § 2711 (1993) (prior to entry of final decree); and Texas, TEX. FAM. CODE ANN. § 16.06 (West 1986) (before final decree).

91 *See, e.g.*, New York *ex rel.* Scarpetta v. Spence-Chapin Adoption Serv., 269 N.E.2d 787 (N.Y.), *cert. denied*, 404 U.S. 805 (1971) (deciding that the interest of the newborn would be best served by reuniting the child with the natural mother). See also Bennett v. Jeffreys, 356 N.E.2d 277 (N.Y. 1976), where the New York Court of Errors and Appeals determined that:

> The parent has a "right" to rear its child, and the child has a "right" to be reared by its parent. However, there are exceptions created by extraordinary circumstances . . .
>
> The day is long past in this State . . . when the right of a parent to the custody of his or her child, where the extraordinary circumstances are present, would be enforced inexorably, contrary to the best interest of the child, on the theory solely of an absolute legal right.

Id. at 281. The court further noted that "the child may be so long in the custody of the nonparent that, even though there has been no abandonment or persisting neglect, by the parent, the psychological trauma of removal is grave enough to threaten destruction of the child." *Id.* at 284.

Professor Lewis Kornhauser of New York University Law School put it in a slightly different context. He stated that their utility functions become interdependent, so that the usual assumption of convex indifference curves no longer holds. Lewis A. Kornhauser, *Great Image of Authority*, 36 STAN. L. REV. 349, 361 n.38 (1984).

92 *See, e.g.*, Wartz v. Fleichman, 278 N.W.2d 266, 270-72 (Wis. 1978) (analyzing the elements of duty in economic duress cases and the requisite elements to find a breach of that duty); POSNER, 4th ed., *supra* note 1, § 4.7, at 113-17; RESTATEMENT (SECOND) OF CONTRACTS § 175 (1957) (setting forth the factors necessary for one to seek relief under this theory).

reasonable person to enter into a contract where he would not otherwise. The threat cannot be one of ordinary economic circumstances.[93] As the court said in *C.C.I. v. Natural Parents*,[94]

> There is no doubt that John and Jane [pseudonyms] were not free from emotions, tensions and inescapable anxieties which resulted from her pregnancy during the time preceding their marriage. No doubt almost any person situated as they were would experience emotional trauma, but there is no law to the effect that surrender of a child is valid only if done without such distress. If such were the law almost any child surrender and subsequent adoption decree could be attacked.[95]

In a natural "parent's rights" revocation state, duress may be the type of hardship most single parents of unplanned children experience.[96]

In between the two extremes are a number of states that allow revocation before final placement or within longer time periods following consent.[97] Physical or psychological harm to children (and, at the same time, to adoptive parents) occurs when natural parents are permitted to revoke consent long after it has been given. In addition, there will be other, market-driven effects. Although we join those commentators and judges who have condemned lengthy revocation periods due to the harm done to the parties involved,[98] we concen-

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93 *See, e.g.*, Chouinard v. Chouinard, 568 F.2d 430, 434-35 (5th Cir. 1978) (listing four factors before duress relieves contractual responsibility).

94 398 So. 2d 220 (Miss. 1980).

95 *Id.* at 224.

96 *See, e.g., In re* Susko, 69 A.2d 132 (Pa. 1949) (duress encountered by unwed mother result of her brothers' accusations and hostility, not those of adoptive parents or agency); *cf.* Meyers v. State, 183 S.E.2d 44 (Ga. Ct. App. 1971) (unplanned pregnancy caused economic stress and embarrassment; also, due to peculiar circumstances, baby left by mother in phone booth held not to have been abandoned).

97 The remaining seven states belong in this category. They are California, CAL. FAM. CODE § 8814.5 (West Supp. 1994) (120 days, or if waiver is executed in department); Colorado, COLO. REV. STAT. ANN. § 19-5-203 (West 1990) (six months); *In re* Custody of C.C.R.S., 1993 Colo. App. LEXIS 311 (divorce rules); Hawaii, HAW. REV. STAT. § 578-2(f) (1989) (before final placement or in best interests); Iowa, IOWA CODE ANN. § 660.7 (West 1981) (prior to final decree upon filing of consent to withdraw); Louisiana, LA. REV. STAT. ANN. § 9-429 (West 1991) (if in best interests); Ohio, OHIO REV. CODE ANN. § 310 (Baldwin 1992) (best interests); Morrow v. Family & Community Serv. of Catholic Charities, Inc., 504 N.E.2d 2, 5 (Ohio 1986) (discussing requirement that adoption consent form must be signed voluntarily), and Tennessee, TENN. CODE ANN. § 36-1-117 (1992) (before interlocutory order in best interests; before petition for any reason).

98 *See, e.g.*, Guardianship of Phillip B., 188 Cal. Rptr. 781 (Cal. Ct. App. 1983) (affirming guardianship petition to avert potential harm to the minor which was deemed to be the likely result of continued parental custody); Henry H. Foster, Jr., *Adoption*

trate here on another effect of revocation. Adoptive parents have other sources of children. For example, they may resort to the black market, where, if the price is high enough, certainty can be purchased. Further, parents insecure about the stability of adoptions in their own states can look for children from other states or foreign countries. Because they are so eager to raise children, adoptive parents as a group tend to be exceptionally well informed. They will discover placements initiated in other states, and a quasi legal intermediary mechanism flourishes.[99] Finally, although we have no way to quantify this behavior, some parents may be so wary of the market, particularly if they have gone through one unsuccessful placement, that they withdraw altogether.

Alternatively, because of the natural parent's relative market power,[100] she can behave opportunistically, extracting consumer surplus from the adoptive parents.[101] These additional payments might range from concessions by the natural parent to visitation after adoption,[102] or listing in an adoption registry.[103] Where legal, the payments might be more direct, such as greater reimbursement for prebirth expenses or loss of income.

Because there are alternatives to in-state adoptions, we can make

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and Child Custody: Best Interest of the Child, 22 BUFF. L. REV. 1, 12-13 (1972); GOLDSTEIN ET AL., *supra* note 14 at 53-64.

99 In many states, potential natural and adoptive parents can both advertise. ADOPTION FACTBOOK, *supra* note 8, pp. 22-33 question 7, reveals 32 states. For examples of such advertisements, see *Id.* at 121-22.

100 The number of adoptable children is very small. If she does not place with this set of parents, it will be easy to secure another set to adopt her baby. The adoptive couple, on the other hand, must start anew in its wait for a baby. For example, in metropolitan Vancouver, 30 newborn children were available for adoption, while 1000 couples were approved and ready to receive an adopted child. Prichard, *supra* note 2, at 343.

101 This particular element of human behavior is detained in Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521 (1981); Brinig & Crafton, *supra* note 6. For additional discussion on opportunism in the family law arena, see Lloyd Cohen, *Marriage, Divorce and Quasi-Rents, Or "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267 (1987).

102 *See, e.g., In re* Gregory B., 542 N.E.2d 1052, 1058-59 (N.Y. 1989) (acknowledging the growing acceptance of open adoption, especially in the case of older children); Curt Suplee, *The Ties That Bind: The Case for "Open" Adoption*, WASH. POST, July 17, 1990, at B4, col. 1 (reviewing LINCOLN CAPLAN, AN OPEN ADOPTION (1990)). *See also supra* note 100.

103 This would permit contact with the child upon reaching adulthood. John M. Stoxen, Comment, *The Best of Both "Open" and "Closed" Adoption Worlds: A Call for the Reform of State Statutes*, 13 J. LEGIS. 292 (1986).

several economic predictions about the adoption market as it is affected by the transactions cost of consent revocation. If natural parents find it relatively easy to revoke consent, there should be fewer in-state adoptions because the adoptive parents do not want to accept the increased risk.[104] There should also be more foreign adoptions and more adoptions from out of state. This last consequence is reflected in the ratio of adoptions in-state (as revealed by court data) to the number of children born in the state whose birth certificates are altered after adoption (revealed in data kept by state bureaus of vital statistics). In fact, some states are net importers of adoptees (the numerator) while others export them (denominator exceeds numerator).

IV. Empirical Results: Adoption and Revocation Statutes

In order to begin an empirical analysis of the effect of adoption revocations on the number of adoptions, it was first necessary to categorize state revocation statutes. The author examined each state statute involving consent and revocation. When the statute provided a specific time period, this value was entered. Other states had no numerical provision, but language such as "in cases of fraud or duress." Some states had no statutory provision, but had case law providing relevant standards. Each state received a numerical "score" ranging from 0 to 500.[105] The set of resulting scores, with sources for the standards, follows as Table I:

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104 See, e.g., Dickson, *supra* note 8, at 917, where the author notes that "existing law and agency practices place overly burdensome risks on adopters and inappropriately fail to consider their interests even after the adoption process is underway."

105 States explicitly disallowing revocation received a score of zero. See *supra* note 79 for the list of these states. States with explicit revocation periods were given the value of the length of the period. See *supra* note 82, (list of states with short periods), and *supra* note 97 (longer periods). If withdrawal of consent is allowed before placement with the adoptive family, or the statute allowed withdrawal only if there was fraud and coercion, the state was awarded a 50, as in the states listed *supra* note 86. If withdrawal is allowed before the final decree in the best interests of the child, the value was 75. See *supra* note 97 for the inventory of the states fitting this criteria. If a parent can withdraw consent any time before the final adoption decree, the value is 360, and the list appears at *supra* note 97. If the parent may withdraw consent at any time, I awarded a score of 500.

State	Statute	Time Period and Grounds	Cases	Score
Alabama	Ala. Code § 26-10A-14 (1992)	before final decree if fraud, mistake; not after 1 year after final decree unless kidnapped		50
Alaska	Alaska Stat. § 25.23.070 (1991)	within 10 days or after 10 days & before final decree if in best interests		10
Arizona	Ariz. Rev. Stat. § 8-538 (West 1991)	upon parent's withdrawal	*Webb v. Charles*, 611 P.2d 562 (Ariz. Ct. App. 1980)	500
Arkansas	Ark Code Ann. § 9-9-209 (Michie 1993)	within 10 days		10
California	Cal. Fam. Code § 8814.5 (West Supp. 1994)	120 days; or waiver of right to revoke executed in department		120
Colorado	Colo. Rev. Stat. Ann. § 19-5-203 (West 1990)	not after 6 months	*In re Custody of C.C.R.S.*, 1993 Colo. App. LEXIS 311	180
Connecticut	Conn. Gen. Stat. § 17a-112 (1992)	none without fraud or coercion and in best interests	*Bailey v. Mars*, 87 A.2d 388 (Conn. 1952)	50
Delaware	Del. Code Ann. tit. 13, § 909 (Michie 1993)	within 10 days		10
Florida	Fla. Stat. Ann. § 63.082 (West 1992)	none except where fraud or duress		50
Georgia	Ga. Code Ann. § 19-8-26 (1991)	within 10 days		10
Hawaii	Haw. Rev. Stat. § 578-2(f) (1989)	before placement or in best interests		50
Idaho	Idaho Code § 16-1504 (1993)	none without fraud, duress, or undue influence	*Petition of Steve D.B.*, 723 P.2d 829 (Idaho 1989)	50
Illinois	Ill. Ann. Stat. Ch. 50, para. 11 (Smith-Hurd 1993)	none; except within 12 months of consent if fraud or duress		50
Indiana	Ind. Code Ann. § 31-3-1-6(f) (West 1989)	before final decree if in best interests	*Rhodes v. Shirly*, 129 N.E. 60, 64 (Ind. 1955)	75
Iowa	Iowa Code Ann. § 660.7 (West 1981)	prior to final decree upon filing of consent to withdraw		180
Kansas	no statute	no withdrawal	*Treiber v. Strong*, 617 P.2d 114 (Kan. Ct. App. 1980)	0
Kentucky	Ky. Rev. Stat. Ann. § 199.540 (Michie/ Bobbs-Merril 1991)	before final judgment; no attack after 2 years except for ethnology		360
Louisiana	La. Rev. Stat. Ann. § 9-429 (West 1991)	if in best interests		80

Maine	no statute only if fraud duress mistake and final decree not entered		*In re David*, 256 A.2d 583 (Me. 1969)	50
Maryland	Md. Fam. Law Code Ann § 5-311 (Michie 1991)	within 30 calendar days		30
Massachusetts	Mass. Gen. Laws Ann. Laws ch. 210, § 11A (West 1987)	none		0
Michigan	Mich. Comp Laws § 710.29 (West 1993)	within 20 days, prior to placement; best interests	*In re Blankenship*, 418 N.W.2d 919 (Mich. Ct. App. 1988)	20
Minnesota	Minn. Stat. Ann. § 259.24(6)(a) (West 1992)	within 10 days any reason; afterwards for fraud		10
Mississippi	Miss. Code Ann. § 93-17-9	none	*C.C.I. v. Natural Parents*, 398 So. 2d 220 (Miss. 1981)	0
Missouri	Mo. Rev. Stat. § 453.050 (1986)	for cause at the court's discretion	*In re Mayernick*, 292 S.W.2d 562 (Mo. 1956)	80
Montana	Mont. Code Ann. § 40-6-135(6) (1993)	before final placement if social services joins	*In re Termination of parental Rights of L.A.C. & D.S.C.*, 718 P.2d 660 (Mont. 1986)	40
Nebraska	Neb. Rev. Stat. § 43-104(1986)	within reasonable time before accepted	*Kellie v. Lutheran Fam. Serv.*, 305 N.W.2d 874 (Neb. 1981)	40
Nevada	Nev. Rev. Stat. § 127.080 (Michie 1993)	none except for fraud	*Blanchard v. Nevada Welfare Dept.*, 542 P.2d 737 (Nev. 1975)	50
New Hampshire	N.H. Rev. Stat. Ann. § 170-B:1 (1990)	before final decree if in best interests	*Adoption of Baby C.*, 480 A.2d 101 (N.H. 1984)	75
New Jersey	N.J. Stat. Ann. § 9:2-16 (West 1992)	none except on court finding of fraud, duress, misrepresentation		50
New Mexico	N.M. Stat. Ann. § 46-7-38(F) (Michie 1993)	before final decree if involuntary or fraud	*In re Kira M.*,864 P.2d 803 (N.M. App. 1993)	50
New York	N.Y. Dom. Rel. Law § 111 (McKinney 1994)	in best interests before final decree	*Dickson v. Lascaris*, 423 N.E.2d 361 (N.Y. 1981)	75
North Carolina	N.C. Gen. Stat. § 48-11 (Michie 1993)	within 30 days or entry of interlocutory decree	*In re Kasim*, 293 S.E.2d 247 (N.C. Ct. App. 1982)	50
North Dakota	N.D. Cent. Code § 14-15-08 (Michie 1991)	before final decree if in best interests		75
Ohio	Ohio Rev. Code Ann. § 310 (Baldwin 1992)	in best interests	*Morrow v. Family & Community Serv. of Catholic Charities, Inc.*, 504 N.E.2d 2 (1986)	80
Oklahoma	Ok. Stat. tit. 10 § 60.10 (West 1987)	within 30 days if in best interests		30

Oregon	Or. Rev. Stat. § 109.312(2) (1993)	before final decree, or only on fraud or duress if sign statement	*Small v. Andrews*, 530 P.2d 540 (Or. 1975)	360
Pennsylvania	23 Pa. Cons. Stat. § 2711 (1993)	prior to entry of final decree		360
Rhode Island	R.I. Gen. Laws § 15-7-6 (1988)	if misrepresentation, under general procedures	*In re Julie*, 334 A.2d 212 (R.I. 1975)	50
South Carolina	S.C. Code Ann. § 20-7-1720 (Law Co-op 1992)	before final decree if in best interests and fraud or duress	*Johnson v. Horry Co.*, 380 S.E.2d 830 (S.C. 1989)	75
South Dakota	S.D. Codified Laws Ann. § 25-6-4 (1993)	within 6 months of final decree only	*In re Termination of Parental Rights over J.M.J.*, 379 N.W.2d 816 (S.D. 1985)	180
Tennessee	Tenn. Fam. Code Ann. § 36-1-117 (1992)	before interlocutory order in best interests; before petition for any reason		50
Texas	Tex. Fam. Code Ann. § 16.06 (West 1986)	before final decree		360
Utah	Utah Code Ann § 78-30-4.3 (1989)	irrevocable		0
Vermont	Vt. Stat. Ann. § tit. 15 § 432(b) 1989)	only if fraud, duress, coercion or undue influence	*In re M&G*, 321 A.2d 19 (Vt. 1974)	50
Virginia	Va. Code Ann. § 63.1-225 (Michie 1993)	before final order upon proof of fraud or duress; after placement upon mutual consent		50
Washington	Wash. Rev. Code § 26.23.160 (1992)	before court approval, or within one year for fraud or duress, incompetence		50
West Virginia	W.Va. Code § 48-4-5 (Michie 1992)	only upon fraud or duress; within 10 days if nonconforming		50
Wisconsin	Wis. Stat. Ann. § 48.46 (West 1990)	within one year if new evidence; must be voluntary	*In re D.L.S.*, 332 N.W.2d 293 (Wis. 1983)	50
Wyoming	Wyo. Stat. § 1-22-109(d) (1988)	upon fraud (code) or duress (opinion)	*In re Parental Rights of T.R. & J.S.*, 777 P.2d 1106 (Wyo. 1982)	50

The data from Table I provide the basis for an empirical test of the effect of consent revocation legislation on the number of adoptions in states.[106] The dependent variable is the number of adoptions/thousands of households in the state.[107] Obviously other things

106 The number of adoptions is located in ADOPTION FACTBOOK, *supra* note 8, at 80-81 (tbl. I).

107 The number of households appears in the UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT 45, 455 (1990) [hereinafter STATISTICAL ABSTRACT].

beside revocation legislation (REVOKE) affect the number of adoptions that occur in states. The number of babies that are available for adoption changes with alternatives to adoption such as abortion or single parenthood. Unmarried women are more inclined to bear children as opposed to abort them if single parenthood becomes socially acceptable[108] and if they receive adequate public assistance. The monthly rate for Aid For Dependent Children (AFDC) is therefore included as a controlling variable, as is the number of abortions in the state for 1987 (ABORTS).[109] Factors influencing the desire to adopt include couples' income (MEDINC),[110] and their infertility, which is reflected in the number of married women in the labor force (WOMENL).[111] The results of robust regression analysis[112] are reported below as Table II:[113]

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108 For example, *A World Without Fathers: The Struggle to Save the Black Family*, NEWSWEEK, Aug. 30, 1993, at 16, suggests that for the African-American segment of the population, single parenthood is becoming the norm rather than the exception. *See also* Dickson, *supra* note 8, at 919 n.17.

109 This number is reported in the ADOPTION FACTBOOK, *supra* note 8, at 96-97 (tbl. 9).

110 STATISTICAL ABSTRACT, *supra* note 107.

111 THE UNITED STATES DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, MONTHLY LABOR REPORTS (1987). Rates of infertility and deferred child bearing have increased dramatically in recent decades. Suplee, *supra* note 102, at B4. The assortment of problems confronted by adoptive parents is discussed in Dickson, *supra* note 8. Additional discussion of the relationship between infertility and the age of women appears *Id.* at 931 n.88 (citing RESOLVE, INC., WHEN YOU'RE WISHING FOR A BABY: MYTHS AND FACTS (1989)); and at 918 n.5 (citing INFERTILITY: MEDICAL, EMOTIONAL AND SOCIAL CONSIDERATIONS 3 (M. Mazor & H. Simons, eds. 1984)). The connection between the number of women in the labor market and the increase in infertility has been noted by both Dickson, *supra* note 8, at 931-32; and Landes & Posner, *supra* note 1.

112 Robust analysis, rather than ordinary least squares, is appropriate where, as here, there is not a normal distribution of errors. This is determined by the Bera-Jarque joint test of skewness and kurtosis, as described in GEORGE C. JUDGE ET AL., INTRODUCTION TO THE THEORY AND PRACTICE OF ECONOMETRICS 890-92 (2d ed. 1988). As opposed to ordinary least squares, robust regressions consider the distance between the observed data and the median of the estimated line (least absolute errors). This procedure avoids the errors produced when very large data points change the mean. The regressions were run on the econometrics program SHAZAM©, as described in KENNETH J. WHITE ET AL., INTRODUCTION TO THE THEORY AND PRACTICE OF ECONOMETRICS 367-73 (2d ed. 1988).

113 R-SQUARE between observed and predicted = 0.2082. CHI-SQUARE = 499.1945 with 2 degrees of freedom.

TABLE II. THE EFFECT OF REVOCATION STATUTES ON ADOPTIONS

VARIABLE NAME	ESTIMATED COEFFICIENT	STANDARD ERROR	T-RATIO 43 DF	PARTIAL CORR.	STANDARDIZED COEFFICIENT	ELASTICITY AT MEANS
UNWEDBI	**-0.13409E-04**	**0.61129E-05**	**-2.1935**	-0.3172	-0.55814	-0.17460
AFDC	0.50740E-03	0.29452E-03	1.7228	0.2541	0.14949	0.14812
WOMENL	-0.59027E-02	0.51756E-02	-1.1405	-0.1713	-0.64414E-01	-0.2482
ABORTS	0.31091E-05	0.26970E-05	1.1528	0.1731	0.29971	0.72186E-01
REVOKE	**-0.58855E-03**	**0.25244E-03**	**-2.3314**	-0.3350	-0.12138	-0.38421E-01
MEDINC	**-0.68679E-04**	**0.81707E-05**	**-8.4055**	-0.7884	-0.61689	-1.5252
CONSTANT	3.6538	0.37618	9.7130	0.8288	0.00000E+00	2.7260

In the regression, significant coefficients are indicated in bold face. The conclusion is that the number of unwed births, the revocation statutes, and the median income are the best predictors of the number of adoptions in a state.

V. Conclusion

Assuming that the uncertainty introduced by relaxed revocation statutes influences the number of adoptions, the immediate question for legislators is whether the focus on the rights of natural mothers is appropriate. Once the state guarantees that the birth mother's consent is voluntarily made, a short revocation period will suffice. As long as the emphasis is truly on "the best interests of the child," the exact wording of the statute makes little difference.

There is room for future analysis of the adoption system. One topic that has already caused some concern, both in the context of surrogate motherhood[114] and more traditional adoptions,[115] is the proper role of the intermediary.[116] Many markets improve with the presence of a middleman who can locate interested buyers and

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114 See, e.g., MICH. COMP. LAWS § 722.859 (West 1993), subjecting those who arrange surrogate contracts to criminal sanction of up to five years imprisonment and up to $50,000.00 fine.

115 The following cases and statutes have defined the duties and responsibilities of intermediaries in the context of standard adoptions: DEL. CODE ANN. tit. 13, § 904 (Michie 1993); D.C. CODE ANN. §§ 32-1002, 32-1009 (Michie 1993); MASS. GEN. LAWS ANN. ch. 210, § 11A (West 1987); N.J. STAT. ANN. §§ 9:3-39, -54 (West 1993); *In re* Adoption of a Child by N.P., 398 A.2d 937 (N.J. Super. Ct. Law Div. 1979); *In re* Adoption of Vincent, (N.Y. Fam. Ct. 1993), 19 F.L.R. 1488; VA. CODE ANN. §§ 63.1-215, 63.1-220.1 (Michie 1991).

116 *See, e.g.*, Anne Taylor Fleming, *Our Fascination with Baby M.*, N.Y. TIMES, Mar. 29, 1987, (Magazine), at 33 (discussing author's visit with attorney who acted as intermediary in that case); Avi Katz, Comment, *Surrogate Motherhood and the Baby-Selling Laws*, 20 COLUM. J.L. & SOC. PROBS. 1 (1986); HOMER CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 623-24 (2d ed. 1988).

sellers, overcoming information problems.[117] The adoption market, however, is characterized by extremely vulnerable buyers and sellers,[118] who are easily exploited by the unscrupulous. Recently, courts have allowed an action for "wrongful adoption," awarding damages in tort where agencies fraudulently misrepresent a child's health or genetic history.[119] This seems preferable to allowing adoptive parents to return the children to county agencies,[120] or enacting still further layers of regulation.[121]

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117 *See, e.g,* Dickson, *supra* note 8, at 921 n.23 (citing George Stigler, *The Economics of Information, in* THE ORGANIZATION OF INDUSTRY 171 (1968)); ARMEN A. ALCHIAN & WILLIAM R. ALLEN, EXCHANGE & PRODUCTION: COMPETITION, COORDINATION & CONTROL 48-50 (3d ed. 1983).

118 *See, e.g.,* Dickson, *supra* note 8, at 921. Dickson notes that "[a]dopters . . . are becoming increasingly vulnerable to fraud and mistreatment because of the combined effects of the competitive market for adoptable children and the emotional burden of infertility." *Id.*; see also *supra* note 117, for sources cited by Dickson in arriving at this conclusion.

119 *See, e.g.,* Dickson, *supra* note 8, at 955-64.

120 *See, e.g.,* Dianne Klein, *"Special" Children: Dark Past Can Haunt Adoptions,* L.A. TIMES, May 29, 1988, at 1, 32 (discussing the problems caused by failure of adoption agencies to inform adoptive parents of a child's troubled history); Andrea Sachs, *When the Lullaby Ends; Should Adoptive Parents Be Able to Return Unwanted Children?,* TIME, June 4, 1990, at 82 (1000 returns, or two percent of all adoptions including those of related children).

121 Regulations requiring full disclosure are advocated by Dickson, *supra* note 8, at 954-55.