Loyola University Chicago Law Journal

Volume 23
Issue 1 *Fall 1991*

Article 3

1991

Compensation for Birth Mothers: A Challenge to the Adoption Laws

Candace M. Zierdt
Assist. Prof. of Law, University of North Dakota School of Law

Compensation for Birth Mothers: A Challenge to the Adoption Laws

*Candace M. Zierdt**

TABLE OF CONTENTS

I. INTRODUCTION

To the dismay of many childless couples, adoptions today are on the decline.[1] Radical reformation of current adoption laws and a metamorphosis of our society's view toward women in relation to

* Assistant Professor of Law, The University of North Dakota School of Law; B.A., 1973, J.D., 1977, University of Kansas; LL.M. 1990, Temple University. The author is indebted to Marina Angel and Ellen Podgor for their invaluable assistance and numerous comments on earlier drafts.

1. Beginning in the early 1970s, adoptions decreased substantially with some states experiencing decreases by as much as 50%. David F. Tegeler, Comment, *Advertising for Adoption Placement: Gray Market Activities in a Gray Area of Constitutional Protection*, 25 DUQ. L. REV. 129, 131 (1986).

these laws must be effected immediately. The number of infants[2] available for adoption continues to dwindle while the number of families longing to adopt these children increases.[3] The baby market has become a lucrative operation as a result of the easy accessibility of contraception,[4] the legalization of abortion,[5] the growing acceptance of an unwed mother's decision to rear her out-of-wedlock child,[6] and the escalation of infertility.[7] As adoption waiting lists expand, desperate couples, eager to establish or expand a family, explore any and every attainable means to procure infants for adoption.[8] Opportunists appear to prey upon and exploit the desperation of these people.[9] Because the demand for infants far exceeds the supply, a black market has evolved[10] which often takes advantage of the parties involved: the adoptive parents, the birth parents, and the child. This Article advocates that changes are needed in the adoption laws to stem these abuses.

This Article initially examines the historical framework for adoption.[11] It then analyzes the dual vehicles presently employed in the adoption realm;[12] namely, agency[13] and independent[14] adop-

2. When speaking about the lack of infants available for adoption, this Article refers to healthy Caucasian infants. Although numerous African-American, handicapped, and older children are available for adoption, unfortunately, there are few couples desiring to adopt these children.

3. Brigitte M. Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S. CAL. L. REV. 10, 14 (1975).

4. *See* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (granting minors the right to access contraceptives and birth control information).

5. Roe v. Wade, 410 U.S. 113 (1973) (granting women the right to abortion in certain circumstances); *see also* Bellotti v. Baird, 443 U.S. 622 (1979) (granting minors the right to secure an abortion); Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52 (1976) (granting minors the right to abortion in some circumstances without parental consent).

6. Howard LaFranchi, *Couples Target Texas in Search for Newborns*, CHRISTIAN SCI. MONITOR, Apr. 11, 1989, at 1 (explaining that more than 90% of unwed pregnant women choose to keep their babies).

7. Ruth-Arlene W. Howe, *Adoption Practice, Issues & Laws 1958-1983*, 17 FAM. L.Q. 173, 195 (1983); *see also* Mitchell A. Charney, *The Rebirth of Private Adoptions*, A.B.A. J., June 1985, at 52, 53 (noting that as of 1985, there were more than three million infertile couples of child-bearing age in the United States).

8. *See infra* notes 103, 110 and accompanying text.

9. *See* Timothy Clifford, *DA Probes Baby-Selling Scam*, NEWSDAY (New York), Feb. 2, 1989, at 8 (citing evidence that a group of lawyers and doctors were involved in selling babies for up to $100,000); *see also infra* note 110 and accompanying text (describing other exploitations).

10. *See infra* part II.C.

11. *See infra* part II.A.

12. *See infra* part II.B.

13. Margaret V. Turano, Note, *Black-Market Adoptions*, 22 CATH. LAW. 48, 52-53 (1976). Turano explains:

> In an agency adoption, the prospective parents, upon submitting their applica-

tions, and discusses the resulting current and potential black market for children created by the present adoption systems.[15]

This Article next discusses state laws governing adoption and the corresponding compensation of birth mothers.[16] It then explores the methodology that has emerged from court decisions evaluating the exchange of money in adoption cases.[17] Courts have employed a two-tiered test to determine the types of compensation allowable for birth mothers who release their children for adoption.[18] This discussion includes a critical evaluation of the application (or misapplication)[19] and the fallacious theoretical basis of this two-tiered test[20] and considers other possible approaches to the problem of compensating birth mothers.[21] Finally, this Article concludes with proposals for reforming existing adoption laws to make them more equitable.[22]

II. BACKGROUND

A. The History of Adoption

Although Roman law is the unquestioned source of American adoption legislation,[23] adoption was practiced well before Roman times by the Assyrian, Greek, and Egyptian people, with some

---

tion for adoption, are interviewed and investigated by the agency to determine their fitness as parents. Once approved, they are placed on the agency's waiting list until a child whom the agency considers suitable becomes available for adoption. They are then allowed to take the child. The placement stage thus completed, the parents petition the court for a decree of adoption. The court then authorizes its own investigation to determine whether the child is being satisfactorily assimilated into the new family. If the investigation reveals that parents and child are adjusting well, a court order of adoption is granted.

Id. (footnotes omitted).

14. *Id.* Turano continues:

> Independent adoptions are those not effected by agencies. In an independent adoption, there is seldom any requirement that adoptive parents be evaluated before placement. The placement is usually arranged by an intermediary, and the choice of parents often is entirely within [the intermediary's] discretion. After the child has been placed in the prospective home, however, the family, if it wishes to adopt the child, must follow the same court procedure followed in an agency adoption.

Id. (footnotes omitted).

15. *See infra* part II.C.
16. *See infra* part III.A.
17. *See infra* part III.B.
18. *See infra* part III.B.
19. *See infra* notes 205-09 and accompanying text.
20. *See infra* notes 252-56 and accompanying text.
21. *See infra* part III.C.
22. *See infra* part V.
23. John F. Brosnan, *The Law of Adoption*, 22 COLUM. L. REV. 332, 332 (1922).

adoptions occurring as far back as 2285 B.C. among the Babylonian people.[24] The Babylonian law on adoption, found in the Code of Hammurabi written in 2285 B.C., suggests that concern for a voluntary consent to adoption dates back to the beginning of adoption law.[25] Further, the Greeks celebrated adoption with provisions that certain formalities attend the adoption ceremony and that it occur during specified festivals.[26] And of course, who does not recall the renowned adoption of Moses?[27]

The Romans had two disparate forms of adoption—adrogation and adoption.[28] Adrogation allowed the adoption of a person who was *sui generis* and independent, a situation that generally comprised the adoption of an adult.[29] In ancient times adoptions fulfilled the purpose of extending blood lines. Fathers without sons used adoption to establish families to ensure that the family line endured.[30] The Romans viewed adoption as "the legal act whereby a person who was in the power of the natural head of his family passed out of the power of such *pater familias* to fall under the paternal power of a new father or head of a family."[31] As a result, the person adopted acquired the rights and responsibilities of a birth child. In general, Roman adoption law furthered the two expansive objectives of "avoiding extinction of the family and perpetuating rites of family [religious] worship."[32]

Moreover, certain essential prerequisites were required to effectuate a valid adoption: (1) the adoption was required to emulate nature, and (2) the adoptee had to satisfy distinct age require-

24. Howe, *supra* note 7, at 173; *see also* Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443 (1971) (providing a thorough discussion of the historical background of adoption).

25. Hockaday v. Lynn, 98 S.W. 585, 586-87 (Mo. 1906) (citing §§ 185-93 of the CODE OF HAMMURABI (2285 B.C.), which allowed adoption, but mandated at § 186 that "[i]f a man has taken a young child to sonship and when he took him his father and mother rebelled, that nursling shall return to his father's house"); Howe, *supra* note 7, at 173 n.2; *see also* Leo A. Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 744 (1956) (discussing the CODE OF HAMMURABI and ancient adoption practices).

26. Brosnan, *supra* note 23, at 333.

27. *Exodus* 2:10 ("And she adopted him for a son and called him Moses, saying I took him out of water.").

28. Brosnan, *supra* note 23, at 332.

29. *Id.*

30. Howe, *supra* note 7, at 174; *see also* Presser, *supra* note 24, at 446 (noting that unlike modern adoption laws, which are designed to serve the best interests of the child, ancient adoption laws, particularly Roman laws, served the purpose of avoiding the extinction of the family and perpetuating the rights of the family).

31. Brosnan, *supra* note 23, at 332.

32. Presser, *supra* note 24, at 446.

ments.[33] In order to imitate nature, a son needed to be younger than his father. Therefore, satisfaction of the second prerequisite necessarily satisfied the first prerequisite.[34] Women, however, were not permitted by Roman law to adopt until after 291 A.D., and even then, women were allowed only a "limited form of adoption to comfort them for the loss of children taken from them."[35]

Moving from antiquity to modernity, England did not recognize adoption[36] until the ratification of the Adoption of Children Act of 1926.[37] Consequently, many claim that adoption was not part of our American common law.[38] Adoption, however, was practiced by the indigenous people of North America, the Native Americans.[39] In 1846, Mississippi became the first state to enact an adoption statute.[40] Eventually, all the other states followed.[41] Although American adoption statutes pattern themselves after Roman law, there is a critical distinction between the two. While Roman adoption law was developed around the needs and rights of the adoptive parents, American adoption law has been aimed primarily at safeguarding the welfare of adopted children.[42] Indeed, the first American adoption laws were passed in response to several instances in which adults took children into their homes and treated them as their own, yet upon the death of the "adoptive parent(s)," the children were not entitled to receive any inheritance because they had not been legally adopted.[43]

By the mid-1800s, rampant poverty in the United States forced many children to live on the streets. In an effort to ameliorate this undesirable social phenomenon, child welfare societies began a cru-

33. Brosnan, *supra* note 23, at 333.

34. *Id.*

35. *Id.*

36. *See* Presser, *supra* note 24, at 448-55 (discussing the failure of the English common law to recognize the legality of adoption).

37. Adoption of Children Act of 1926, 16 & 17 Geo. 5, ch. 29 (Eng.); 17 HALSBURY, LAWS OF ENGLAND §§ 1406-23 (2d ed. 1935); *see* Huard, *supra* note 25, at 746.

38. Abe W. Waldauer, *State Regulation of Child Adoptions*, 17 TENN. L. REV. 937, 938 (1943).

39. Huard, *supra* note 25, at 748.

40. *See* Catherine N. McFarlane, *The Mississippi Law on Adoptions*, 10 MISS. L.J. 239, 240 (1938) (stating that Mississippi enacted its first adoption statute in 1846); Woodward's Appeal, 70 A. 453, 457 (Conn. 1908); *cf.* Ross v. Ross, 129 Mass. 243, 262 (1878) (stating that in 1851, Massachusetts was "[o]ne of the first, if not the very first of the States . . . to introduce [an adoption statute]").

41. *See* Presser, *supra* note 24, at 443. Within 25 years of the passage of the first adoption laws, 24 states had enacted adoption laws. *Id.*

42. Howe, *supra* note 7, at 174.

43. *See, e.g.*, Ross v. Ross, 129 Mass. 243 (1878).

sade to induce families to adopt these children.[44] During this period, adoptions served the welfare of the state as well as the welfare of children by extricating a child from a life of poverty or from life in a charitable institution, and by placing the child in a more desirable environment.[45]

Soon thereafter, however, the adoption picture turned bleak. Parents became careless about how and where they placed their children for adoption. Children's societies placed "uninvestigated children in uninvestigated homes,"[46] and these homes commonly exploited the children as a cheap source of labor.[47] Some children were sold or given away for adoption by their parents.[48] Such occurrences led the Massachusetts legislature to compel judges to determine the fitness of the adoptive parents and their home before granting an adoption. Consequently, the courts created the "best interests of the child" test as a method of determining adoptive fitness.[49]

By the 1920s, some experts began to regard adoption as a bane instead of a boon for the homeless child. Experts criticized judges for mechanically granting adoptions without questioning whether adoption was actually in the best interests of the child. Child welfare experts castigated this judicial practice because they believed that couples were routinely adopting children for uncharitable purposes.[50] Welfare agencies began discouraging adoptions and began advocating that children would be better off in children's homes instead of in adoptive homes.[51] Nevertheless, by the 1950s, adoption once again became a popular means to rescue a child from a life of poverty, an institutional home, or an indifferent family.

---

44. Howe, *supra* note 7, at 176. Howe explains:

> By the mid 1800s many east coast cities were plagued by gangs of street urchins. New York City in 1850 had about 10,000 vagrant children, wandering homeless, committing minor crimes, and living in great misery. . . . Children's aid societies rounded up thousands of children and sent them west to farms where their hands were welcome. Newspapers of the day carried advertisements for children wanted for adoption, and parents either sold or gave them away.

Id.

45. *Id.*

46. Presser, *supra* note 24, at 460.

47. Howe, *supra* note 7, at 176.

48. *Id.*

49. *Id.* at 176-77.

50. *See generally* Joseph W. Newbold, *Jurisdictional and Social Aspects of Adoption*, 11 MINN. L. REV. 605, 606-07 (1927) (providing examples of cases that led agencies to believe adoptions were being undertaken for uncharitable purposes).

51. *Id.* at 606.

From the late 1950s and into the 1960s, more infants became available for adoption, agencies actively sought couples, and waiting lists were short.[52] Almost cyclically, however, by the end of the 1960s and into the 1970s, the function of adoption once again began to change. Families no longer were adopting solely to help an impoverished child; rather, childless couples were adopting as a means of satisfying an intense longing to have a family.

As the "pro-family" movement[53] blossomed, so did the desire to adopt infants. Today, though one incentive to adopt still may include a wish to propagate the family line, the key focus is upon creating a parent-child relationship.[54] Unfortunately, this emphasis upon the parent-child relationship emerged simultaneously with the increasing acceptance of out-of-wedlock children, the onslaught of contraceptive technology, and the soaring infertility rate among married couples.[55] Consequently, a shortage of infants available for adoption has developed.[56] As this shortage continues and the competition for infants increases, the lines of demarcation between agency and independent adoptions grow more pronounced, with advocates on both sides touting the advantages and disadvantages of both adoption systems.

B. Agency Versus Independent Adoption

Laws regulating the methods of adoption vary from state to state.[57] Some states absolutely prohibit independent adoptions,[58] while others permit them to varying degrees.[59] Consequently, birth mothers and adopting parents often forum shop for the state

52. Howe, *supra* note 7, at 180.

53. This is technically known as the social movement directed toward emphasis on the nuclear family.

54. *See* Howe, *supra* note 7, at 177.

55. Tegeler, *supra* note 1, at 131-32; Charney, *supra* note 7, at 53.

56. As early as the 1940s, there were reports of 30 applicants for every child available for adoption. Waldauer, *supra* note 38, at 937.

57. *See generally* Paul T. Fullerton, *Independent Adoption: The Inadequacies of State Law*, 63 WASH. U. L.Q. 753 (1985) (analyzing several aspects of state adoption statutes including regulations on who may place children for adoption, investigations of adoptive parents, residency requirements, restrictions on the importation of children, disclosure of adoption expenses, and violations of the adoption laws).

58. *See, e.g.*, DEL. CODE ANN. tit. 13, § 904 (1981 & Supp. 1991) (permitting adoption only through *authorized agencies*).

59. *See e.g.*, KY. REV. STAT. ANN. § 199.473 (Baldwin 1970) (requiring all persons other than licensed agencies to submit a written application to place or receive a child for adoption); LA. REV. STAT. ANN. § 9:422.3 (West 1965 & Supp. 1991) (permitting private adoption); TEX. FAM. CODE ANN. § 11.07 (West 1989) (a 1987 amendment deleted a requirement that an adoption petition must be filed by an agency authorized by the Texas Department of Human Services to place children for adoption).

that offers them the most propitious adoption laws. Due to this, child welfare advocates have recognized a need for and urged uniformity in the laws governing adoptions.[60]

Depending upon the laws of each state, individuals or couples may adopt through agencies or through independent means.[61] In a typical agency adoption,[62] commonly referred to as a "white market adoption," the birth mother[63] surrenders her child directly to an agency. The agency then places the child in an adoptive home selected through agency procedures. These agency procedures usually conform to national guidelines such as those promulgated by the Child Welfare League of America. Once the agency is assured that the adoptive home is acceptable, the agency then consents to the adoption.[64]

In contrast, in an independent adoption,[65] frequently called a "gray market adoption," the birth mother normally uses an intermediary to help her through the adoption process, but it is the birth mother who actually consents to the adoption by the adoptive parents.[66] In addition, whereas agency adoptions must conform to certain national guidelines, independent adoptions are subject only to state laws. Independent adoptions, therefore, permit the birth mother a greater degree of control over the adoption than do agency adoptions in which the primary control rests with the

60. Daniel G. Grove, *Independent Adoptions: The Case for the Grey Market*, 13 VILL. L. REV. 116, 123 (1967); George W. Myers, Jr., Comment, *Independent Adoptions: Is the Black and White Beginning to Appear in the Controversy Over Grey-Market Adoptions?*, 18 DUQ. L. REV. 629, 631 (1980); Natalie H. Wallisch, Note, *Independent Adoption: Regulating the Middleman*, 24 WASHBURN L.J. 327, 354-56 (1985).

61. *See, e.g.*, statutes cited *supra* notes 58-59.

62. For a thorough discussion of agency adoptions, see JOAN MCNAMARA, THE ADOPTION ADVISER 44-63 (1975). McNamara explains that agency adoptions usually involve one of three different types of adoption agencies: public agencies, which are typically run by government departments of welfare or social services; private agencies, which generally deal with a broad range of homeless children; and sectarian agencies, which specialize in adoptions for children and parents of a specific religion. *Id.* For an explanation of the distinctions between independent and agency adoptions, see *supra* notes 13-14.

63. Although it is certainly true that birth fathers may be involved in the adoption process, that occurrence unfortunately is rare and it is usually the birth mother who must deal with this crisis. Consequently, this Article refers to birth mothers.

64. Tegeler, *supra* note 1, at 131.

65. For a discussion of independent adoptions, see MCNAMARA, *supra* note 62, at 74-84. McNamara observes that private adoptions, also referred to as independent or gray market adoptions, are those that are generally arranged by attorneys, obstetricians, clergymen or other intermediaries without utilizing the services of a licensed adoption agency. *Id.*

66. CHILDREN'S HOME SOCIETY OF CAL., THE CHANGING PICTURE OF ADOPTION 12 (1984).

agency.[67]

Agency and independent adoptions are also procedurally disparate in their investigative approaches to adoptions. Agencies typically mandate that adopting parents conform with a strict set of conditions before they are eligible to adopt.[68] To determine whether these conditions have been satisfied, agencies utilize a variety of criteria to evaluate potential adoptive families including race, ethnicity, religion, and age.[69] Moreover, agencies require a home study[70] before placing a child in an adoptive home. Agencies justify the use of these standards because they provide a means of monitoring and evaluating adoption applicants and thereby enable the agency to consider the child's best interests.[71]

Independent adoptions, on the other hand, usually involve simpler investigative procedures. Since the primary control in an independent adoption rests with the birth mother and not with an agency, independent adoptions do not necessarily require any strict pre-adoption investigation. In fact, the completion of a home study in independent adoptions is not done until after the child has been placed in the home.[72]

Agency and independent adoptions also differ in terms of the amount of privacy they afford to the parties involved.[73] Because of the strict set of conditions agencies impose, agencies are more in-

67. WILLIAM MEEZAN ET AL., ADOPTIONS WITHOUT AGENCIES; A STUDY OF INDEPENDENT ADOPTIONS 37-38 (1978). Birth mothers reportedly turn away from agency adoptions because of the number, perceived arbitrariness, and perceived inappropriateness of the agency requirements. *Id.*

68. *See* Linda F. Smith, *Adoption—The Case for More Options*, 1986 UTAH L. REV. 495, 527-28 (criticizing agency confidentiality requirements); Constance J. Miller, Comment, *Best Interests of Children and the Interests of Adoptive Parents: Isn't it Time for Comprehensive Reform?*, 21 GONZ. L. REV. 749 (1986) (examining agency requirements and the related constitutional interests of adoptive parents); *see also* MEEZAN ET AL., *supra* note 67, at 37-38 (observing that adopting couples come under much less scrutiny in independent adoptions).

69. Miller, *supra* note 68, at 749.

70. A typical home study requires a social worker to visit an adoptive family's home, verify their references, and eventually make a recommendation regarding the suitability of the family as an adoptive placement.

71. *Cf.* Miller, *supra* note 68, at 776-97 (discussing the constitutionality of using such criteria).

72. Myers, *supra* note 60, at 633.

73. *See In re* Emanuel T., 365 N.Y.S.2d 709, 716 (Fam. Ct.), *rev'd sub nom.* Matter of Infant S., 370 N.Y.S.2d 93 (App. Div. 1975). Upon questioning by the trial judge, a birth mother and maternal grandmother explained that they sought a private adoption instead of an agency adoption because it spared them from having to answer embarrassing questions about the birth mother's out-of-wedlock pregnancy at a time when it troubled her to speak about it and because she believed the attorney handling the adoption would help her to find a good home for her child. *Id.*

quisitive into the private lives of all the parties involved in the adoption.[74] In an agency adoption, the identity of the birth mother may be kept confidential, regardless of the parties' wishes. In contrast, independent adoptions may not provide any assurance that the birth mother's identity will remain undisclosed. Consequently, as the birth mother often will choose to unveil her identity, birth mothers and adoptive parents are increasingly seeking private adoptions,[75] because they usually have fewer demands and allow the parties to choose the degree of privacy.

Another distinction between the two adoption methods is the risks and benefits each offers. First, agencies counsel both the birth mother and the adopting parents during the adoption process, while independent adoptions often do not provide any counseling.[76] Second, birth mothers are responsible for their own medical and hospital payments in agency adoptions, but it is quite common in independent adoptions for the adopting parents to pay the birth mother's medical and hospital expenses related to childbirth. Third, agencies generally provide government subsidized medical care, but in independent adoptions, birth mothers are usually able to select their own physicians as well as the medical facility of their choice.[77] Finally, because independent adoptions are controlled by the birth mother and the adopting parents and not by an independent third party, independent adoptions pose a greater risk that the adoption process will never be completed and that the birth mother ultimately will reclaim her child.[78]

Agency and independent adoptions also differ in the amount of time and cost involved in each process. Because agency adoptions require stricter investigative procedures, independent adoptions traditionally may be accomplished in a considerably shorter period

74. MEEZAN ET AL., *supra* note 67, at 229.

75. As of 1975, it was estimated that more than 75% of all adoptions were handled through agencies. Tegeler, *supra* note 1, at 131. Sources now claim, however, that private adoptions account for anywhere from one-third to approximately one-half of all adoptions of healthy white infants. Robert Lindsey, *Adoption Market: Big Demand, Tight Supply*, N.Y. TIMES, Apr. 5, 1987, § 1, pt. 1, at 1.

76. Counseling furnishes an extra safety feature in the independent setting and may help curtail unethical practices. Myers, *supra* note 60, at 642; Miller, *supra* note 68, at 802. Moreover, counseling may assist birth mothers in understanding the adoption process and in dealing with the emotional trauma of relinquishing their children for adoption. As a result, counseling increases the likelihood that consents to adoption are voluntary, informed, and therefore irrevocable. Wallisch, *supra* note 60, at 342; *see* MEEZAN ET AL., *supra* note 67, at 117-19.

77. Jane A. Robert, Comment, *Parental Consent: The Need for an Informed Decision in the Private Adoption Scheme*, 47 LA. L. REV. 889, 890 (1987).

78. MEEZAN ET AL., *supra* note 67, at 28-34.

of time[79] than agency adoptions[80] and offer immediate placement of a child in an adoptive home.[81] Finally, although independent adoptions offer the advantage of greater speed, they are more costly than agency adoptions because the adoptive parents often pay the birth mother's medical and hospital expenses related to childbirth.[82]

A major study, entitled *Adoptions Without Agencies*, commissioned by the Child Welfare League of America and completed in 1978, compared families who adopt through agencies with families who pursue private adoptions.[83] The agencies participating in the study rated most of the independent homes as equal to or better than the agency homes with respect to the physical and emotional care provided to an adopted child.[84] The study also found that approximately two-thirds of the independent adoption intermediaries interviewed believed that there were areas where they could cooperate with agencies and that this type of collaboration might diminish the risks involved in independent placements.[85] The intermediaries suggested joint participation in the following areas: agency counseling for birth mothers and adoptive parents involved in independent adoptions, and agency performance of home studies before independent adoption placement.[86] In addition to assisting independent adoptions, providing these services may also furnish agencies with a source of much needed funding. The study also found that birth mothers increasingly use the independent system because they can choose quality private medical

79. It is not uncommon for couples pursuing agency adoptions to be placed on waiting lists that may be over three years long. *Id.* at 228. Over one-half of the agencies surveyed in the study, *Adoptions Without Agencies*, reported that waiting lists for adoptive couples currently were closed and those that remained open often were three years long. *Id.*

80. *Id.* at 78. Half of the adopting couples in the above sample had a child placed with them within six months of approaching an intermediary. Most couples seeking children through the agency adoption process had a baby placed in their home within twelve to eighteen months. *Id.* at 228-29; *see* Charney, *supra* note 7, at 53-55.

81. MEEZAN ET AL., *supra* note 67, at 144.

82. Carol S. Silverman, *Regulating Independent Adoptions*, 22 COLUM. J.L. & SOC. PROBS. 323, 331 n.80 (1989).

83. MEEZAN ET AL., *supra* note 67, at 17-32.

84. *Id.* at 232. A similar 1963 study found no significant quantitative difference between agency and private adoptions in unsatisfactory placements. Myers, *supra* note 60, at 634. In contrast, the National Committee For Adoption, a Washington-based committee representing over 135 private, not-for-profit adoption agencies, claims that the failure rate for independent adoptions is twice as high as the failure rate for agency adoptions. Silverman, *supra* note 82, at 334 n.94.

85. MEEZAN ET AL., *supra* note 67, at 143.

86. *Id.*

care instead of relying on welfare-provided medical care. Additionally, because birth mothers are more likely to receive help with medical, housing, and other living expenses, independent placements are more appealing to them.[87]

Although independent adoptions were employed as early as the 1920s,[88] in the past ten or fifteen years, they have increased in popularity compared to agency adoptions.[89] The modern trend is to permit independent adoptions,[90] but to control them through limitations on compensation and requirements for court-ordered home studies.[91] In addition, agencies currently are facing severe fiscal crises and, as a result, may have difficulty meeting even the minimal medical costs of birth mothers.[92] In response, agencies are likely to develop creative ways of providing these services. At least one agency suggested that the adoptive parents pay the birth mother's medical costs.[93] Adopting this proposal would eliminate a significant difference between agency and private placements. Another suggestion is that greater funding be appropriated to state agencies in states where independent adoptions are outlawed.[94] Moreover, legalizing independent adoptions or relaxing regulations

87. *Id.* at 37-38.

88. *See* Newbold, *supra* note 50, at 622. Advertisements of children for adoption by people who objected to the amount of red tape required for an agency adoption appeared in newspapers as early as the 1920s. *Id.*

89. *See* Myers, *supra* note 60, at 629; *cf.* Richard R. Carlson, *Transnational Adoption of Children*, 23 TULSA L.J. 317 (1988) (discussing the increase in popularity of transnational adoptions caused by the shortage of healthy, adoptable infants born in the United States). For a general discussion of the inherent problems in the independent adoption process and proposals for the elimination of these problems, see CHILDREN'S HOME SOCIETY OF CAL., *supra* note 66, at 12. One prominent study reported that before pursuing independent adoptions, 70% of adoptive couples first attempted to adopt through agencies. *See* MEEZAN ET AL., *supra* note 67, at 82.

90. *See* James A. Shrybman & Patricia V. Fettmen, *Why Make Private Adoptions So Difficult?* WASH. POST, July 2, 1989, (Editorial), at C8. Legislation recently passed in Virginia restricts the reimbursement of medical expenses and financial assistance that a birth mother may receive from adoptive parents, and also prohibits birth mothers from receiving help with housing, food, or clothing during their pregnancies if they utilize the independent adoption process. *Id.* Birth mothers may collect this compensation, however, if they surrender their children for adoption through agencies. *Id.* All parties involved in the adoption process including birth mothers, adoptive parents and experts, except, of course, agencies, roundly criticized this new law. *Id.*

91. Tegeler, *supra* note 1, at 152.

92. CHILDREN'S HOME SOCIETY OF CAL., *supra* note 66, at 124-25 (1985); *see also In re* Baby Girl D., 517 A.2d 925, 934 (Pa. 1986) (Hutchinson, J., dissenting) (recognizing that "the economic realities of shrinking government aid for social services cannot be ignored" and that "it is becoming more difficult for . . . adoption agencies to meet their financial needs through donations").

93. CHILDREN'S HOME SOCIETY OF CAL., *supra* note 66, at 125.

94. Tegeler, *supra* note 1, at 132.

for private adoptions in these states may help to ease the financial burden on agencies.

Why do we have two different schemes for adoption? Agencies offer a more secure approach to adoption because they follow traditional guidelines such as mandatory counseling for all involved parties, confidentiality, and controlled placement of the child. Private placements are considered riskier because counseling is not required and because the birth mother's direct involvement creates a greater possibility that she will change her mind about the adoption.[95] Yet it is important that both systems remain. There is no demonstrative evidence that agency placements are more beneficial than private ones. Moreover, the absence of a monopoly on adoptive placements "ha[s] been found to have salutary effects on the efficiency of agency procedure."[96] Maintaining both systems, agency and private adoptions, has the advantage of each system keeping a check on the other. Nevertheless, this competition between agencies and independent adoptions has fueled the debate over the black market.

C. The Black Market

A major concern with independent adoptions is that only a subtle transition is required to move an adoptive parent from the gray market into the black market.[97] The paramount difference between the two adoption markets is the existence of a profit motive. Thus, the critical inquiry is whether intermediaries are finding adoptive homes in exchange for reasonable fees or for profit.[98]

Whenever demand exceeds supply, conditions are ripe for a black market.[99] The case of babies, unfortunately, is no different.[100] Though the existence of a black market has been recognized for some time, the situation has worsened in recent years due to the swelling imbalance between the supply of and the demand for in-

95. *See* Robert, *supra* note 77, at 890 (discussing disadvantages of agency adoptions and proposing tightened guidelines for private adoptions); *see also* Silverman, *supra* note 82, at 323, 329-31 (providing a critical look at private adoptions from an agency viewpoint).

96. Bodenheimer, *supra* note 3, at 108.

97. MCNAMARA, *supra* note 62, at 74-84. The black market has been defined as those adoptions that involve an intermediary whose business is earning a profit by selling infants. Wallisch, *supra* note 60, at 333. The controlling factor becomes the ability to pay and not the fitness of the parents or the best interests of the child. *Id.*

98. MCNAMARA, *supra* note 62, at 80.

99. Turano, *supra* note 13, at 48; *see* Wallisch, *supra* note 60, at 333.

100. *See generally* Turano, *supra* note 13, at 48-53 (discussing the black market, weaknesses in independent adoptions, and suggesting reforms).

fants available for adoption.[101] A black market for infants was detected as early as the 1950s,[102] and reports continue that the baby business still flourishes.[103] Obviously, it is difficult to acquire accurate statistics regarding such behavior because black market activities are illegal in all states.[104] Although most states have statutory restrictions regarding the exchange of money between parties in an adoptive placement,[105] enforcement is very difficult, if not impossible, without the support of the concerned parties.[106]

There is general agreement that the black market involves only a handful of independent adoptions,[107] and that these usually take place in states with the weakest adoption laws and procedures.[108] Frantic people often behave in extreme ways[109] as shown by reported acts of desperation over the past few years.[110] This type of

101. *Id.* at 48.

102. *See, e.g., Juvenile Delinquency (Interstate Adoption Practice): Hearings on Juvenile Delinquency in the U.S. Before the Subcomm. of the Senate Comm. on the Judiciary*, 84th Cong., 1st Sess. (1955); Turano, *supra* note 13, at 48 n.2.

103. E.R. Shipp, *Death Draws Public's Eye to Adoption*, N.Y. TIMES, Nov. 27, 1987, at B1 (noting that adoption experts say that there is a booming market for the sale of healthy white infants with prices that may range from $20,000 to $75,000); *see also* MEEZAN ET AL., *supra* note 67, at 148 (stating that in a study of private adoptions, 56% of facilitators believed there were organized rings of doctors, lawyers, and hospitals arranging adoptions "for profit"); Lindsey, *supra* note 75, at 1 (quoting federal authorities as saying that a rising demand for healthy white infants has led to a proliferation of organized rings that smuggle babies across the border and then sell them to the highest bidder in the United States).

104. *See* Tegeler, *supra* note 1, at 133. For both an analysis of the problems created by a black market in children and proposed remedies, see Turano, *supra* note 13, at 48-53.

105. Tegeler, *supra* note 1, at 133.

106. *See* MEEZAN ET AL., *supra* note 67, at 11.

107. Wallisch, *supra* note 60, at 334.

108. *Id.*; Myers, *supra* note 60, at 631. Testimony before the United States Senate indicates that black market placements involve at least one state with relatively weak adoption laws and procedures, and that the only way to remedy this situation and combat the black market for children is to have national uniformity in the adoption laws. *Id.* (citing S. REP. No. 167, 95th Cong., 2d Sess. 26-27 (1978)); *see also* Turano, *supra* note 13, at 60-61 (discussing the operations of the black market).

109. *See* Lindsey, *supra* note 75, at 1 (citing examples of couples who have sought babies by placing notices on cars at shopping centers, parking lots, park benches, and railroad overpasses); Turano, *supra* note 13, at 48-53; *see also* MEEZAN ET AL., *supra* note 67, at 77 (explaining that legally questionable adoptions occur in all strata of our society and thus are not relegated to specific societal groups or conditions).

110. *Tearful Mom Pleads for Baby Back*, MIAMI HERALD, Oct. 21, 1989, at 1B (reporting that a mother in Florida reportedly entered a hospital under the name of the proposed adoptive mother and then, after the birth of the child, turned the infant over to the adoptive couple in return for $1,100, a plane ticket, and other gifts); *see also Baby-Selling Case*, WASH. POST, May 17, 1989, metro final edition, at C6 (noting that a woman accused of trading her infant son for money and drugs received a three-year suspended sentence after pleading guilty to conspiring to sell cocaine); Clifford, *supra* note 9, at 8

activity is not limited to any one class of people, but instead occurs in all strata of our society. Age, family income, length of marriage, and the number of children already in a family have no direct correlation to legally questionable activities in adoptions.[111]

Interestingly, most black market adoptions are not detrimental to the welfare of the child.[112] The procurement of these children is not for illegal or immoral purposes, and the adoptive parents are usually not criminals or unfit parents. They are desperate people with the financial ability to purchase a child.[113]

Thus, at least two authors have proposed the legalization of the black market as a solution to the baby shortage.[114] One author of this proposal, Judge Richard Posner of the Seventh Circuit Court of Appeals, rests the foundation of his legalization analysis on the economics of supply and demand. Indeed, the article containing this proposal is popularly referred to as "the baby-selling article," a

---

(stating that after the death of Lisa Steinberg in New York, an investigation into private adoptions allegedly uncovered evidence that six lawyers and a number of doctors were involved in a scheme to sell white babies for up to $100,000); Patricia Hurtado, *Couple Accused of Running Illegal Adoption Agency*, NEWSDAY (New York), June 22, 1988, city edition, at 3 (reporting that a Brooklyn couple and their lawyer were charged with operating an illegal adoption agency by paying pregnant women $2,000 for their children and then selling the children to the highest bidder); *It's a Seller's Market*, LIFE, Sept. 1988, family, at 80 ("With 100 couples vying for each healthy white infant, hopeful adoptive parents go to greater lengths to obtain a child."); Claudia Levy, *Baby Selling on the Rise, Officials Say; Arrest of Pennsylvania Couple Said to Reflect Hidden Problem*, WASH. POST, July 19, 1988, metro final edition, at B1 (reporting on a couple accused of attempting to sell their newborn daughter to undercover Maryland state troopers); *The Market for Babies*, CHRISTIAN SCI. MONITOR, Feb. 22, 1989 (Editorial), at 20; Karen Stabiner, *The Baby Brokers; in the Emotional World of Private Adoptions, the Lawyers Make the Deals Between Childless Couples and Women Who Give Up Their Babies*, L.A. TIMES, Aug. 14, 1988, Sun. home edition (Magazine), at 8; *Two Face Baby-Selling Charge*, N.Y. TIMES, Nov. 25, 1988, § B, at 13 (noting that the parents of a two-month-old male infant were charged with selling their son for $3,500 and three ounces of uncut cocaine). Four people, including a father-and-daughter team of lawyers, were arrested for allegedly operating a baby-selling ring that charged as much as $36,000 for an infant. Barbara Whitaker, *Adoption Agency as Baby Sellers*, NEWSDAY (New York), June 21, 1989, city edition, at 7. The four were charged with enticing prospective adoptive couples into paying large fees and supposed expenses of the birth mothers so that they could obtain an infant more quickly. *Id.*

111. *See* MEEZAN ET AL., *supra* note 67, at 77.

112. LAURIE WISHARD & WILLIAM R. WISHARD, ADOPTION: THE GRAFTED TREE 105 (1979).

113. *Id.*

114. Elizabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 324 (1987) [hereinafter Landes & Posner, *Baby Shortage Economics*]; *see* CYNTHIA MARTIN, BEATING THE ADOPTION GAME (1980); Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59 (1987) [hereinafter Posner, *Adoption Market Regulation*].

term which Posner has not disputed.[115]

In essence, the baby-selling article develops:

> a model of supply and demand for babies for adoption under the existing pattern of regulation and shows (1) how that regulation has created a baby shortage (and, as a result, a black market) by preventing a free market from equilibrating the demand for and supply of babies for adoption and (2) how it has contributed to a glut of unadopted children maintained in foster homes at public expense.[116]

Under this model, the price of a child would be determined by factors such as a birth mother's direct and opportunity costs in carrying the child to term, and any psychic costs she incurs by giving birth to a child she will not keep, divided by the direct, opportunity, and psychological costs of either having and keeping the child, or of aborting the child.[117]

Posner and Landes, his co-author, list the major items for which birth mothers are not currently compensated that would become part of the allowable costs of "producing and selling a baby."[118] These items include:

> (1) the opportunity costs of the natural mother's time during the period of pregnancy or hospitalization when she is precluded from working, over and above her maintenance costs, (2) any pain or other disutility of the pregnancy and delivery to her, (3) any value which she attaches to keeping the child rather than putting it up for adoption, and (4) the costs of search of the middleman—usually an obstetrician or lawyer—in locating and bringing together the supplier and demander.[119]

Ultimately, Posner and Landes propose the authorization of designated adoption agencies, on an experimental basis, to use a portion of their adoption fees to pay women contemplating abortion to forego the abortion, have the child, and then relinquish it for adoption.[120]

There has been considerable criticism of the Landes and Posner article.[121] To help the reader understand their reasoning, the authors employ an economic analysis in which they analogize the sale of infants to commodities such as automobiles and television

115. Posner, *Adoption Market Regulation*, *supra* note 114, at 59.
116. Landes & Posner, *Baby Shortage Economics*, *supra* note 114, at 324.
117. *Id.* at 329.
118. *Id.* at 337-39.
119. *Id.* at 337.
120. *Id.* at 347-48.
121. *See infra* notes 123-24 and accompanying text; *see also* Posner, *Adoption Market Regulation*, *supra* note 114, at 59 (responding to critics).

sets.[122] A common criticism of this law-and-economic analysis is its comparison of infants to ordinary commodities.[123] Other criticisms of the Posner and Landes proposal include a concern that children sold on an open market would go to the highest bidder and therefore to the wealthiest families, that there would be no consideration of the best interests of the child in the sale, that such a system would permit slavery, and that it would allow baby breeding.[124]

In 1987, Posner responded to criticisms of the first baby-selling article.[125] He stated that two common misconceptions about his article were that he advocated a free market for babies, and that his proposal to legalize the black market was a radical break with existing ethical norms.[126]

In responding to his critics, Posner asserted that the money currently paid to birth mothers is really a sale in disguise.[127] In other words, the gray market is really a black market incognito. Posner also stated that the price of babies would not be driven up because prices in a free market normally are lower than those in a black market.[128] He reiterated that buyers would not be free to abuse children because the laws forbidding the abuse and neglect of children would remain in effect.[129] Posner, however, would limit remedies for breach of contract in the adoption area.[130] Posner's main rationalization for his proposal is that he believes it will curtail the number of abortions.[131] Finally, Posner seems to imply that baby selling does not equate with slavery because the children will be sold into families that will care for them, and that perhaps, baby

122. Posner, *Adoption Market Regulation, supra* note 114, at 64; *see* JONATHAN SWIFT, GULLIVER'S TRAVELS (1726) (as an example of another author who analogized infants to commodities (potatoes)).

123. *See* 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).

124. *See id.*; Jane M. Cohen, *Posnerism, Pluralism, Pessimism*, 67 B.U. L. REV. 105 (1987) (responding to Posner's "baby-selling article").

125. *See* Posner, *Adoption Market Regulation, supra* note 114, at 59-71.

126. *Id.* at 59-60.

127. *Id.* at 71.

128. *Id.* at 64-65.

129. *Id.* at 65-67 ("The idea that a significant number of people are lurking about who if given the chance would buy babies for criminal purposes is a bogeyman.").

130. *Id.* at 67. Apparently even Posner would draw the line in breach of contract cases. For example, Posner explains that adoptive parents could not reject a baby because of a handicap. *Id.* Nor would adoptive parents be able to force a birth mother to surrender her baby if she changed her mind, unless a competent authority found that it would be in the child's best interest to be with the adoptive parents. *Id.* Additionally, the birth mother would not be allowed to take the baby back after adoption. *Id.*

131. *Id.* at 62-63.

breeding should be permitted for couples who are unable to have children for medical or genetic reasons.[132]

Posner proposes implementing his scheme initially by allowing agencies to induce pregnant women who have decided to abort, not to do so through the payment of money.[133] Posner's proposal differs greatly from this Article's proposal which only would allow pregnant women, who have *already* made a decision to relinquish their child for adoption, to receive compensation for certain expenses while they await the birth of their child. Thus, a critical difference between Posner's proposal and this Article's proposal is the focus on when and why the offer of compensation occurs in relation to the decision to surrender a child.

This author's proposal, unlike the Landes and Posner proposal, does not allow a party to promise money to a birth mother to entice her to change the decision she has made regarding her unwanted pregnancy. In addition, this author's proposal would not compensate a birth mother for pain or for other disutility costs relating to the pregnancy and birth of the child, would not place a value on what it costs the birth mother to relinquish the child as opposed to keeping it, and would not allow the middle person to receive significant search costs.

The overriding problem with the Landes and Posner proposal is that it exploits women. Money is offered to pregnant women who have decided to have an abortion to forego the abortion, give birth, and place the child for adoption. The sole intent behind the offer of money is to influence a woman's decision regarding her pregnancy. The next logical step is to attempt to influence pregnant women who have decided to keep their children instead to relinquish their babies for adoption, with the promise of money and material gain. Obviously, in this scenario, only poor women would need to sell their children. Women with sufficient income would not be relegated to making these kinds of decisions.

It is arguable that there is very little difference between Posner's proposal and prostitution. Essentially, a woman with an unwanted pregnancy is allowing others to use her body for purely economic reasons.[134] This proposal exploits women and their reproductive capacity.

---

132. *See id.* at 70-71.

133. *Id.* at 63-64.

134. This can be distinguished from the surrogate mother situation where a woman makes a decision to accept money *before* voluntarily becoming pregnant, and the other party involved is the birth father.

Although it may be true that some mothers are going to sell their infants, this is undoubtedly only a small part of the black market. The real culprit is the middle-person, for whom Posner advocates a sizeable role, a middle-person who becomes involved in the situation for the sole purpose of making a profit.[135] Mothers entangled in baby marketing schemes generally are victims exploited by a middle-person.[136] Many authors and child welfare experts predict that authorities cannot control this type of activity until the applicable laws are strictly enforced.[137]

Further, several recently reported incidents of baby selling involve mothers and fathers selling their infants for money and drugs.[138] These incidents suggest an increase in poverty and the drug problem, which should be remedied through the enforcement of drug laws and the rehabilitation of drug addicts, not by restricting compensation for birth mothers.

At least one commentator has suggested that states may discourage the black market in children by requiring the disclosure of expenses in adoption proceedings.[139] A number of statutory schemes limit the purposes for which money may be spent in connection with adoptions.[140] Statutes, however, that attempt to restrict the actual quantitative amount of compensation exchanged in adoption cases are largely ineffective.[141]

As a consequence, there is a delicate balance between properly compensating birth mothers for their labor and expenses, and cre-

135. *See* Julie Johnson, *Baby Brokering: Desperate Girls' Case Reveals Shadowy World*, N.Y. TIMES, Oct. 29, 1987, at B1 (reporting that pregnant teenage girls, attracted by the offer of round trip air fare, spending money, a maternity wardrobe, and coverage of all medical costs, were allegedly exploited by a man who arranged to have their infants adopted for a fee and then kept the fee for himself); *see also* Wallisch, *supra* note 60 (discussing regulation of the middle-person).

136. Johnson, *supra* note 135, at B1.

137. *See* Tegeler, *supra* note 1, at 143-47. Enforcement of anti-baby-selling laws is very difficult and perhaps impossible without the support of the parties involved in the adoption; such support is difficult to obtain when it is counter to their interests. *See id.*; Myers, *supra* note 60, at 629; Turano, *supra* note 13, at 60-61.

138. Lisa Leff, *Maryland Family Adopted "Sold" Baby; Girl Found Healthy in "Good Home,"* WASH. POST, Nov. 30, 1988, at D6. The birth parents were arrested for allegedly giving an undercover officer their seven-week-old son in exchange for $3,500 and three ounces of cocaine. *Id.* There were also allegations that the couple had earlier relinquished an infant daughter for $5,000. *Id.*; *see supra* note 110.

139. Paul T. Fullerton, *Independent Adoption: The Inadequacies of State Law*, 63 WASH. U. L.Q. 753, 763 (1985).

140. Wallisch, *supra* note 60, at 350 n.182. These include restrictions on fees charged, mandatory court approval of the fees charged, an accounting report of all disbursements of any value made in connection with the adoption, and a requirement of court approval of reasonable attorney fees. *Id.* at 350 nn.182-85.

141. *Id.* at 351.

ating a wholesale baby market. Compensating birth mothers is not baby selling. On the contrary, birth mothers should indeed be compensated, but it is unnecessary to go further and create the baby-selling market that Landes and Posner support.

III. AN ANALYSIS OF COMPENSATION TO BIRTH MOTHERS

The parties to an adoption may exchange money in the following situations: (1) where the parties to an adoption are unrelated and generally are strangers; (2) where the exchange of money is between family members;[142] and (3) where the adoption involves surrogate mothers.[143] This Article, which focuses on exchanges of money between adoptive parents and unrelated birth mothers, discusses the current limitations on compensation to birth mothers and the modifications that should be made to enhance this system. Therefore, it is first necessary to consider how the various states handle compensation for birth mothers who are relinquishing their children for adoption.

A. State Laws Governing Birth Mother Compensation[144]

A critical disparity exists among state adoption laws concerning

142. Enders v. Enders, 30 A. 129 (Pa. 1894) (holding that an agreement to pay a daughter-in-law $20,000 and her son $10,000 when the son comes of age in exchange for the boy living with and being educated by his grandfather is not against public policy and will be enforced); *see also* Reimche v. First Nat'l Bank of Nev., 512 F.2d 187 (9th Cir. 1975) (finding that an agreement by a father to provide for a mother of an illegitimate child in the putative father's will in exchange for an agreement to permit the adoption of the child by its father is enforceable because it does not violate public policy). *But see* Willey v. Lawton, 132 N.E.2d 34 (Ill. App. Ct. 1956) (holding that an offer by a birth mother and her husband to the birth father that they would agree to adopt his children for $5,000 so that the birth father would not have to pay future child support was an illegal contract which was void as against public policy and not enforceable).

143. Barbara L. Atwell, *Surrogacy and Adoption: A Case of Incompatibility*, 20 COLUM. HUM. RTS. L. REV. 1, 2 (1988). Atwell notes that "A 'surrogate parenting agreement' is an agreement in which the surrogate agrees for a fee to be impregnated through artificial insemination, to carry the child to term, and, after birth, to deliver the newborn baby to the biological father and to surrender all parental rights she would otherwise have." *Id.* Atwell analyzes surrogate motherhood as an attempt to create a new form of independent adoption and suggests that such agreements should not be enforced to the extent that they are incompatible with adoption statutes. *Id.*; *see also* Avi Katz, *Surrogate Motherhood and the Baby-Selling Laws*, 20 COLUM. J.L. & SOC. PROBS. 1 (1986) (discussing and comparing the surrogate mother laws and the baby-selling laws); John J. Mandler, Note, *Developing a Concept of the Modern "Family": A Proposed Uniform Surrogate Parenthood Act*, 73 GEO. L.J. 1283 (1985) (discussing the criticisms of surrogate motherhood relating to the similarities between baby selling and surrogate parenthood arrangements).

144. For purposes of this Article, compensation refers to any payment of money made to a birth mother in connection with the adoption of her child, including but not

compensation to birth mothers. For example, some birth mothers who release their children for adoption receive compensation for all expenses during their pregnancies, while other birth mothers are relegated to meeting their needs through the welfare system. Obviously, there is a need for consistency and reform in the adoption laws to stem the disparate treatment afforded to birth mothers on a state-by-state basis.

Unfortunately, the states lack uniformity in their adoption laws concerning the type and amount of compensation a birth mother may receive.[145] Some states specifically allow a birth mother to

---

limited to, living expenses, medical costs, legal costs, counseling costs, attorney fees, and other reasonable costs.

145. Linda Jean Davie, Note, *Babes and Barristers: Legal Ethics and Lawyer-Facilitated Independent Adoptions*, 12 HOFSTRA L. REV. 933, 940 (1984).

Many state statutes allow birth mothers to recover reasonable expenses incident to maternity. ARIZ. REV. STAT. ANN. § 8-114 (1989) (a person shall not receive, directly nor indirectly, anything of value in exchange for giving or obtaining consent to place a child in an adoptive home, except in regard to reasonable medical and legal costs as well as counselling and agency fees); IOWA CODE § 600.9 (1981) ("a natural parent shall not receive anything of value as a result of the natural parent's child or former child being placed with and adopted by another person," except as for expenses relating to the natural mother's child raising, childbirth, or delivery of the child for adoption); LA. REV. STAT. ANN. § 9:424.2 (West 1965 & Supp. 1991) (reimbursement payments made by the adoptive parents to the birth mother are permissible for medical expenses, reasonable administrative and agency expenses and foster care expenses); MD. FAM. LAW. CODE ANN. § 5-327 (1984) (an agency or individual may not charge or receive compensation for adoption placement, except for "reasonable and customary charges or fees for hospital or medical or legal services"); OHIO REV. CODE ANN. § 3107.10 (Anderson 1989) (a filing for adoption shall not state that there will be disbursements in connection with placing of the child for adoption, except for physician expenses, hospital expenses, attorneys' fees, and agency expenses); UTAH CODE ANN. § 76-7-203 (1990) ("any person, while having custody, care, control, or possession of any child, who sells any child for consideration of the payment of money or other things of value is guilty of a felony of the third degree, except costs for medical, hospital and legal services"); WIS. STAT. ANN. § 948.24 (West 1990) (it is illegal to be involved in an adoption where expenses exceeding the "actual costs of the hospital and medical expenses of the mother and child" are spent).

Other state statutes allow the birth mother to recover only that amount a court determines is reasonable. ALA. CODE § 26-10-8 (1986), *repealed by* 1990 ALA. ACTS 90-554, § 38 (effective Jan. 1, 1991) (it shall be unlawful to "hold out inducements to parents to part with their offspring . . . except through the commitment of a court having jurisdiction"); ALASKA STAT. § 25.23.090 (1983) (a petitioner in any proceeding for the adoption of a minor shall file a report showing any expenses incurred in connection with the adoption); ARK. CODE ANN. § 9-9-211 (Michie 1991) (in any proceeding for an adoption, a report must be filed listing all disbursements of anything of value in connection with the adoption); COLO. REV. STAT. ANN. § 19-5-213 (West 1986 & Supp. 1990) (no person shall pay or be paid anything of value in connection with an adoption, except attorneys fees and other fees approved by the court); MICH. COMP. LAWS ANN. § 710.54 (West 1986 & Supp. 1990) ("except for charges and fees approved by the court" no person shall accept or receive any compensation in relation to adoption); N.M. STAT. ANN. § 40-7-50 (Michie 1989) (a petitioner in an adoption case must file a full accounting of everything

receive compensation for living expenses.[146] Others do not define by law the amount or type of compensation that a birth mother

paid in connection with the adoption); S.D. CODIFIED LAWS ANN. § 25-6-4.2 (1984) (offering, giving, or receiving unauthorized consideration for adoption is a felony, except for money which is expended with the court's approval).

Other state statutes prohibit or criminalize the birth mother's or a third party's receipt of any compensation in exchange for a consent to adopt. CAL. PENAL CODE § 273 (West 1989 & Supp. 1991) (any person who pays money or anything of value "to a parent for the placement for adoption, for the consent to an adoption, or for cooperation in the completion of the adoption" is guilty of a misdemeanor); DEL. CODE ANN. tit. 13, § 928 (1981) (no natural parent of any child who is being placed for adoption shall receive a fee of any type in connection with the placement of the child or with the adoption); FLA. STAT. ANN. § 63.212(1)(d) (West 1985) (it is unlawful for any person "to sell or surrender, or to arrange for the sale or surrender of, a child to another person for money or anything of value"); GA. CODE ANN. § 19-8-24 (Michie 1981) (it is unlawful for any person to hold out inducements to a birth parent to give up his or her child); IDAHO CODE § 18-1511 (1987) (it is illegal for any person to "sell or barter any child for adoption"); ILL. REV. STAT. ch. 40, para. 1526 (1989) (no person, agency, etc. shall pay or be paid any compensation for placing out a child for adoption, except "a child welfare agency"); IND. CODE ANN. § 35-46-1-9 (Burns 1985) (it is a class D felony to "transfer . . . or receive . . . any property in connection with the waiver of parental rights, the termination of parental rights, the consent to adoption or the petition for adoption"); KY. REV. STAT. ANN. § 199.590 (Baldwin 1982 & Supp. 1990) (no person shall "sell or purchase" any child for the purpose of adoption); MASS. ANN. LAWS ch. 210, § 11A (Law. Co-op. 1987) (any person will be punished for accepting "payment in the form of money or other consideration in return for placing a child for adoption"); MO. REV. STAT. § 568.175 (1979 & Supp. 1991) (a person commits the offense of trafficking when that person offers or receives money, or any other type of consideration, for the delivery of a child from one person to another, or for the execution of the consent to adopt or to terminate parental rights); NEV. REV. STAT. § 127.290 (1986) (no person, who does not operate a licensed child-placing agency, shall accept directly or indirectly any compensation for placing, arranging or assisting in arranging delivery of a child for adoption); N.J. STAT. ANN. § 9:3-54 (West 1976 & Supp. 1990) (no person shall receive any type of compensation for "offering to make or assisting or participating in any placement for adoption"); N.Y. SOC. SERV. LAW § 374(6) (McKinney 1983) (no person shall pay or give to any person any compensation in connection with placing a child out for adoption); N.C. GEN. STAT. § 48-37 (1984) (no person shall give or accept, any fee or other compensation for receiving or placing any child for adoption); OR. REV. STAT. § 109.311(3) (1990) (no person shall charge, accept, or pay another person to adopt a minor child, except for fees involved in locating a child and fees charged by licensed adoption agencies); TENN. CODE ANN. § 36-1-135 (1984) ("it is unlawful for any person," other than an adoption agency, to charge or receive any compensation or thing of value whatsoever in connection with the placement of a child for adoption); TEX. PENAL CODE ANN. § 25.11 (West 1989) ("a person commits an offense if he . . . offers to accept, agrees to accept, or accepts a thing of value for the delivery of a child to another . . . for purposes of adoption"); VA. CODE ANN. § 63.1-220.4 (Michie 1987 & Supp. 1990) (no person shall give or accept "any money, property, service or other thing of value in connection with a placement or adoption"); W. VA. CODE § 48-4-16 (1986 & Supp. 1991) ("any person who knowingly gives to another person any thing of value in consideration for the recipient's locating, providing, or procuring a minor child for, but not limited to, adoption" is guilty of a misdemeanor offense).

146. *See, e.g.*, FLA. STAT. ANN. § 63.212 (1)(d) (West 1985 & Supp. 1991); TENN. CODE ANN. § 36-1-135 (1984); UTAH CODE ANN. § 76-7-203 (1990).

may receive,[147] and still others limit compensation to either medical, legal, counseling, or other reasonable costs.[148] Furthermore, no uniform definition of reimbursable expenses exists. Nevertheless, most states mandate that all payments must be reported to the court.[149]

Laws that prohibit or limit the receipt of compensation by birth mothers presumably protect the birth mother from being coerced into consenting to the adoption of her child.[150] In reality, however, this refusal to permit compensation to birth mothers for medical, legal, counseling, living, and other costs that birth mothers reasonably need to live comfortably during their pregnancies is based on archaic paternalistic assumptions that will be shown to lack validity.[151]

B. The Two-Tiered Test—A Judicial Analysis of Compensation for Birth Mothers

In addition to state statutes regulating compensation for birth mothers, several states' courts have adopted a two-tiered approach to determine the proper compensation to be afforded to birth mothers.[152] To apply this two-tiered analysis, a court must first

147. *See* MEEZAN ET AL., *supra* note 67, at 188-98. For example, the adoption statutes of Hawaii, Kansas, Maine, Minnesota, Montana, Nebraska, New Hampshire, Oklahoma, Rhode Island, South Carolina, Vermont, and Wyoming do not address the issue of compensation for birth mothers. *Id.*

148. *See, e.g.*, ALASKA STAT. § 25.23.090 (1983); ARIZ. REV. STAT. ANN. § 8-114 (1989); ARK. CODE ANN. § 9-9-211 (Michie 1991); CAL. PENAL CODE § 273 (West 1989 & Supp. 1991); COLO. REV. STAT. ANN. § 19-5-213 (West 1986 & Supp. 1990); DEL. CODE ANN. tit. 13, § 928 (1981); GA. CODE ANN. § 19-8-24 (Michie 1991); IDAHO CODE § 18-1511 (1987); IND. CODE ANN. § 35-46-1-9 (Burns 1985); IOWA CODE § 600.9 (1981); LA. REV. STAT. ANN. § 9:424.2 (West 1965 & Supp. 1991); MD. FAM. LAW CODE ANN. § 5-327 (1984); MO. REV. STAT. § 568.175 (1979 & Supp. 1991); N.Y. SOC. SERV. LAW § 374(6) (McKinney 1983); TEX. PENAL CODE ANN. § 25.11 (West 1989); VA. CODE ANN. § 63.1-220.4 (Michie 1987 & Supp. 1990); W. VA. CODE § 48-4-16 (1986 & Supp. 1991).

149. *See, e.g.*, IND. CODE ANN. § 35-46-1-9 (West 1986 & Supp. 1991); IOWA CODE § 600.9 (1981); MICH. COMP. LAWS ANN. § 710.54 (West 1986 & Supp. 1991); N.M. STAT. ANN. § 40-7-50 (Michie 1989); OHIO REV. CODE ANN. § 3107.10 (Anderson 1989); OR. REV. STAT. § 109.311(3) (1990).

150. *See, e.g., In re* Adoption of Infant Girl Banda, 559 N.E.2d 1373 (Ohio Ct. App. 1988). According to the court, the purpose of a statute which limits certain expenditures in an adoption case is:

> to protect both the mother and her baby from falling prey to a person involved in the black market baby business. The fear is that financial incentive in the transfer of a child will cause a mother to make a decision that is not in the best interest of herself or the child.

Id. at 1380.

151. This is not a concession that these types of limitations were ever valid.

152. *See* Downs v. Wortman, 185 S.E.2d 387 (Ga. 1971); Savannah Bank & Trust

decide who the beneficiaries are to an adoption contract. Is it the adoptive parents, the birth parents, the child to be adopted, or a combination of any of the three? For instance, financially assisting a birth mother to enable her to leave the state after the birth of her child is not acceptable because the mother, not the child, receives the benefit.[153] Once this determination is made, the court can then decide whether the compensation was legitimate, and hence, allowable.

Since it provides the clearest articulation of the two-tiered analysis, this Article will discuss the Pennsylvania case of *Gorden v. Cutler*.[154] In *Gorden*, the Pennsylvania Superior Court[155] adopted a two-tiered approach for analyzing the legality of money exchanges between parties to an adoption.[156] In *Gorden*, the adoptive parents sought to adopt an infant through an independent adoption.[157] Through their attorney, the adoptive parents contacted the birth mother and father.[158] The adoptive parents agreed to pay the birth mother's medical expenses[159] on the condition that the birth parents execute a consent to the adoption.[160] In return for the adoptive parents' promise to pay the "lying in" expenses,[161] the birth

Co. v. Hanley, 65 S.E.2d 26 (Ga. 1951); Gray v. Maxwell, 293 N.W.2d 90 (Neb. 1980); Barwin v. Reidy, 307 P.2d 175 (N.M. 1957); Gorden v. Cutler, 471 A.2d 449 (Pa. Super. Ct. 1983).

Thus, the reasoning in Gorden v. Cutler, to be discussed below, is not endemic to Pennsylvania, as illustrated by the other courts that have chosen to use this same model.

Moreover, states that have not judicially adopted the two-tiered test as applied in *Gorden* use similar statutory guidelines to assess the legality of compensation for a birth mother where they limit reimbursable expenses to those connected with the birth of the child. *See, e.g.*, ALASKA STAT. § 25.23.090 (1983) (limiting compensation to medical or hospital care received by the mother or minor during the mother's prenatal care or confinement); IOWA CODE § 600.9 (1981) (limiting compensation to an amount commensurate with necessary services provided to the birth mother relating to child birth, child raising, or delivery of the child for adoption).

153. *See* Downs v. Wortman, 185 S.E.2d 387, 388 (Ga. 1971).

154. Gorden v. Cutler, 471 A.2d 449 (Pa. Super. Ct. 1983). *Gorden* represents the prevailing belief in our society that equates the exchange of money in adoption cases with baby selling.

155. The Pennsylvania Superior Court is an intermediate appellate court of Pennsylvania.

156. *Gorden*, 471 A.2d at 458. While the Pennsylvania Supreme Court later applied the two-tiered approach in *In re* Baby Girl D., 517 A.2d 925 (Pa. 1986), this Article first examines *Gorden* because of its clarity.

157. *Gorden*, 471 A.2d at 450.

158. *Id.*

159. The estimated cost of the birth mother's expenses was $3,000, which included medication and treatment in the hospital, doctor's fees, a sonogram, an ultrasound test, the delivery, prenatal care, blood work, and circumcision of the infant. *Id.*

160. *Id.*

161. Lying-in expenses are those expenses directly connected to the birth of a child.

parents agreed to consent to the adoption of their unborn child.[162] Thereafter, the adoptive parents expended approximately $3,000 to cover the birth mother's expenses.[163] After payment of these expenses, the adoptive parents received custody of the infant boy.[164]

Prior to the filing of a Petition for Adoption by the adoptive parents, the birth parents filed a Petition for Writ of Habeas Corpus seeking the return of their child.[165] After a hearing, the trial court ordered the adoptive parents to return the infant to the custody of his birth parents.[166] The court made no provision for the repayment of the adoption-related expenditures to the adoptive parents.[167] Consequently, the adoptive parents filed suit for reimbursement of these expenses.[168]

Though the trial court held it lacked jurisdiction to decide the case, it opined that, if given an opportunity to reach a decision, it would deny the adoptive parents' request to recoup their expenses from the birth parents.[169] The court explained that it would base its denial for reimbursement on its belief that a contract to pay expenses in exchange for a consent to adopt is void as a matter of law because it violates public policy.[170] The court voiced its concern that the necessary corollary to the adoptive parents' argument would be that payment of medical bills would entitle a payor to have custody of the child; such an agreement, the court stated, cannot be judicially enforced.[171]

Although reversing on a jurisdictional issue,[172] the appellate court in *Gorden* nevertheless reached the merits of the case. The court found the real issue to be whether the Pennsylvania courts would enforce an adoption contract. To answer this question, the *Gorden* court first had to determine whether a contract for adoption violates public policy.[173] The Pennsylvania adoption statute

162. *Gorden*, 471 A.2d at 450.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* Custody was not an issue on appeal. *Id.*
167. *Id.*
168. *Id.* at 450-51.
169. *Id.* at 452.
170. *Id.*
171. *Id.*
172. *Id.* at 452-53. The court explained that Pennsylvania had recently unified its court system to simplify procedures and to remove archaisms from the judicial system. *Id.* As a result, a case could no longer be dismissed simply because it was in the wrong court; instead the proper remedy would be to transfer the case to the correct division. *Id.* The court thus held that the trial court improperly dismissed the case.
173. *Id.* at 454. The court noted that the agreement to adopt is a contract, and there-

involved,[174] like many other state statutes,[175] does not proscribe any specific fees in adoptions. Rather, the adopting parents must submit all payments made in connection with an adoption to the court for approval.[176]

Thus, because the Pennsylvania statute did not prohibit adoption contracts expressly, the *Gorden* court held that a court must determine that the adoption contract injured the public or worked against the public good in order to declare such an arrangement void as against public policy.[177] Specifically, in the adoption context, the court must consider whether the questioned contract benefits the child.[178] Once the court determines that the contract benefits the child, the court then must review the terms of the contract and the facts of each case to see if the contract violates public policy.

To further this analysis, the *Gorden* court next adopted and employed a two-tiered test,[179] first articulated by the Supreme Court

---

fore, the court's task was to elucidate a definition of "public policy" regarding such contracts. *Id.* at 455. Public policy is an ever-changing term. Donegal Mut. Ins. Co. v. Long, 564 A.2d 937, 943 (Pa. Super. Ct. 1989), *appeal granted*, 582 A.2d 323 (Pa. 1990) (noting that the courts have rarely articulated a definition of "public policy" and when they have, the meaning is vague and variable; the only constant of public policy being that it is never constant). The *Gorden* court stated:

> Public policy, in the administration of the law by the courts, is essentially different from what may be public policy in the view of the legislature. . . . The public policy which dictates the enactment of a law is determined by the wisdom of the legislature. If the legislature declared by statute, that it was injurious to public interests, under any circumstances, for a parent to surrender the custody of a child during minority to a grandfather, that would be the end of discussion on that question. . . . But in the absence of any statute forbidding such a contract, . . . we must find, as a fact, that such contracts to be void, have a tendency to injure the public, or are against the public good.

Gorden, 471 A.2d at 455 (quoting Enders v. Enders, 30 A. 129, 129 (Pa. 1894)).

174. Adoption Act, PA. STAT. ANN. tit. 23, §§ 2101-2910 (1990).

175. *See, e.g.*, LA. REV. STAT. ANN. § 9:424.2 (West 1965 & Supp. 1991); *see* statutes cited *supra* note 149.

176. Adoption Act, PA. STAT. ANN. tit. 23, § 2533(b)(8), (c) (1990) (requiring an itemized accounting of money and consideration to be paid to or received by an intermediary or to or by any other person or persons to the knowledge of the intermediary by reason of the adoption placement).

177. *Gorden*, 471 A.2d at 455 (citing *Enders*, 30 A. at 129).

178. A child is clearly not chattel and cannot be bought and sold. Knight v. Deavers, 531 S.W.2d 252, 256 (Ark. 1976). In a contested adoption, the *Knight* court awarded custody of a child to foster parents, despite a written agreement by the foster parents that they would not try to gain legal custody of the child. *Id.* at 253. The court stated that a child is not chattel and that no one has a proprietary right in a child. *Id.* at 256.

179. *See infra* part V. The court refers to this test as two-tiered, presumably because when examining the contract, two questions are posed. In reality, however, it is a simple one-part test. A true two-tiered test will be proposed in the remedy section of this Article.

of Georgia in 1951[180] and later refined by that same court in 1971.[181] The essence of this test is that a mother may not agree to the adoption of her child by another in exchange for monetary consideration to herself because such an agreement is against public policy and therefore void.[182] However, if the monetary consideration flows to the child and not to the mother, the contract is not against public policy.[183] Other courts that apply this two-tiered analysis[184] today recognize that it is common for adopting parents to pay the medical and hospital expenses of a birth mother, a benefit ultimately flowing to the child.[185] A blanket disallowance of such payments would serve only to overburden an already taxed social service system.

After reviewing the facts, the appellate court in *Gorden* found that all of the money expended by the adoptive parents directly benefitted the child and in no way inured to the benefit of the birth mother.[186] These payments covered expenses for the birth mother's medication and treatment while hospitalized, an ultrasound test, prenatal care, blood work, the delivery of the baby, and the baby's circumcision.[187] Ultimately, the appellate court concluded that there was a valid contract and a wrongful breach by

180. Savannah Bank & Trust Co. v. Hanley, 65 S.E.2d 26, 29 (Ga. 1951) (holding void an agreement which allowed adoption of a child in return for a bequest of property because the benefit flowed to the birth mother and not to the child).

181. Downs v. Wortman, 185 S.E.2d 387 (Ga. 1971). The birth mother was given plane fare in exchange for signing adoption papers. *Id.* at 388. The court held that this type of consent was involuntary, and therefore the mother could withdraw her consent. *Id.* The exchange was against public policy because the consideration flowed to the mother and not to the child. *Id.*

182. *Hanley*, 65 S.E.2d at 29.

183. Savannah Bank & Trust Co. v. Wolff, 11 S.E.2d 766, 772-73 (Ga. 1940).

184. *See, e.g.*, Barwin v. Reidy, 307 P.2d 175 (N.M. 1957). The *Barwin* court recognized that it is common for adopting parents to agree to pay certain hospital and medical expenses for a birth mother and her child in anticipation of adoption. *Id.* at 184. The court found that this type of agreement does not violate public policy because it advances the welfare of the child by ensuring that the child and mother have adequate attention. *Id.* Where, however, the child is released for adoption in consideration of a monetary payment for the benefit of the parent, the consent is void. *Id.*; *see also* Gray v. Maxwell, 293 N.W.2d 90 (Neb. 1980). The *Gray* court adopted the reasoning of *Barwin*, holding that it is not contrary to public policy for persons to make provisions for the hospital and medical expenses of a birth mother. *Gray*, 293 N.W.2d at 95. However, a promise to pay an amount in excess of legitimate expenses in exchange for a child renders the agreement void as against public policy. *Id.*

185. *In re* Adoption of Baby Boy M.G., 522 N.Y.S.2d 822 (Sur. Ct. 1987) (approving all medical expenses and other expenses which related specifically to the adoption); *see Gray*, 293 N.W.2d at 95.

186. Gorden v. Cutler, 471 A.2d 449, 458 (Pa. Super. Ct. 1983).

187. *Id.* at 450-51.

the birth parents.[188] Accordingly, the appellate court held that the birth parents were required to reimburse the adoptive parents.[189]

Recently, the Pennsylvania Supreme Court had an opportunity to apply *Gorden*'s two-tiered test in *Baby Girl D.*[190] The *Baby Girl D.* court reviewed the fees that six different adopting couples paid to a single adoption agency for expenses incurred in locating, preparing, and arranging an adoption. The questioned fees covered the agency's expenses for: (1) counseling birth mothers; (2) counseling adoptive parents; (3) advertising; (4) birth mothers' room, board, and travel; (5) birth mothers' medical treatments not directly related to the birth of the children; and (6) agency fees.[191]

The court employed the two-tiered analysis to determine whether to allow the payments.[192] Although the agency, not the birth mother, received the actual payment of the fees, the court stated that when using the two-tiered test, courts must inquire whether the benefit of any adoption-related payment flowed directly to the child.[193]

Thus, pursuant to the two-tiered analysis, the Pennsylvania Supreme Court disallowed all of the fees under scrutiny. The court first disallowed the agency's fees for counseling birth mothers on the ground that any benefit inured directly to the birth mother and that the only possible benefit to the child was indirect.[194] Second, the court used the same ground to deny charges for room and board and expenses for transporting birth mothers from their homes to the agency.[195] Third, the court denied both the counseling fees for the adoptive parents and the agency fees.[196] Other disbursements that the court denied included medical expenses

188. *Id.* at 458.

189. *Id.* at 458-59. *But see* A.L. v. P.A., 517 A.2d 494 (N.J. Super. Ct. App. Div. 1986). The court held that the birth parents were not liable for civil damages resulting from their revocation of consent or opposition to the entry of an adoption order in a private adoption agreement because it would have an improper chilling effect upon the birth parents' exercise of their right to continue the parent-child relationship. *Id.*

190. *In re* Baby Girl D., 517 A.2d 925 (Pa. 1986). This decision illustrates rather vividly the continuing confusion with the two-tiered test.

191. *Id.* at 926.

192. *Id.* at 927.

193. *Id.* at 927-28.

194. *Id.* at 928. The agency had argued that counseling fees should be permitted because the stability induced by counseling benefits the child. *Id.*

195. *Id.* The adopting couples did not pay to house the birth mother of the infant *they* were actually to adopt. *Id.* If they had, the court indicated that it would arguably constitute an illegal payment to the mother in anticipation of the transfer of the child and further it would bring the voluntariness of the mother's actions into question. *Id.*

196. *Id.* at 930. Agency fees based on a sliding scale are per se illegal because the court could not conceive of any possible relationship between the costs of providing adop-

wholly unrelated to the birth,[197] Lamaze classes, prenatal care, and a sonogram.[198]

The court reasoned that the need for a limitation on fees is two-fold. First, limitations on expenses ensure the placement of children in homes that promote their needs and welfare.[199] Second, limitations on expenses ensure that children will not be bought and sold.[200] The court further reasoned that assistance directly benefitting a birth mother would "naturally tend to influence the mother's decision whether to relinquish her parental rights."[201] The court also feared that the type of indirect financial aid involved in the *Baby Girl D.* case would trigger the infamous "slippery slope" without prospects of an end.[202] The dissent questioned the propriety of formulating a per se rule requiring a direct benefit to a child and posited that a definition of direct benefit would prove elusive and produce anomalous results.[203] The dissenters preferred to approach the compensation issue on a case-by-case basis.[204]

The following comparison between the *Gorden* and *Baby Girl D.* decisions illustrates the problem with the two-tiered test. The *Gorden* court found that all of the expenses paid by the adopting parents to the birth parents were allowable because they directly benefitted the child. The fees specifically included services for an ultrasound test and for prenatal care.[205] Yet, the *Baby Girl D.* court, applying the same test, prohibited reimbursement of fees for prenatal care, Lamaze classes, and a sonogram, explaining that

---

tion services and a couple's gross income. *Id.* The court viewed mandatory counseling fees for adoptive parents as mere agency fees in disguise. *Id.*

197. *In re* Baby Girl D., 517 A.2d 925, 929 n.6 (Pa. 1986) (positing that the surgical removal of a mass from a birth mother's breast is an example of this type of expense).

198. *Id.* at 929.

199. *Id.* at 926.

200. *Id.* at 927.

201. *Id.* at 929.

202. *Id.* For example, the *Baby Girl D.* court asked the following questions:

> Are we then to sanction provision by adoptive parents of a halcyon environment and delectable foods for expectant mothers on the grounds these are beneficial to the child? If medical science were to determine that stress during pregnancy is inimical to the fetus, and an expectant mother's employment was causing her stress, would prospective adopters be expected to employ an agency to find the mother a happier work environment, or perhaps simply support the mother during her pregnancy lest the added stress inhibit the baby's development or effect his insufferable disposition? We think not.

Id.

203. *Id.* at 931 (Hutchinson, J., dissenting) ("So called indirect benefits, under certain circumstances promote the needs and welfare of the child and may at times be essential to its well-being.").

204. *Id.* at 933 (Hutchinson, J., dissenting).

205. Gorden v. Cutler, 471 A.2d 449, 451 (Pa. Super. Ct. 1983).

these expenses were not directly connected to the birth and did not directly benefit the child.[206]

National statistics, however, tell a story different than that assumed by the *Baby Girl D.* court. Studies clearly show a direct correlation between prenatal care and infant mortality.[207] In fact, the United States government, because of a concern for the lack of prenatal care for pregnant mothers in impoverished communities, is currently proposing a national health care plan that would provide prenatal care to all women.[208] Given these statistics, it is difficult to comprehend how a court could conclude that prenatal care does not directly benefit a child. Furthermore, as the dissent noted in *Baby Girl D.*, indirect benefits under certain circumstances still promote the needs and welfare of the child and, at times, may be essential to a child's well being.[209] Consequently, *Gorden* and *Baby Girl D.* illustrate the problems involved in arbitrarily applying the two-tiered test with its corresponding emphasis upon the direct benefits to the child.

C. Differing Approaches to Compensation for Birth Mothers

As evidenced by the *Gorden* and *Baby Girl D.* cases above, many state courts review the compensation to birth mothers in adoption cases. Numerous states mandate the filing in court of a list of adoption expenditures.[210] As a result, many courts have the opportunity to review these payments to determine which expenses are

206. *Baby Girl D.*, 517 A.2d at 929. Fortunately, in response to the *Baby Girl D.* decision, the Pennsylvania legislature specifically amended its adoption statute to allow payments for certain expenses which relate to the birth of the child. PA. STAT. ANN. tit. 23, § 2533(d) (1990). The legislature, obviously concerned about this dichotomy, amended the adoption statute specifically to allow payments of medical and hospital expenses for prenatal care; expenses incurred related to the birth of the child; medical, hospital and foster care expenses on *behalf of the child*; and reasonable expenses for counseling. *Id.*

207. Paul H. Wise et al., *Infant Mortality Increase Despite High Access to Tertiary Care: An Evolving Relationship Among Infant Mortality, Health Care, and Socioeconomic Change*, PEDIATRICS, Apr. 1988, at 542.

208. Spencer Rich, *U.S. Launches Campaign to Reduce Infant Mortality; Critics of 'Healthy Start' Contend 10-City Pilot Drains Funds From Similar Programs*, WASH. POST, Feb. 15, 1991, at A8; *Large City Infant Mortality High*, WASH. POST, Feb. 20, 1991, at A17.

209. *Baby Girl D.*, 517 A.2d at 934 (Hutchinson, J., dissenting).

210. *See, e.g.*, ALASKA STAT. § 25.23.090 (1983) (a petitioner in any proceeding for the adoption of a minor shall file a report showing any expenses incurred in connection with the adoption); ARK. CODE ANN. § 9-9-211 (Michie 1991) (in any proceeding for an adoption, a report must be filed listing all disbursements of anything of value in connection with the adoption); *see also supra* note 149 and accompanying text.

allowable.[211] As noted previously, however, there is no uniform agreement among the states concerning which types of compensation should be allowed in the adoption context.[212] There is also a difference of opinion within individual states' courts regarding the correct definition of such terms as "reasonable expenses."

For example, New York surrogate courts, which are charged with reviewing exchanges of money in adoption cases, are at odds with each other concerning what expenses are properly reimbursable in adoption cases. The applicable New York statute allows adoptive parents to reimburse birth parents for expenses in connection with "the birth or care of the adoptive child, the pregnancy or care of the adoptive child's mother or the placement or adoption of the child and on account of or incidental to assistance in arrangements for such placement or adoption."[213]

The compensation structure of the New York statute, at first glance, appears more progressive than the two-tiered test. Yet New York surrogate courts have interpreted it to interdict reimbursement of the following: (1) food and temporary living expenses for a birth mother both before and after the birth of the child;[214] (2) living expenses for the maintenance of a birth mother's home in another state while she resided in New York;[215] (3) travel expenses;[216] and (4) agency fees.[217] To add to the confusion, at least one New York surrogate court interpreted the statute to allow reimbursement of living expenses for a birth mother.[218] Clearly, there is no accord among the New York courts in this matter.

Recently, the Illinois Appellate Court held that a $10,000 payment, purportedly to aid the birth mother to begin a new life, was an illegal payment and thus, voided the birth mother's consent to adoption.[219] But in New Jersey, an illegal payment did not void a

211. Courts, however, must rely upon the honesty of the parties and their attorneys to file accurate reports. For example, an attorney was disciplined for omitting cash payments made by adoptive couples to physicians from the schedules of expenses filed with the court in 21 private adoption cases. *In re* Nadler, 438 N.E.2d 198, 199 (Ill. 1982).

212. *See supra* note 145 and accompanying text.

213. *In re* Adoption of Anonymous, 501 N.Y.S.2d 240, 242 (Sur. Ct. 1986) (quoting N.Y. DOM. REL. LAW § 115(7) (McKinney 1985)).

214. *Id.*

215. *Id.*

216. *Id.*

217. *In re* Adoption of Baby Boy, M.G., 522 N.Y.S.2d 822 (Sur. Ct. 1987).

218. *Id.* at 823.

219. *In re* Adoption of Kindgren, 540 N.E.2d 485 (Ill. App. Ct. 1989) (holding payments of money in excess of the reasonable and actual medical expenses related to the birth of the child void as against public policy).

consent to an adoption where it was in the child's best interest.[220]

New Jersey appellate courts, however, hold that adoptive parents cannot expect that a legally tentative decision to privately adopt a child will not be revoked. All investments of time, money, and emotion must be understood against that principle. Thus, adoptive parents cannot recover any out-of-pocket expenses spent on an adoptive child while in their custody after the birth parents breach the agreement and regain custody of their child.[221] In conclusion, the lack of uniformity prevalent in state statutes governing birth mother compensation is only further exacerbated by state court interpretations of their respective state adoption statutes.

D. The Relation Between Voluntary Consent and Compensation in Adoption Cases

Ultimately, our society desires to ensure that birth parents who relinquish their children for adoption are doing so voluntarily and free from duress or coercion.[222] Many believe that receiving compensation will influence a birth mother's decision whether to relinquish her child for adoption. Accordingly, this is the rationale used for refusing to allow a birth mother to receive a direct benefit.[223] This rationale appears to underlie all limitations on receipt of compensation by birth mothers who relinquish their children for adoption. Therefore, the voluntariness of the birth mother's decision is of vital importance to the issue of compensation.

Historically, the courts decided the voluntariness issue by focusing on the presence or absence of duress or fraud in the decision-making process. Although courts today often look at a combination of factors when trying to ascertain whether a consent is voluntary, they seem to view attempts to withdraw consent with a jaundiced eye. Once a consent is given, courts apparently desire to give effect to such a consent.

For example, one court has held that a combination of the following factors do not constitute duress and, therefore, do not vitiate a birth mother's consent to the adoption of her child:

---

220. *In re* Adoption of a Child by I.T., 397 A.2d 341 (N.J. Super. Ct. App. Div. 1978) (holding that an adoption was valid because it was in the best interest of the child even though the adoptive parents clearly violated the law and involved themselves in an illegal adoptive placement).

221. A.L. v. P.A., 517 A.2d 494, 498 (N.J. Super. Ct. App. Div. 1986).

222. *See* Huebert v. Marshall, 270 N.E.2d 464 (Ill. App. Ct. 1971) (holding that consent to adoption obtained by duress or coercion is void *ab initio* and therefore should be set aside).

223. *See supra* part III.B.

depression; weakness from recent childbirth; confusion caused by heavy medication; pressure by an official of a birth mother's church; pressure by an attorney representing the adoptive parents; and misinformation to the birth mother regarding the finality of her signature.[224] The same court specifically noted that "the fact that [the birth mother] was weakened by her recent delivery and depressed, as all women would be under similar circumstances, does not constitute duress."[225] Thus, it has been found that these circumstances would not unduly influence a birth mother's decision to surrender her child for adoption.

The Illinois courts have had the opportunity to review the consent in adoption cases many times over the past 30 years and their decisions are representative of similar cases from around the country. One Illinois appellate court held that an illegal $200 payment to a birth mother from the adopting parents would not necessarily vitiate a birth mother's consent.[226] Thus, the exchange of money in an adoption case is not always so suspect that it invalidates the consent.

Whether a consent is voluntary is often difficult to ascertain; the courts must consider an adoption situation in its entirety.[227] In addition, prior case law is not always helpful because courts must review each situation on a case-by-case basis, and the cases often present inconsistent results. For example, pressure by parents of a teenage, unwed mother to relinquish her child may constitute duress.[228] Parents may not permissibly condition their parental love and the fulfillment of their legal obligation to support their daughter during her minority on her consent to an adoption.[229] Further, the payment of money in excess of the reasonable and actual medical expenses of the birth of a child also may vitiate the consent to adoption because it is void as against public policy.[230] Other

224. Anonymous v. Anonymous, 530 P.2d 896, 899 (Ariz. Ct. App. 1975).

225. *Id.* at 898.

226. Cohen v. Janic, 207 N.E.2d 89, 92 (Ill. App. Ct. 1965) (noting that the proper sanction for an illegal payment is found in the criminal laws and not in the adoption act).

227. *See* Huebert v. Marshall, 270 N.E.2d 464, 467 (Ill. App. Ct. 1971). The *Huebert* court recognized "moral duress" where an alleged friend of a birth mother convinced her to relinquish her child for adoption. It was later shown that this "friend" was having an affair with the birth father and had made plans to meet him in another state after he left his wife. *Id.*

228. *In re* Sims, 332 N.E.2d 36, 40 (Ill. App. Ct. 1975).

229. *Id.*

230. *In re* Adoption of Kindgren, 540 N.E.2d 485, 485 (Ill. App. Ct. 1989). In *Kindgren*, adoptive parents paid a birth mother $1,000 to cover her medical expenses, without seeing any bills. *Id.* at 488-89. Additionally, the mother of the adoptive mother paid the birth mother an additional $9,000 to help her start a new life. *Id.* at 487. The court

courts, however, have concluded that environmental stress and haste do not necessarily equal duress negating a mother's consent to adopt.[231] In fact, courts have found a birth mother's consent voluntary even in cases evidencing that extenuating circumstances influenced her decision to consent to the adoption of her child.[232]

Accordingly, while the Illinois Supreme Court has refused to recognize "environmental stress" as a factor affecting consent,[233] the Missouri courts have countenanced that there is a "somewhat indefinite and shadowy border area which for want of better words can be called duress 'by force of circumstances' " in adoption cases.[234] Therefore, depending upon state law, "force of circumstances" may or may not affect a birth mother's consent.

One situation in which the "force of circumstances" may complicate a finding of voluntary consent involves transnational adoptions. Because of the shortage of children available for adoption, there has been an increase in the number of transnational adoptions within the past ten years.[235] Many courts closely scrutinize these types of adoptions. For instance, a New Jersey couple, acting through an unapproved and unlicensed agency, retained an attorney from Chile to assist them in securing a Chilean child for adop-

---

held that this exchange of money voided the consent to adoption because it was against public policy. *Id.* at 489.

231. Regenold v. Baby Fold, Inc., 369 N.E.2d 858 (Ill. 1977), *appeal dismissed*, 435 U.S. 963 (1978). In *Regenold*, a 19-year-old mother contacted and visited a child welfare agency, signed a consent to release her child for adoption, and surrendered custody of her child to the agency. *Id.* at 860-62. Four days later, after speaking with friends, she began proceedings to withdraw her consent. *Id.* at 862. At the time of the placement, the mother was under a great deal of stress. *Id.* at 860-61. After being divorced for only one month, she found herself living with her parents who constantly argued and were in the process of obtaining a divorce, disagreeing with her mother on the rearing of her three-year-old brother, facing financial difficulties, and taking medication. *Id.* According to the court, this type of environmental stress, however, did not amount to the duress which is necessary to vitiate a consent to the adoption of one's child. *Id.* at 865.

232. *In re* Surrender of Minor Children, 181 N.E.2d 836 (Mass. 1962). In this case, a pregnant, unmarried mother with an IQ of 60 and four children was in jail, awaiting trial, and had no relatives to help her take care of her children. *Id.* at 836-37. A social worker encouraged her to relinquish her children by reminding her of the possible length of her jail sentence. *Id.* The court held that the mother voluntarily consented to the adoption of her children and stated that the mother consented with full understanding and was not unduly influenced or distressed. *Id.* at 838-39.

233. *See supra* note 231 and accompanying text.

234. *In re* Interest of G., 389 S.W.2d 63, 69 (Mo. Ct. App. 1965) (holding that where a birth father induced the mother of a child to sign a consent for adoption by assuring her that the grandmother would return the child whenever the birth father ceased his wanderings and secured employment, and where the birth mother at all times opposed the adoption, the consent was not voluntary).

235. Carlson, *supra* note 89, at 317 & n.3.

tion.[236] In violation of a New Jersey statute, the adopting couple expended approximately $5,000 in connection with receiving a child for adoption. The appellate court noted that the legislative intent behind the section of the adoption statute proscribing the use of intermediaries was to prevent the trafficking in human lives for profit as in the black market for babies.[237] Interestingly, although New Jersey forbids the use of intermediaries, if a child is illegally placed for adoption, the statute does not thwart the finalization of the adoption.[238]

Birth mothers will almost always consent to the adoption of their children under circumstances that may cast doubt upon the voluntariness or understanding of the consequences of the consent.[239] In other words, this type of situation is inevitably difficult and rarely will one find a birth mother gladly surrendering her child for adoption. Despite this, it does not necessarily follow that a woman is incapable of a well-thought-out decision in these matters. Although the situation may be very difficult and emotionally charged, a birth mother is still capable of reaching a reasoned decision.

A clear and compelling example of a mother being forced to consent to an adoption against her will is the case of *In re Hua*.[240] In that case, an unmarried Vietnamese mother and an African-American soldier living in Vietnam had an out-of-wedlock daughter.[241] The birth father returned to the United States.[242] A social welfare agency approached the mother on several occasions and discussed the discrimination her child most likely would experi-

236. *In re* Adoption of a Child by N.P., 398 A.2d 937, 938-39 (N.J. Super. Ct. Law Div. 1979).

237. *Id.* at 939.

238. *In re* Adoption of a Child by I.T., 397 A.2d 341, 344 (N.J. Super. Ct. App. Div. 1978). In *Adoption of Child by I.T.*, adoptive parents violated the state adoption statute by using international agents and large sums of money to obtain a child illegally, and used their financial stability to "jump to the head of the line" of those couples waiting for a placement by an approved agency. *Id.* at 343. The court declared that it could find no evidence that the parents were unfit or that the adoption would not be in the best interests of the child. *Id.* at 348. The court, therefore, held that the adoption was not void. *Id.* Apparently, being dishonest and violating the law do not always render adoptive parents unfit to care for a child.

239. People *ex rel.* Scarpetta v. Spence-Chapin Adoption Serv., 269 N.E.2d 787, 788 (N.Y.), *cert. denied, sub nom.* DeMartino v. Scarpetta, 404 U.S. 805 (1971). The court noted that "[i]t is or should be obvious that the surrender of a child by its parent, whatever the circumstances or reason, has elements of tragedy in it and that pain, feelings of guilt, and suffering will not be avoided whatever course is taken." *Id.*

240. *In re* Hua, 405 N.E.2d 255 (Ohio 1980).

241. *Id.* at 256.

242. *Id.*

ence in Vietnam because of the child's African-American heritage.[243] Those discussions, coupled with the escalating civil war in Vietnam and the heavy bombardment of Da Nang, convinced the mother to surrender her child.[244] The reviewing court held that the welfare agency took advantage of the wartime circumstances and the mother's fear that her life was in danger and played upon this situation to induce the birth mother to relinquish her child for adoption.[245] Accordingly, the court held that this consent was executed under duress. In less clear circumstances, however, courts have found that a birth mother's stress of financial and emotional problems does not vitiate her consent to adopt her child.[246]

When reviewing a decision by a birth mother to consent to the adoption of her child, courts recognize that the situation is always difficult. Courts acknowledge, however, that a woman, in dire financial straits and in the midst of many personal and emotional problems, is nonetheless able to voluntarily consent to the adoption of her child. Even though third parties may give advice to the birth mother and influence her decision, courts rarely view this type of influence as coercion. Since the courts have determined that a woman can make a competent and voluntary decision under such conditions, the legal community should accept such standards of voluntariness as enunciated by the courts.

IV. An Analysis of Laws Relating to Compensation for Birth Mothers

As shown above, although state laws and court opinions vary, the current trend prohibits birth mothers who are relinquishing their babies for adoption from receiving anything except the most meager compensation. There are two fundamental problems with this position; one is the apparent misapplication of the rules,[247] and the other is an erroneous theoretical foundation.

---

243. *Id.* at 257.

244. *Id.*

245. *Id.* at 259.

246. *See* McCurdy v. Albertina Kerr Homes, Inc., 498 P.2d 392, 395 (Or. Ct. App. 1972). Although the birth mother's father made her appointment with the adoption agency, she was the one who initiated the events leading up to the eventual placement of the child for adoption. *Id.* at 394-95. The *McCurdy* court held that stress of financial and emotional problems is insufficient to show undue influence and invalidate a consent to adoption. *Id.* at 395.

247. The misapplication of the rules has been previously illustrated in the discussion of the two-tiered test and the comparison of differing state court decisions that interpret identical rules differently. *See supra* part III.B-C. A proposal for a clearer, easier, and fairer test is presented at the end of this Article. *See infra* part V.

First, the disparity among state laws with respect to compensation for birth mothers encourages people who reside in states with fairly restrictive rules regarding compensation for birth mothers to relocate or to file adoption petitions in states with more lenient laws. For example, when Louisiana adoption laws were particularly permissive regarding compensation for birth mothers, at least one adoption agency reportedly recruited unwed pregnant women from different states to live in Louisiana.[248] In return for placing their children for adoption through that agency, the women received air fare, maternity clothes, and living expenses.[249] Moreover, after *Baby Girl D.* and its misapplication of the two-tiered test, at least one Philadelphia attorney no longer accepts adoption clients in Pennsylvania because he believes he can provide better services for his clients if the adoption is completed in another state.[250] These inconsistencies again illustrate the need for uniform adoption laws.[251]

Second, the present theory underlying our society's treatment of compensation for birth mothers is erroneous. The rationale for placing limitations on compensation is as follows. First, society wants to discourage any profit motive in connection with adoptions. Society's concern with the profit motive relates to a desire to eradicate the black market in children; society will not permit children to be bartered and sold like property.[252] Second, society wants to ensure that a birth mother's consent to the surrender of her child for adoption is voluntary and not procured under duress.[253]

---

248. *See* Johnson, *supra* note 135, at B1.

249. *Id.*

250. Interview with Bob Braun, Attorney, in Philadelphia, PA regarding his adoption law practice (Mar. 1990).

251. For articles urging the need for such uniform adoption laws, see sources cited *supra* note 60.

252. *See* Gray v. Maxwell, 293 N.W.2d 90 (Neb. 1980) (holding that although it is not against public policy for adopting parents to pay a birth mother's hospital and medical expenses, it is against public policy to relinquish a child in consideration of a promise to pay a sum of money in *excess* of legitimate expenses); *see also* Adoption Hotline, Inc. v. State, 385 So. 2d 682, 684 (Fla. Dist. Ct. App. 1980) ("The probable injury to the public is evident in the obvious and immediate potential for a black-market-baby-sale network, attendant with the improper and highly probable 'unsuitable' placements of children, in violation of Florida law.") (citation omitted); *In re* Adoption of Kindgren, 540 N.E.2d 485, 485 (Ill. App. Ct. 1989) (holding that a consent to adoption given in exchange for an illegal payment of $10,000 renders a consent void as against public policy); *In re* Adoption of Anonymous, 143 N.Y.S.2d 90, 94 (App. Div. 1955) (holding that a birth mother who places her child for adoption may not demand or accept any compensation except for reasonable medical fees and hospital charges).

253. *See In re* Baby Girl D., 517 A.2d 925, 927 (Pa. 1986); *see also supra* part III.D.

The current view assumes that whenever a birth mother receives a benefit from her decision to relinquish her child for adoption, her decision is the product of undue influence.[254] Based on this supposition, case law emerged prohibiting birth mothers from accepting any direct monetary benefits from the adoption process. This view gives women very little credit. Although it is true that deciding to relinquish an unwanted child for adoption is surely a very difficult and painful experience, women generally are perfectly capable of handling such a decision without allowing their wills to be overborne simply by the prospects of financial gain.[255] It is time to abolish these paternalistic compensation laws.[256] Refusing to allow birth mothers reasonable compensation only serves to keep women in a cage of poverty.

V. THE REMEDIES

Our adoption system requires radical restructuring. Although welfare experts have been calling for uniform adoption laws for over forty years, inconsistency remains the rule. Not only are individual state statutes inconsistent, but state courts often disagree on critical definitions contained within their own state adoption statutes. This Article makes several proposals for reformation of the current adoption laws that will make the adoption system more equitable. Suggested are liberalization of the statutes regulating compensation for birth mothers; a mandatory counseling requirement for birth mothers who wish to receive compensation; recom-

254. *See supra* part III.B-C.

255. One of the concerns voiced by advocates of this position is that a woman could not possibly voluntarily relinquish her child until *after* the birth of the child. This point is debatable, but it can easily be resolved by not allowing a birth mother to give her consent to the adoption until a certain number of days have passed after the birth of her child.

256. In Frontiero v. Richardson, 411 U.S. 677 (1973), Justice Brennan recognized the problem of paternalistic laws stating:

> There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage. Indeed this paternalistic attitude became so firmly rooted in our national consciousness that, 100 years ago, a distinguished member of this court was able to proclaim "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood."

Id. at 684 (quoting Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring)).

mended counseling for adoptive parents; and completion of a home study, preferably before a child's placement in an adoptive home, but in any event no later than one week after placement of the child. Additional suggestions include a requirement for reporting all expenditures to the court; insurance reform to help offset the costs of adoptions; a call for states to enact a uniform adoption law governing compensation for birth mothers; an amendment to the Child Welfare Act of 1980[257] that links the receipt of federal funds to the passage of uniform adoption laws; and strong enforcement incentives. Implementation of these proposals can serve to rectify the dilemmas produced by the status quo. The recent escalation of the problems in the adoption market illustrates the need to consider these avenues.

The current situation is forcing more and more potential adoptive families to abandon the traditional modes of adoption and to begin exploring more extreme methods such as black market adoptions. In addition, birth mothers in search of better medical care, greater control over the adoption process, and alternatives to the welfare system are turning away from agency adoptions. Both independent and agency adoptions have positive and negative aspects, and it is important that each system remain intact. However, it is time for the two systems to cooperate and work toward a common goal—the improvement of our national adoption system. It is also time for legislators to take notice of the changes needed in the system and to act immediately to implement them.

The first step should be the passage of a federal law requiring uniform state adoption laws. Obviously there can be no uniformity without such a federal statutory enactment. Although some may object to an intrusion by the federal government in a matter of family law, such regulation is not a novel idea. In fact, we currently have federal legislation intact that can provide a foundation for this law. This legislation is the Adoption Assistance and Child Welfare Act of 1980 ("Adoption Act"),[258] which instituted major changes in the adoption subsidy laws. The Adoption Act involved a major restructuring of Social Security Act programs for the care of children who must be removed from their homes and also established a program of federal support to encourage adoptions of children with special needs.[259] The legislation linked a state's receipt

257. Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620-628, 670-679 (1988 & Supp. 1989).

258. *Id.* §§ 620-628.

259. SENATE FINANCE COMM., ADOPTION ASSISTANCE AND CHILD WELFARE ACT

of federal foster care funds to the establishment of a state adoption subsidy program.[260] Similarly, the Adoption Act could be amended to connect the receipt of federal foster care funds to a state's adoption of a uniform federal adoption statute.

The proposed adoption statute must initially require uniformity in a minimum of the following areas: expanded compensation for birth mothers, a mandatory counseling requirement for birth mothers who desire to receive compensation, and a recommended counseling requirement for adoptive parents. Additional requirements should include the completion of a home study no later than one week after placement of a child in an adoptive home and preferably completion before the actual placement of a child, reporting of all expenditures, and strong enforcement incentives.

It is time to critically examine compensation, or rather the lack thereof, for birth mothers who are surrendering their children for adoption. Uniformity is required to stem the rising tide of the black market and to curb the abuse of forum shopping. At a minimum, birth mothers should be allowed remuneration for reasonable living expenses, medical expenses, legal fees, agency fees, counseling fees, and other childbirth-related expenses.

A new test must be established for evaluating the exchange of money between parties to an adoption. This new test should not be based on archaic notions of paternalism or on a belief that women are basically unable to render a voluntary decision in matters relating to the adoption of their children. A suggested test is a true two-tiered test which asks the following questions: (1) does the child receive an actual benefit from the payment; and (2) if not, does the child receive an indirect benefit from the exchange? If the answer to either of these questions is in the affirmative, the exchange of money should be permissible. This test would allow a birth mother to receive compensation for reasonable expenses as long as her child receives at least an indirect benefit.

A limit, however, may need to be imposed on the exchange of money in adoption cases to ensure the integrity of the process. For example, guidelines similar to the child support guidelines in domestic relation cases can be easily developed regarding the amount of allowable payments for living, medical, or other expenses. As long as the parties stay within the guidelines, courts will presume the payments to be legal. If the parties wish to exceed the estab-

---

OF 1980, S. REP. NO. 336, 96th Cong., 2d Sess 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 1448, 1450.

260. *Id.*

lished guidelines, this should only be authorized with the court's permission. This type of exception would likely occur where a birth mother has a serious medical problem. Separate guidelines could be established on a state-by-state basis to meet the specific needs of varying rural and urban areas. Obviously, a birth mother's living expenses will be more costly in Miami, Florida or New York City than in Macon, Georgia or Rolla, Missouri.

Other safeguards need to be established in order for this system to work. One of the most important precautions is mandatory counseling for a birth mother before allowing her to receive compensation for living and other expenses. This requirement ensures that a decision to relinquish one's child is voluntary and not coerced by the lure of money. The timing of the decision to relinquish is absolutely critical. If the decision is made prior to the negotiations and the agreement by adoptive couples to pay expenses, it should be presumed to be voluntary.

Since agencies are already in the business of providing counseling to birth mothers concerning these issues, it is suggested that they be the party responsible for providing mandatory counseling.[261] This could help adoption agencies defray some of their rising costs. Furthermore, mandatory counseling should allay the fears of those who worry that birth mothers will make bad decisions because of the offer of money in adoption cases.

Moreover, home studies must be completed preferably before the placement of a child in an adoptive home but, at a minimum, absolutely no later than one week after placement. Again, adoption agencies are already providing home studies for their clients so they may make their services available to parties pursuing independent adoptions. This suggestion addresses a major concern of critics of the independent process who are troubled by the placements of children in uninvestigated homes.

Discretionary counseling for adoptive parents should be made available. All expenditures must be reported to the court for the court's review. Either the states or the federal government need to resume collecting data on adoptions. This has not been accomplished for over ten years and, as a result, we have no reliable statistics in this area.

Finally, the uniform adoption law must have teeth. Laws are of little use if they are not enforced. And generally, there has been a

261. A fund to pay for counseling could be established through fees paid by prospective adoptive parents. Once the birth mother receives compensation, she should be required to reimburse the fund for her counseling fees.

gross lack of enforcement of laws relating to the exchange of money in adoptions.[262] In particular, officials must be given the tools to enforce the laws properly. One suggestion is that any violation of the adoption statute be considered per se against the best interests of the child and, therefore, result in the denial of the adoption. This may be a harsh rule, but perhaps it is the only way to deal a fatal blow to the abuse of the adoption system.

In addition to the passage of federal legislation requiring a uniform adoption statute, adoptive parents should be permitted to declare a tax deduction for any expenses paid by them on behalf of a birth mother, which would have been deductible if they had actually incurred the expenses themselves. Also, insurance companies should be encouraged to cover medical expenses paid by an adoptive parent on behalf of a birth mother in the same manner as if the adoptive mother actually had incurred the expenses.

VI. CONCLUSION

Our adoption laws must be revised. Prospective adoptive parents often seek adoption today to fulfill a need to establish a family. Adoptions are no longer being pursued for the sole purpose of guaranteeing the continuation of family lines. It is time to consider the needs and interests of all the parties involved including the adoptive parents, the birth parents, and the child.

It is also time to realize that the laws regulating compensation for birth mothers are based on archaic notions of paternalism toward women. Women do not need protection from making bad decisions regarding relinquishing a child for adoption. They are capable of making intelligent, informed, and voluntary decisions in these matters.

Instituting these changes will allow more equitable treatment of birth mothers. Birth mothers already face a very difficult decision. There is no reason to force them to live in poverty when the means are available to allow them to live with dignity. It is time to amend our adoption laws and belatedly welcome them into the twentieth century.

262. MEEZAN ET AL., *supra* note 67, at 211-18.