Best of Both Open and Closed Adoption Worlds: A Call for the Reform of State Statutes, The; Note

John M. Stoxen

Follow this and additional works at: http://scholarship.law.nd.edu/jleg

Recommended Citation
Available at: http://scholarship.law.nd.edu/jleg/vol13/iss2/16

This Note is brought to you for free and open access by the Journal of Legislation at NDLScholarship. It has been accepted for inclusion in Journal of Legislation by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.
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).


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. While liberalization of state abortion laws has decreased the number of potential adoptees, studies show that the increasing tendency of unwed mothers to raise their children might play a greater role in the decline. As society increasingly accepts unwed parenthood, single mothers keep more babies. Meanwhile, adoption waiting lists grow longer.

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).


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.


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 for unwed pregnancy. Abortion represents the most cost-efficient solution to unplanned pregnancy. It leaves the woman without a dependent child, thus reducing her potential need for government financial assistance.

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*. 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.

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).

Abortion represents the most cost-efficient solution to unplanned pregnancy. It leaves the woman without a dependent child, thus reducing her potential need for government financial assistance.

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*. The Court
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

---

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.

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).


23. See Leepson, supra note 3, at 860.
dissipated in recent years.\textsuperscript{24} Nonetheless, society has not readily accepted the practice of relinquishing their babies for adoption.\textsuperscript{25} Peers and relatives pressure young mothers to keep babies.\textsuperscript{26} Many social workers admit they do not present adoption as an option to unwed mothers for fear of alienating or upsetting their clients.\textsuperscript{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.\textsuperscript{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.\textsuperscript{29} Moreover, research shows single parenthood places undue stress upon the parent, thereby increasing the likelihood of child abuse.\textsuperscript{30} Furthermore, unwed mothers often fall into child abuse-prone demographic categories, such as low education level,\textsuperscript{31} low social class,\textsuperscript{32} low income\textsuperscript{33}

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{27} 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.

\textsuperscript{28} 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. Musicik, Handler & Waddill, supra note 9, at 27.


\textsuperscript{30} 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 Covenant 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.

\textsuperscript{31} Address by the Rev. Bruce Ritter at the University of Notre Dame (Jan. 31, 1986).

\textsuperscript{32} 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.


\textsuperscript{36} In 1983, 75.1\% of all families headed by never-married women fell below the poverty threshold,
and poor housing conditions.\textsuperscript{34} Youth also makes unwed mothers more likely to be child abusers.\textsuperscript{35} Clinical studies also show the psychological imbalances exhibited by many unwed mothers who keep their children lead to child abuse.\textsuperscript{36} In addition to being physically harmed, child abuse victims often carry lifelong mental scars.\textsuperscript{37}

Adoption may be the best solution for mother and child in many cases of unwed pregnancy.\textsuperscript{38} Even in cases where parent does not abuse child, lawmakers should recognize that poverty itself is harmful to the development of children.\textsuperscript{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.

\section*{ADOPTION IN THE UNITED STATES}

Adoption has existed since the formation of organized communities.\textsuperscript{40}

---

\begin{enumerate}
\item The highest poverty rate of any type of family. \textit{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. \textit{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, \textit{supra} note 31, at 28-30. In addition, the vast majority of deaths from child abuse come from poor families. \textit{See id.} at 29-30; R. Gelles & C. Cornell, Intimate Violence in Families 56 (1983); Gil, \textit{supra} note 32, at 298-99.
\item Young adults are more likely to abuse their children than are older parents. See R. Gelles & C. Cornell, \textit{supra} note 33, at 56.
\item 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. \textit{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. \textit{Id.} at 12-13.
\item Children cannot understand their parents' resort to abuse, and the confusion may affect the child for life:
\begin{quote}
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.
\end{quote}
\begin{quote}
\ldots \textit{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.
\end{quote}
Elmer, \textit{supra} note 32, at 185-86.
\item 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, \textit{supra} note 9, at 6.
\item Poverty produces stress in family life and creates health and safety hazards for children, regardless of abuse. \textit{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:
\begin{quote}
[F]oor children, like their parents, must live among poor people. \ldots Among other things that 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.
\end{quote}
Elmer, \textit{supra} note 32, at 208-09.
\item 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.\textsuperscript{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.\textsuperscript{42}

As states began to more closely regulate the adoption process,\textsuperscript{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.\textsuperscript{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.\textsuperscript{45}

In a nonconfidential (or open) adoption, adoptive and biological parents exchange identifying information. In fact, biological parents can meet potentially (or closed) adoptions, biological and adoptive parents never meet. Today almost all states require that public agency adoption records remain confidential, at least until the adoptee reaches majority.\textsuperscript{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.\textsuperscript{45}

The agreement provides the adoptee with the names

\textsuperscript{41} See Baran, Pannor & Sorosky, The Concept of Open Adoption, 45 AM. J. ORTHOPSYCHIATRY 196 (1975).

\textsuperscript{42} 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).

\textsuperscript{43} See Baran, Pannor & Sorosky, supra note 40, at 197.

\textsuperscript{44} See supra note 3, at 31.

\textsuperscript{45} All states had enacted adoption statutes by 1931.

\textsuperscript{46} See Baran, Pannor & Sorosky, supra note 40, at 197.
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

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


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:

[The 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, 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 restrick the balance to better accommodate the needs of adoptees and biological parents who wish to reunite. Organizations such as Reunion of Adoptees and Birth Relatives,59 American Adoption Congress,56 and Adoption Records Reform Project60 press for access to adoption records.56 Their efforts—which include state legislation,60 media campaigns,60 and grassroots efforts—have met with mixed results.60

(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 may order 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); MICH. STAT. ANN. § 26.33.330 (Supp. 1985-86); Wis. STAT. 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.


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).
Adoption Reform

as Concerned United Birthparents,60 Adoptees' Liberty Movement Association61 and Orphan Voyage62 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 to give guidance to surrendering biological parents.

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, Cedaredge, 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 the Illinois constitution's 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 § 2245(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

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. §§ 45-67a, 45-68 (West 1981) (adoptive parent 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 requests search, 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 21 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).
Adoption Reform

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 Attorneys75 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).


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.


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. Independent adoptions also save tax money because expenses—including the biological mother’s living expenses—are covered privately.

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

State laws routinely require public adoption agencies to give biological parents a breathing period to reconsider consent to adoption. State stat-
Adoption Reform

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

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

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. 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. Also, proponents allege that a ban on independent adoption is likely to require thorough examination of potential adoptive parents to determine whether they are likely to make good parents.86

**Notes**

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 degrade 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.88

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. The Connecticut experience demonstrates that
private adoption, with its flexibility for structuring confidential and noncon-
fidential adoptions, appeals to unwed mothers considering adoption.

RECOMMENDATIONS

State legislatures should enact statutes flexible enough to accommodate
confidential and nonconfidential adoption. 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. 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, and, even where available, its cost excludes some potential adoption
parties.

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. Independent adoption also
provides another source through which would-be adoptive parents can lo-
cate 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-adop-
tion counseling for biological and adoptive parents, provisions that allow

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 con-
cerned, 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 proce-
dure and legality is abandoned, where children not legitimately adopted are only further
penalized, where deals grow ever more furtive, subterfuges multiply, prices skyrocket.

L. McTAGGART, supra note 2, at 329.

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

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.

Id. at 328.

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.

See supra notes 46-47 and accompanying text.

See supra note 73 and accompanying text.

See supra note 79 and accompanying text.

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 given until five days after birth and may be withdrawn within 30 days); 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).
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. 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.

John M. Stoxen*

---

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