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Margaret V. Turano

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# BLACK-MARKET ADOPTIONS\*

## INTRODUCTION

Babies, like any commodity, are subject to the law of supply and demand.<sup>1</sup> Whenever demand increases at a time when supply is diminishing, conditions are ripe for the growth of a black market.<sup>2</sup> Such are the present conditions in the adoption field.<sup>3</sup> Widespread use of contraceptives and the liberalization of abortion laws have contributed to a decline in the rate of illegitimate births.<sup>4</sup> Moreover, as the social stigma attaching to

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\* This article is a student work prepared by Margaret V. Turano, a member of the ST. JOHN'S LAW REVIEW and the St. Thomas More Institute for Legal Research.

<sup>1</sup> For a discussion of supply and demand in the baby market, see STAFF OF THE SUBCOMM. ON CHILDREN AND YOUTH OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, REPORT ON FOSTER CARE AND ADOPTIONS: SOME KEY POLICY ISSUES, 94TH CONG., 1ST SESS., 21 (Comm. Print 1975). A representative of the Adoptive Parents Group of Philadelphia testified before the Subcommittee on Children and Youth that certain lawyers whom she approached in hopes of obtaining an adoptable child quoted her a price of \$10,000 plus hospital expenses, and added that if she had come 3 months earlier, the price would have been \$7000. They attributed the increase in price to the change in supply and demand. *Hearings on Examination and Exploration of Existing and Proposed Federal Policies Affecting the Adoption of Children and Their Placement in the Foster Care System Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 1st Sess., at 142 (1975) [hereinafter cited as *1975 Hearings*].

<sup>2</sup> The black market in babies may be defined as that section of the market which seeks to profit from placing a child for adoption. The baby black market has been recognized as a problem for over 25 years. See, e.g., Comment, *Moppets on the Market*, 59 YALE L.J. 715 (1950) [hereinafter cited as *Moppets*]. In 1955, the black market received notoriety when the Senate held hearings which divulged many sordid black-market incidents. *Hearings on S. 3201 Before a Subcomm. of the Senate Comm. on the Judiciary*, 84th Cong., 1st Sess. (1955). For a discussion of these hearings and the black market generally, see Grove, *Independent Adoptions, The Case for the Gray Market*, 13 VILL. L. REV. 116 (1967) [hereinafter cited as *Grove*].

<sup>3</sup> While a black market in babies has existed for some time, the imbalance of supply and demand in the adoption field has become increasingly worse in recent years. For example, in the Los Angeles County Department of Adoption, the largest public adoption agency in the United States, adoption placements decreased from 2500 annually in the late 1960's to only 1100 in 1973. Similarly, a prominent New York agency, Spence-Chapin, placed only 110 children in 1973 as opposed to 476 in 1967. J. McNAMARA, *THE ADOPTION ADVISOR* 46 (1975) [hereinafter cited as *McNAMARA*]. The demand for adoptable children, however, is still great. See, e.g., *1975 Hearings*, *supra* note 1, at 142, wherein it was alleged that an attorney had offered a baby to one woman for \$10,000, saying, "Take it or leave it. I have five other couples."

<sup>4</sup> McNAMARA, *supra* note 3, at 25.

illegitimacy fades, increasing numbers of parents bearing children out of wedlock are deciding to keep their children rather than place them for adoption.<sup>5</sup> Because of the reduced availability of desirable children for adoption,<sup>6</sup> certain unprincipled profiteers have been able to capitalize on the situation, creating a small but thriving "baby black market."<sup>7</sup>

Though the common element of all black-market placements is profit-making, such transactions may take various forms. The most difficult ones to detect are those in which the adoption process is actually bypassed. To accomplish this, the natural mother registers at the hospital under the adoptive mother's name, so that the child's birth certificate will contain the adoptive parent's surname.<sup>8</sup> A more common arrangement involves an intermediary, often an attorney or doctor, who provides a young, unmarried pregnant woman with medical and living expenses in exchange for the right to place the child.<sup>9</sup> There are, of course, numerous possible variations

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<sup>5</sup> Elizabeth Cole, director of the North American Center on Adoption, estimated that the proportion of unwed mothers surrendering their children for adoption had decreased from 80% several years ago to 20% in 1975. *1975 Hearings*, *supra* note 1, at 6.

<sup>6</sup> The children most sought by adoptive parents are healthy white infants. Older, handicapped, minority, emotionally disturbed, or other "hard to place" children are still abundantly available for adoption. Of the 365,000 children in temporary foster homes awaiting adoption, it has been estimated that 100,000 of them are in this "hard to place" category and are available for adoption if homes can be found for them. Johnson, *The Business in Babies*, N.Y. Times, Aug. 17, 1975, § 6 (Magazine), at 11 [hereinafter cited as Johnson].

Until recently, it appeared that the problem of "hard to place" children would be eased by interracial adoptions. This appeared to be the case because for several years prior to 1972, black children were being adopted in increasing numbers by white families. In that year, however, the National Association of Black Social Workers issued a statement strongly denouncing such interracial adoptions, and since 1972 the rate has declined. Consequently, since there has been no appreciable increase in the number of black homes available for these children, for the most part, they have remained unadopted. McNAMARA, *supra* note 3, at 35-37.

<sup>7</sup> Because of the secretive nature of the black-market transaction, it is impossible to know exactly how many black-market sales occur. It was estimated, however, by Joseph Reid, executive director of the Child Welfare League of America, that each year four or five thousand black-market adoptions take place. *1975 Hearings*, *supra* note 1, at 31. This estimate represents approximately 2% of total adoptions and 25% to 30% of nonagency, nonrelative adoptions. *Id.*

<sup>8</sup> See Sitomer, *Baby Sales—For Big Profits*, Christian Science Monitor, June 24, 1974, at 5, col. 1.

<sup>9</sup> For a discussion of the role of the intermediary, see Grove, *supra* note 2, at 121. The young mother has much to gain from this arrangement. It provides her with the opportunity to keep her condition secret, allows her to obtain good medical care, and permits her to avoid agency redtape. It also benefits the adoptive parents, who often have been turned away from agencies. For a firsthand account of such an arrangement, see McTaggart, *How I Sold—And Almost Bought—A Baby*, N.Y. News, Apr. 13, 1975 (Magazine), at 6 (also printed in *1975 Hearings*, *supra* note 1, at 96). For a more detailed discussion of these arrangements, see Gross, *Our Outdated Adoption Laws*, PARENTS' MAGAZINE, Nov. 1974, at 64; Hatton, *The Baby Brokers*, Cleveland Plain Dealer, Mar. 16, 1974, at 1, col. 1 (also printed in *1975 Hearings*, *supra* note 1, at 49-73) [hereinafter cited as Hatton]; Johnson, *supra* note 6, at

on these schemes.<sup>10</sup>

Though such arrangements may seem harmless on the surface, possibilities for abuse are inherent in the very nature of the transaction.<sup>11</sup> The priorities present in a normal adoption are completely reversed; the welfare of the baby and the natural mother, as well as the fitness of the adoptive parents, are subordinated to the profit motive of the black marketeer.<sup>12</sup> Since a sale is the ultimate goal of the baby broker, insufficient care is taken to ensure that the consent of the natural mother is truly voluntary.<sup>13</sup>

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11; Levy, *The Baby Peddlers*, PHILADELPHIA MAGAZINE, Feb. 1975, at 76 (also printed in *1975 Hearings*, *supra* note 1, at 83-90) [hereinafter cited as Levy]; N.Y. Times, Feb. 20, 1973, at 1, col. 6; U.S. NEWS AND WORLD REPORT, May 19, 1975, at 34.

<sup>10</sup> Illustrative of the many variations in black-market transactions is the experience of one Florida couple who allegedly sold its 3-month-old child for a 1971 Chevrolet. N.Y. Post, Sept. 21, 1972, at 5, col. 1. It is reported that one baby broker offered a couple in their forties a baby for \$10,000, showing them a portfolio of photographs and directing them to choose a male and a female to be the parents of their child. Anson & Clifford, *Babies for Sale*, NEW TIMES, June 14, 1974, at 28, col. 3 [hereinafter cited as Anson & Clifford]. A young New Jersey woman, separated from her husband and acting in desperation, reportedly sold her 18-month-old son to a baby broker in Florida for \$1208. Long Island Press, Jan. 16, 1976, at 1, col. 3.

<sup>11</sup> See generally Grove, *supra* note 2, at 118-21. Because the person who arranges the placement generally does not adequately investigate the propriety of the adoption, some tragic situations do arise. In one case it was discovered that the young mother was using drugs at the time she became pregnant, Levy, *supra* note 9, at 76 (also printed in *1975 Hearings*, *supra* note 1, at 83). In another case, the adoptive parents sought to return the child upon discovering, some months after the placement had been made, that the child had suffered brain damage at birth. CBS News, 60 Minutes, *Baby for Sale*, July 27, 1975, at 17-18 (transcript on file in the St. John's Law Review Office). © Copyright CBS Inc. 1975. All rights reserved. Originally broadcast July 17, 1975 over the CBS Television Network as part of the 60 MINUTES program series.

<sup>12</sup> The statutes prohibiting black-market transactions are normally couched in terms of a prohibition against receiving compensation for child placement. See, e.g., COLO. REV. STAT. ANN. § 19-4-115 (1973); ILL. ANN. STAT. ch. 4, § 9.1-21 (Smith-Hurd 1975); N.J. STAT. ANN. § 2A:96-7 (1969). Reports of the fees received for white infants vary. As one reporter commented: "This newborn baby weighs a healthy 7 pounds, 11 ounces. At the going black market adoption rate, he is worth \$1,298.40-a-pound on the hoof." Young, CBS Evening News, Sept. 27, 1974, at 17 (transcript on file in the St. John's Law Review Office). © Copyright CBS Inc. 1974. All rights reserved. Originally broadcast September 27, 1974 over the CBS Television Network on THE CBS EVENING NEWS WITH WALTER CRONKITE. A Florida attorney allegedly received \$8500, half to cover the mother's medical and living expenses and half as his fee. Cohen, *Private Adoption Agent Offers Rare Commodity: White Babies*, Washington Post, Apr. 27, 1975, at A22, col. 2. A California district attorney claimed that fees of \$10,000 to \$20,000 had been charged by a baby broker in Los Angeles. *1975 Hearings*, *supra* note 1, at 175. At the Senate hearings, an adoptive parent testified that she had been quoted a price of \$10,000. *Id.* at 144. Another witness testified that it was not unheard of to be quoted a price of \$25,000. *Id.* at 171.

<sup>13</sup> The parental consent required for an adoption causes many difficult problems. State laws differ widely on how consent must be given, and if and when it can be revoked. See generally, Moppets, *supra* note 2, at 728-29; Comment, *Revocation of Parental Consent to Adoption: Legal Doctrine and Social Policy*, 28 U. CHI. L. REV. 564 (1961) [hereinafter cited as

Prospective adoptive parents need not show the marketeer that they are fit for parenthood,<sup>14</sup> but rather that they can afford the fee,<sup>15</sup> which may run in excess of \$25,000.<sup>16</sup> Consequently, the existence of a black market promotes a system in which the rich often can adopt when the poor cannot,<sup>17</sup> regardless of fitness.

Such practical considerations, along with the moral objections to selling babies, dictate the need for renewed efforts to eliminate black-market placements altogether. The following discussion will focus both on

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*Revocation of Parental Consent*}. In most states consent of a parent will not be required where the parent has abandoned the child or has otherwise relinquished the right of custody. See, e.g., CAL. CIV. CODE § 224 (West Supp. 1976); ILL. ANN. STAT. ch. 4, § 9.1-8 (Smith-Hurd 1975); PA. STAT. ANN. tit. 1, § 311 (Supp. 1975).

Where consent is required, it is sound policy to require that it be given in the presence of a judge or an agency representative. A number of jurisdictions have such a provision. See, e.g., CAL. CIV. CODE § 226.1(a) (West Supp. 1976) ("in the presence of an agent of the State Department of Health or of a licensed county adoption agency"); COLO. REV. STAT. ANN. § 19-4-102 (1973) (in juvenile court); MINN. STAT. ANN. § 259.24(5) (Supp. 1976) ("before a representative of the commissioner of public welfare, his agent or a licensed child-placing agency"); WIS. STAT. § 48.84(2)(a) (Supp. 1975) ("before a judge of any court of record"). Although consent is more likely to be voluntary than one which is merely required to be in writing, some states require only the latter. See, e.g., ARK. STAT. ANN. § 56-106(a) (1971) ("written consent verified by affidavit"); N.C. GEN. STAT. § 48-7(a) (Supp. 1975) ("written consent"). In Arizona, where consent must be in writing and witnessed by at least two persons, any consent given within 72 hours of birth is invalid. ARIZ. REV. STAT. ANN. § 8-107(B) (1956). This required delay gives the natural mother time to consider her decision to relinquish the child, and thus tends to safeguard the voluntariness of consent.

<sup>14</sup> In one case the adoptive parents' own natural children had been taken away by the juvenile court. Hatton, *supra* note 9, at 4a, col. 3 (also printed in 1975 *Hearings*, *supra* note 1, at 52).

<sup>15</sup> This disregard by unscrupulous brokers of all but the financial qualifications of the adopting parents becomes shockingly evident in the technique called "auction-blocking." The adoptive parents are told that the child for which they have contracted has been born, but that complications have arisen which will cost an additional \$2000. The broker informs them that he has another couple willing to pay the extra cost. When the original couple agrees to pay the additional amount, the same ploy is used on the second couple to boost the price again. 1975 *Hearings*, *supra* note 1, at 142. The auction-blocking technique was reported in one case to have raised a bid from \$8000 to \$12,000, forcing the "winning" bidders to borrow \$7000 from friends and relatives to meet the price. Levy, *supra* note 9, at 76-77 (also printed in the 1975 *Hearings*, *supra* note 1, at 83-84). At the adoption hearing a check in the amount of \$2000 was presented and the rest paid in cash, thus camouflaging the illegality of the transaction. *Id.*

<sup>16</sup> See note 12 *supra*.

<sup>17</sup> The fees charged by agencies are generally structured in such a way that even families who are not wealthy can afford them. Depending on the agency chosen by the prospective parents, the methods of calculating fees may vary. Some agencies charge a set fee. Others charge a nominal fee or none at all. Others, employing a sliding scale, charge a token fee for lower income families and a substantial sum for wealthier couples. Whatever the method of charging fees, the average fee charged by a public agency is \$200-400, McNAMARA, *supra* note 3, at 105-06, and that of a private agency licensed by the state ranges between \$450 and \$900. *Id.* at 109-10. The exorbitant black-market fees, see note 12 *supra*, eliminate the less affluent from the class of prospective adoptive parents.

the problems created by the black market and on several proposals for its eradication. It will attempt to distinguish between the legitimate types of independent adoption known as the gray market and those illegal adoptions which comprise the black market. Further, it will demonstrate that black-market sales will be eliminated only by the strict and well-enforced regulation of gray-market placements, and that such regulation, in order to be effective, must cover not only activities within each state, but also, and perhaps more importantly, interstate placement of children for adoption.

#### BLACK MARKET AS A PERVERSION OF INDEPENDENT GRAY-MARKET ADOPTIONS

Inasmuch as the black-market problem involves illegal placements, it should be examined in the context of child placement in general. Children may be placed for adoption either through an agency<sup>18</sup> or through independent channels. In an agency adoption, the prospective parents, upon submitting their application for adoption, are interviewed and investigated by the agency to determine their fitness as parents.<sup>19</sup> Once approved, they are placed on the agency's waiting list until a child whom the agency considers suitable becomes available for adoption.<sup>20</sup> They are then allowed to take the child. The placement stage thus completed, the parents petition the court for a decree of adoption.<sup>21</sup> The court then authorizes its own investigation to determine whether the child is being satisfactorily assimilated into the new family.<sup>22</sup> If the investigation reveals that parents and child are adjusting well, a court order of adoption is granted.

Independent adoptions are those not effected by agencies.<sup>23</sup> In an inde-

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<sup>18</sup> For a discussion of the criteria used by agencies in selecting adoptive parents, see McNAMARA, *supra* note 3, at 51-56.

<sup>19</sup> The agency investigation has been attacked because it is alleged that this type of investigation forces many prospective adoptive parents to resort to nonagency sources to obtain a child. Discouraged by their ordeals with agencies, some parents who subsequently turned to independent adoptions complained that agencies subjected them to "embarrassing, grueling interviews and outdated, impossible standards as to whether they were 'fit' to adopt a child." 1975 Hearings, *supra* note 1, at 95, 110-11. On the other hand, the agencies, over the past 20 years, have attempted to improve their screening procedures to emphasize a family's ability to love and care for a child rather than racial, ethnic, or financial considerations. *Id.* at 13.

<sup>20</sup> The average period a couple must wait before it receives a baby is approximately 5 years. McNAMARA, *supra* note 3, at 75.

<sup>21</sup> All states require a judicial decree of adoption to change the legal status of parent and child. See, e.g., CAL. CIV. CODE § 227 (West Supp. 1976); ILL. ANN. STAT. ch. 4, § 9.1-14 (Smith-Hurd 1975). Such was not always the case, for at one time adoptions could be effectuated by contract or by deed. It was not until 1931 that all states required a court decree. Moppets, *supra* note 2, at 725. See also Hofstadter & Levitan, *A Study in Adoption—Initial Investigation and Termination of Parental Rights*, 142 N.Y.L.J. 58, Sept. 21, 1959, at 4, col. 3.

<sup>22</sup> See, e.g., ILL. ANN. STAT. ch. 4, § 9.1-6 (Smith-Hurd 1975); PA. STAT. ANN. tit. 1, § 335 (Supp. 1975).

<sup>23</sup> For discussions of independent placements, see Grove, *supra* note 2; Moppets, *supra* note 2.

pendent adoption, there is seldom any requirement that adoptive parents be evaluated before placement.<sup>24</sup> The placement is usually arranged by an intermediary, and the choice of parents often is entirely within his discretion.<sup>25</sup> 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.

Thus, the essential difference between the agency and the independent adoption involves the placement procedures followed. Since the agencies are closely supervised by the state and are required to follow rigid procedures, it is highly unlikely that an agency will participate in a black-market sale.<sup>26</sup> Independent placements, however, may provide unscrupulous intermediaries with a medium through which profit may be derived by exploiting the current demand for babies.<sup>27</sup>

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<sup>24</sup> Grove, *supra* note 2, at 123. See also *Moppets*, *supra* note 2, at 724. But see FLA. STAT. ANN. § 63.092(1) (Supp. 1976); N.H. REV. STAT. ANN. § 170-B:14(II) (Supp. 1975) (requirement of a preplacement investigation for most independent adoptions). Advocates of agency adoption and those who favor independent placement are in disagreement over the need for this investigation and other agency safeguards. The limited protection afforded the parties by the court investigation is deemed inadequate by agency proponents, particularly where the court investigator is not required to be a social worker. See notes 47-48 *infra* for the qualifications various states require their investigators to possess. The agency proponents feel that the best interests of the natural parents, the child, and the adoptive parents can be secured only by agency procedures. See generally 1975 Hearings, *supra* note 1, at 3, 1970; Grove, *supra* note 2, at 121-23; Elson & Elson, *Lawyers & Adoption: The Lawyer's Responsibility in Perspective*, 41 A.B.A.J. 1125 (1955) [hereinafter cited as Elson & Elson]; Hamner, *Alabama MD's and Their Role in Adoptions*, 38 J. MED. ASS'N ST. ALA. 888 (1969) [hereinafter cited as Hamner]; Mitchell, *Kentucky Law Relating to Placement of Children for Adoption*, 53 Ky. L.J. 223 (1965).

<sup>25</sup> The intermediary is often an attorney or doctor with no special qualifications for placing children. See generally Elson & Elson, *supra* note 24; Hamner, *supra* note 24. In some independent adoptions, the intermediary does not even meet the family with whom he is going to place the child. In one reported account, an attorney was willing to place an infant with a woman after one telephone conversation, the subject of which was his fee. 1975 Hearings, *supra* note 1, at 146-48.

<sup>26</sup> Agencies must be licensed by and are regulated by the state. For instance, in New York, the state commissioner of social welfare grants, and may revoke, agency licenses. N.Y. Soc. SERV. LAW §§ 374-b to 379 (McKinney 1976). Because of this state supervision, the likelihood of abuse by an agency is reduced. It has been alleged, however, that at least one agency has engaged in black-market activities, arranging more than 1000 adoptions and amassing over a million dollars. Hearings on S. 3201 Before a Subcomm. of the Senate Comm. on the Judiciary, 84th Cong., 1st Sess., 193-95 (1955). In general, however, the likelihood of baby selling in an agency adoption would seem to be minimal.

<sup>27</sup> Despite the possibility of abuse inherent in independent placements, several commentators contend that the independent system is a valuable and necessary feature of the adoption process in most states. Those who advocate independent adoptions, dismayed by agency redtape and long waiting lists, see note 9 *supra*, are concerned that elimination of independent adoptions would hinder adoption by many qualified and deserving persons. See generally Grove, *supra* note 2, at 124-25; 1975 Hearings, *supra* note 1, at 201-03. Another factor militating against the abolishment of independent adoptions is that many agencies presently do not

The segment of independent adoptions most vulnerable to black-market pressures is that commonly referred to as the gray market.<sup>28</sup> In contrast to the sinister sound of the term, gray-market adoptions, consisting of nonagency placement with nonrelatives,<sup>29</sup> are legal in most states.<sup>30</sup> The personnel of the gray market runs the gamut from kindly doctors, attorneys, and social workers with high ethical standards to sharp practitioners teetering on line between the black market and the gray. Once the intermediary receives an illegal fee, the placement crosses the line from gray market to black market. Thus, the latter may properly be viewed as a perversion of the gray market. Consequently, laws governing gray-market adoptions must be structured to prevent the deterioration of the independent adoption system caused by the existence of the black market.

#### CURRENT ATTEMPTS TO ELIMINATE THE BLACK MARKET

##### *Elimination of the Gray Market*

In an attempt to eradicate the black market, a small number of states have decided to prohibit the placement of children outside agency channels.<sup>31</sup> In these states, the general rule is that a child unrelated to the adoptive parents<sup>32</sup> must be placed by an agency. Under such regulations even the natural mother may not place her child with a person of her choice unless that person is related to the child.<sup>33</sup>

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have the funds to supply young mothers with prenatal and postnatal care. For example, one young reporter, posing as an unwed pregnant woman, found that none of the New York agencies could have provided her with adequate care. Making contact with a private placement attorney, she was assured that all expenses, including rent, medical, and living expenses, would be paid. Taggart, *How I Sold—And Almost Bought—A Baby*, N.Y. News, Apr. 13, 1975 (Magazine), at 6 (also printed in *1975 Hearings*, *supra* note 1, at 96).

<sup>28</sup> For a general discussion of the gray market, see Grove, *supra* note 2, at 121-25.

<sup>29</sup> In 1971, there were 16,560 gray-market placements. *1975 Hearings*, *supra* note 1, at 30. This figure represents 9.7% of the total number of adoptions, and 20% of all nonrelative adoptions.

<sup>30</sup> *1975 Hearings*, *supra* note 1, at 33.

<sup>31</sup> See, e.g., CONN. GEN. STAT. ANN. § 45-63 (1958), *as amended*, (Supp. 1975); DEL. CODE ANN. tit. 13, § 904 (1974); MASS. GEN. LAWS ANN. ch. 28A, § 11 (Supp. 1976); MINN. STAT. ANN. § 259.22(2) (Supp. 1976).

<sup>32</sup> The degree of relationship required for independent placement varies. Connecticut, for example, merely stipulates that the parties must be "related," CONN. GEN. STAT. ANN. § 45-63 (1958), *as amended*, (Supp. 1975). In Delaware, the adopting party must be a "stepparent . . . [or] blood relative." DEL. CODE ANN. tit. 13, § 904 (1974). In Massachusetts, one must be "related by blood or marriage," MASS. GEN. LAWS ANN. ch. 28A, § 11 (Supp. 1976) while in Minnesota, one must be a stepparent or relative by blood or marriage within the third degree. MINN. STAT. ANN. § 259.22(2) (Supp. 1976).

<sup>33</sup> The concept of adoption, nonexistent at common law, was created by statute. See H. CLARK, *THE LAW OF DOMESTIC RELATIONS* 603 (1968); *Lyman v. Sullivan*, 147 Conn. 134, 157 A.2d 759 (1960) (dictum). Thus, the natural mother has no innate right to place her child for adoption, and the state legislatures, which created the statutory authority permitting adoption, may also regulate the adoption process. See *Department of Child Welfare v. Lorenz*,



Before a jurisdiction decides to rely exclusively on agency placements, several questions must be resolved. One troublesome issue involves the status of those children who, before the effective date of the statute prohibiting private placements, have been privately placed with a family, but not yet adopted. Since it would seem unduly harsh to disallow the adoption because of noncompliance with the state's new placement provisions, the statute should provide that placements made before the date of enactment will not be affected by the legislation.<sup>34</sup>

A more difficult problem involves the phenomenon known as "de facto" adoption, in which an actual parent-child relationship does exist although there has been no legal adoption. A de facto adoption may occur when a family obtains a child through an independent placement in one state and then moves to a state prohibiting private placements<sup>35</sup> before obtaining a decree of adoption. Similarly, a de facto adoption exists when persons who have taken custody of a child, perhaps as foster parents or as temporary guardians for the child of a friend, find themselves in a position to adopt the child.

States prohibiting independent adoptions within their borders have treated de facto adoptions in various ways. For instance, a state confronted with a de facto adoption may place the case under the jurisdiction of an agency authorized to decide whether it should legitimize the situation by using the fiction of "making the placement" itself to allow subsequent approval of the adoption by a court.<sup>36</sup> An alternative response to de facto adoption is to enact legislation providing that a placement made while the prospective adoptive parents are residents of another state will be honored in the enacting state, if the placement met the requirements of the state in which it was effected. Legislation of this type allows the enacting state's courts to grant decrees of adoption to such persons without agency intervention.<sup>37</sup> One criticism of the latter approach is that a person from an agency state could escape the brunt of the placement prohibition by simply meeting another state's residency requirement.<sup>38</sup> Because of the possibility

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407 S.W.2d 699 (Ky. 1966), wherein a statute requiring that the person arranging the placement of a child for adoption obtain permission from the secretary of the welfare department was upheld because of the legislature's wide latitude in regulating adoptions.

<sup>34</sup> See, e.g., MINN. STAT. ANN. § 259.22(3) (Supp. 1976), which states that the statutory prohibition is not applicable to placements made before the statute's effective date. The recently passed legislation in Massachusetts, however, contains no such provision. MASS. GEN. LAWS ANN. ch. 28A, § 11 (Supp. 1976).

<sup>35</sup> The "de facto" adoption was explained in a communication from Susan Burns, supervisor of Adoption Service, Children's Bureau of Delaware, to Roger Toogood, executive director of the Children's Home Society of Minnesota, Oct. 11, 1973, on file at the Child Welfare League of America, 67 Irving Place, New York, N.Y.

<sup>36</sup> The fictitious agency placement is occasionally used as a solution to the de facto adoption problem in Delaware. *Id.*

<sup>37</sup> See MINN. STAT. ANN. § 259.22(2)(d) (Supp. 1976).

<sup>38</sup> Residency for placement and adoption purposes is not always a serious obstacle. See note 62 *infra*.

of subterfuge, legislation prohibiting independent adoptions must be aimed at protecting families who are making a bona fide attempt to adopt children already in their homes, while at the same time avoiding the creation of a loophole which could defeat the purpose of the statute. Depending upon the balance struck between these two objectives, the degree of control asserted over de facto adoptions will vary from state to state.

Although the drastic step of outlawing independent adoptions may be a viable solution in some jurisdictions,<sup>39</sup> it is not feasible in every state. Where agency services are inadequate, highly bureaucratic, or greatly overworked, a disservice to all parties might result if the entire administrative burden of adoptions were shifted to the agencies.<sup>40</sup> Thus, any state considering such a sweeping solution should not only undertake a thorough study of the resources and facilities available to its agencies, but should also consider the impact such a change may produce upon the state's entire adoption system.

#### *Regulation of the Gray Market*

The majority of jurisdictions, having deemed it undesirable to outlaw private placements, continue to rely on regulation of the gray market. The various types of regulations include the following:

1. Limitations on nonagency placements. In a number of states, nonagency placements may be made only by the natural parents, a relative, or guardian.<sup>41</sup>

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<sup>39</sup> Except for the problem with de facto adoptions, the Delaware prohibition of independent adoptions, DEL. CODE ANN. tit. 13, § 904 (1974), seems to be achieving its objectives. By taking a strict position from the time of the statute's inception, Delaware has fostered a policy which has led doctors and lawyers to eschew the practice of placing children. Letter from Susan Burns, supervisor of Adoption Service, to Roger Toogood, executive director of the Children's Home Society of Minnesota, Oct. 11, 1973, on file at the Child Welfare League of America, 67 Irving Place, New York, N.Y.

<sup>40</sup> Not all states have well-staffed agencies and sufficient resources to arrange adoptions on a large scale. O'Connell, *The Adoption Muddle: A Possible Solution*, 15 N.Y.L.F. 759, 770 (1969) [hereinafter cited as O'Connell]. In addition, agencies have been criticized for not using best efforts to place adoptable children. The thrust of this criticism stems from the fact that agencies are funded in proportion to the number of children under their care; consequently, once a child is adopted the agency loses a portion of its compensation. Anson & Clifford, *supra* note 10, at 29, col. 1; 1975 *Hearings*, *supra* note 1, at 111. Robert Anson and Judith Clifford give two illustrations of the failure of agencies to provide homes for hard-to-place children. In one, a broadcast requesting a family for a 12-year-old black girl was made over New York television by the Council on Adoptable Children. Six months later, although 200 calls had been received, the agency had yet to follow up on any of them. In the second case, the same council allegedly interviewed over 1000 couples anxious to adopt a hard-to-place child, discovering that a large majority of them had been rejected by the agencies. Anson & Clifford, *supra* note 10, at 30, col. 1.

<sup>41</sup> See, e.g., MICH. COMP. LAWS ANN. § 722.124 (Supp. 1975) (parent, guardian, relation, agency, or government unit may make placement); NEB. REV. STAT. § 43-701 (1974) (parent

2. Criminal sanctions for making a profit from child placement.<sup>42</sup>

3. Required placement report. In several states, the adopting parents must report to an appropriate department of the state within a certain number of days before or after the placement is made.<sup>43</sup> The department, upon being apprised of the placement, can then commence a prompt investigation.<sup>44</sup>

4. Disclosure of expenses. Some states require disclosure of all expenses incurred in the adoption process.<sup>45</sup>

5. Postplacement investigation. Subsequent to placement, most states require an investigation of the home for a period prescribed by law before a final decree of adoption will be granted.<sup>46</sup> In some states this investigation must be done by a social worker,<sup>47</sup> in others by any person appointed by the court.<sup>48</sup> The investigation period varies from state to state, some

or person licensed by Department of Public Welfare may make placement); N.Y. SOC. SERV. LAW § 374(2) (McKinney 1976) (parent, guardian, relative, or authorized agency may make placement); ORE. REV. STAT. § 418.300 (1973) (relatives of first or second degree may make placements).

<sup>42</sup> See, e.g., ARIZ. REV. STAT. ANN. § 8-126(c) (1956) (misdemeanor); COLO. REV. STAT. ANN. § 19-4-115 (1973) (misdemeanor); N.J. STAT. ANN. § 2A:96-7 (1969) (high misdemeanor); OKLA. STAT. tit. 21, § 866(1) (Supp. 1975) (misdemeanor for first offense; felony for subsequent offenses). For convictions under New Jersey's statute, which makes it a high misdemeanor to receive compensation for placing a child, see *State v. Segal*, 78 N.J. Super. 273, 188 A.2d 416 (App. Div. 1963); *State v. Wasserman*, 75 N.J. Super. 480, 183 A.2d 467 (App. Div. 1962), *aff'd per curiam*, 39 N.J. 516, 189 A.2d 218 (1963).

<sup>43</sup> See, e.g., ARIZ. REV. STAT. ANN. § 8-108(A) (1956) (within 5 days after placement); COLO. REV. STAT. ANN. § 19-4-110(1) (1973) (adopting parents must petition for adoption within 30 days after placement); FLA. STAT. ANN. § 63.092(1) (Supp. 1976) (30 days prior to placement); MINN. STAT. ANN. § 257.03 (1971) (within 30 days after placement); N.H. REV. STAT. ANN. § 170-B:14(II) (Supp. 1975) (30 days prior to placement).

<sup>44</sup> Statutes requiring a report on any placements prior to or immediately following the placement are a valuable means of avoiding the problem which normally results when a child is removed from a home after psychological ties have been formed. Statutes which require the petition to be filed "upon the entry of the child in the adoptive home or as soon thereafter as reasonably convenient," e.g., WYO. STAT. ANN. § 1-709 (Supp. 1975), are probably less effective for this purpose, since the "reasonably convenient" standard is rather vague.

<sup>45</sup> See, e.g., ARIZ. REV. STAT. ANN. § 8-114(A) (1974), CAL. CIV. CODE § 224r (West. Supp. 1976); FLA. STAT. ANN. § 63.097 (Supp. 1976).

<sup>46</sup> See, e.g., GA. CODE ANN. § 74-410 (1973); ILL. ANN. STAT. ch. 4, § 9.1-6 (Smith-Hurd 1975); PA. STAT. ANN. tit. 1, § 336 (Supp. 1975).

<sup>47</sup> See, e.g., CONN. GEN. STAT. ANN. § 45-63 (Supp. 1975) (welfare commissioner or agency); CAL. CIV. CODE § 226.6 (West Supp. 1976) (department of health or licensed agency); ILL. ANN. STAT. ch. 4, § 9.1-6 (Smith-Hurd 1975) (agency or probation officer).

<sup>48</sup> See, e.g., KY. REV. STAT. ANN. § 199.510(1) (Supp. 1974) (any person designated by the department of welfare or the court); PA. STAT. ANN. tit. 1, § 335 (Supp. 1975) (agency or "appropriate person designated by the court"); S.C. CODE ANN. § 10-2587.10(a) (Supp. 1975) ("representative designated by the court"). According to a caseworker for the Children's Bureau of South Carolina, the "representative may be the attorney's secretary, who spends

having no statutory minimum while others require an investigation of a year or more.<sup>49</sup>

6. Permission for placement. One State requires the permission of the secretary of the welfare department before an independent placement may be made.<sup>50</sup> Such a requirement is not quite as stringent as a complete prohibition against non-agency placements, but it does result in maintenance of a tight rein on those who wish to arrange independent placements.

7. Limitations on attorney's fees. One State limits the amount an attorney may charge for legal services in an adoption case to \$500.<sup>51</sup> This provision is intended to prevent concealment of an illegal placement payment under the guise of compensation for legal services.

Statutes such as these recognize that the child's welfare is paramount, and that a child who is the subject of a nonagency adoption needs more legislative protection than one placed by an agency already strictly regulated. In attempting to provide for the child's welfare, states have created legal obstacles designed to prevent the party who wishes to sell a baby for cash from effectuating his goal. Nevertheless, black-marketeers have remained in operation, with their continued success based largely upon three phenomena. First, several of the regulatory statutes are susceptible to circumvention.<sup>52</sup> For example, in states where natural parents are allowed to place their own children, but placement by an intermediary is banned,<sup>53</sup> it is possible to consider placement as having been made by a natural parent even though the intermediary makes all the arrangements.<sup>54</sup> Although the natural parent knows nothing of the couple who is adopting the child, if she physically hands the child over to the adoptive parents, the

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a relatively short time investigating the suitability of the home. . . ." Letter from John H. Wolff to the *St. John's Law Review*, Nov. 4, 1975.

<sup>49</sup> See, e.g., FLA. STAT. ANN. § 63.122 (Supp. 1976) (90 days); GA. CODE ANN. § 74-408 (1964) (90 days); LA. REV. STAT. ANN. § 9:432 (West 1965) (1 year); ORE. REV. STAT. § 109.350 (1973) (no minimum).

<sup>50</sup> KY. REV. STAT. ANN. §§ 199.470(4), 199.473(1) (Supp. 1974). For a case upholding the constitutionality of this requirement, see *Department of Child Welfare v. Lorenz*, 407 S.W.2d 699 (Ky. 1966).

<sup>51</sup> FLA. STAT. ANN. § 63.097 (Supp. 1976) specifies that the \$500 maximum fee is exclusive of hospital and court costs. A higher fee, however, may be charged with the court's permission.

<sup>52</sup> Complaining of the ease with which these statutes can be circumvented, agency advocates point out that agency procedures are much more likely to be enforced. Joseph Reid, executive director of the Child Welfare League of America, which is responsible for the accreditation of agencies in the United States, stressed this point in his testimony at the Senate hearings. *1975 Hearings*, *supra* note 1, at 33-34.

<sup>53</sup> See, e.g., MICH. COMP. LAWS ANN. § 722.124 (Supp. 1976); NEB. REV. STAT. § 43-701 (1974); N.J. STAT. ANN. § 2A:96-6 (1969); N.Y. SOC. SERV. LAW § 374(2) (McKinney 1976); ORE. REV. STAT. § 418.300 (1975).

<sup>54</sup> Grove, *supra* note 2, at 126.

placement can be said to be permitted by statute. Similarly, in states requiring disclosure of fees,<sup>55</sup> the attorney and the adoptive parents can camouflage the placement fee by agreeing to disclose only that portion of the fee allocated to legitimate legal services, with the remainder passing between the parties in cash. Thus, since the court is unaware of the actual fee paid, the parties may successfully evade the antiprofitteering and disclosure laws.<sup>56</sup>

Second, it appears that some of the statutes suffer from lack of enforcement.<sup>57</sup> The dearth of suits in this area of the law is not surprising, since it is unlikely that complaints will be forthcoming from either an intermediary who has profited, the adoptive parents who have obtained a coveted, albeit expensive, child in an impossible market, or the child itself, who is usually non sui juris. Normally, those few cases which do reach the courts are initiated by a natural mother who after a change of heart claims that her "consent" to the adoption was not truly voluntary. The illegality of the placement, coupled with the defective "consent," may result in denial of the adoption decree.<sup>58</sup> In an uncontested adoption, however, the

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<sup>55</sup> See, e.g., ARIZ. REV. STAT. ANN. § 8-114(A) (1956); CAL. CIV. CODE § 224r (West Supp. 1976); FLA. STAT. ANN. § 63.097 (Supp. 1976).

<sup>56</sup> The testimony of Sharon Horner at the Senate hearings indicated that black-market lawyers would accept \$1000 to \$2000 by check and the rest as "cash on delivery." When questioned about the fee in court, the parents would often perjure themselves. 1975 Hearings, *supra* note 1, at 142.

<sup>57</sup> For example, Oregon has a statute prohibiting individuals other than relatives from placing a child, unless licensed by the State. ORE. REV. STAT. § 418.300 (1973). Barbara Davis Spencer, manager of the Adoption Unit of the Oregon Department of Human Resources, revealed that this statute is not enforced. Letter from Barbara Davis Spencer to the *St. John's Law Review*, Nov. 5, 1975. Oregon's problem with lack of enforcement was verified by Stuart R. Stimmel, State Director of the Boys and Girls Aid Society of Oregon, who mentioned that although there had been some convictions under the statute years ago, the courts recently have had few opportunities to review it. The state department which reviews all independent adoptions "does not even remind offenders that such a statute exists." Moreover, he said, independent placers become indignant when their activities are questioned. Letter from Stuart R. Stimmel to the *St. John's Law Review*, Oct. 29, 1975.

Nebraska, like Oregon, prohibits placements by intermediaries. NEB. REV. STAT. § 43-701 (1974). Joseph F. Kelly of the United Catholic Social Services estimates that "[i]n spite of the Nebraska statutes . . . there are hundreds of private placements done in Nebraska each year. . . . The courts readily finalize such adoptions. Most of these are probably gray and not black market." Letter from Joseph F. Kelly to the *St. John's Law Review*, Nov. 10, 1975.

<sup>58</sup> See, e.g., *In re P*, No. M-14-379 (N.J. County Ct., Morris County, Jan. 10, 1972) reprinted in Polow, *The Lawyer in the Adoption Process*, 6 FAMILY L.Q. 72 (1972). In this case, the adoption was denied and the child returned to his natural mother because of irregularities in the placement procedure. The mother was a young California woman who, soon after relinquishing her child with much uncertainty to a New Jersey family, attempted to reclaim the child. The New Jersey court, finding that neither California nor New Jersey law had been satisfied by the method of placement, returned the child to the natural mother and severely chastised the California attorney who had arranged the adoption, recommending that the attorney general and the state bar association take appropriate disciplinary action. *Id.* at 82.

court often will not forbid the adoption merely because the parties involved disregarded one of the regulations. Since the best interests of the child are of utmost importance,<sup>59</sup> courts frequently decide to leave the child in the home of a family approved by a court rather than remove him to an agency to begin the adoption process anew.<sup>60</sup>

The third factor contributing to the strength of the black market is the great variation in state laws. The black-marketeer faced with legal restriction is often able to pursue his sinister business in a sister state.<sup>61</sup> Unfortunately, in a system where each of the 50 states has its own statutes regulating adoption, such a course of action is entirely possible. Since jurisdictions differ in terms of residency requirements,<sup>62</sup> regulation of im-

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In *People ex rel. Kropp v. Shepsky*, 305 N.Y. 465, 113 N.E.2d 801 (1953), a child who had been placed in an adoptive home by an attorney, was returned to the natural mother because she had withdrawn her consent prior to the expiration of the 6-month statutory limit then in force. For a discussion of this statute, see note 74 *infra*. In *Sampson v. Holton*, 185 N.W.2d 216 (Iowa 1971), a case with tragic undertones, the highest court of Iowa reached a similar solution. The natural mother, a divorcee, was destitute. One day before giving birth to the child, she had been evicted with her four other children from the mobile home they occupied. After receiving a release from the mother, the attending physician took the baby from the hospital and delivered it to a prosperous married couple. Within a month, the natural mother attempted to get her child back by seeking a writ of habeas corpus. Although the Iowa Supreme Court finally ruled in her favor because the adoption had not satisfied certain statutory requirements, the child was almost 2 by the time she was returned to her natural mother. The court observed:

[N]umerous adoptions probably proceed without the intervention of a child-placing agency . . . and . . . many of those adoptions are completed satisfactorily. But the participants in such cases are playing with fire. The contemplated adoption may abort before consummation, as this one did, with grief to all concerned.

*Id.* at 219.

<sup>59</sup> When the court adjudges that the adoption will be against the best interests of the child, the adoption decree will not be granted. See, e.g., *In re Emanuel T.*, 81 Misc. 2d 535, 365 N.Y.S.2d 709 (Family Ct. N.Y. County 1975) (petition for adoption denied because private placement with 63-year-old adoptive parent was not in best interest of child); *In re H*, 69 Misc. 2d 304, 330 N.Y.S.2d 235 (Family Ct. N.Y. County 1972) (petition for adoption denied because private placement with 42-year-old divorcee working full time and living in deteriorated hotel was not in best interest of child).

<sup>60</sup> The trauma caused by removal of the child from an adoptive family is discussed in *Revocation of Parental Consent*, *supra* note 13, at 567. See also *Grove*, *supra* note 2, at 130.

<sup>61</sup> See *Grove*, *supra* note 2, at 127; see also *O'Connell*, *supra* note 40, at 765-66.

<sup>62</sup> Some states allow access to their courts only to adoptive parents who reside in or are domiciliaries of the state. See, e.g., CONN. GEN. STAT. ANN. § 45-63 (1958), as amended, (Supp. 1975); DEL. CODE ANN. tit. 13, § 902(b) (1974); IDAHO CODE § 16-1506 (Supp. 1975); IND. ANN. STAT. § 31-3-1-1 (Burns Supp. 1975). Other states will grant adoption decrees as long as the child is a resident, thus allowing nonresidents to adopt. See, e.g., IOWA CODE ANN. § 600.1 (Supp. 1976) (any person may seek adoption in the county in which he or the child resides); ME. REV. STAT. ANN. tit. 19 § 531 (Supp. 1975) (any resident or nonresident may bring petition where he or the child resides); MO. ANN. STAT. § 453.010 (Vernon 1949) (where petitioner or child lives); N.Y. DOM. REL. LAW § 115 (McKinney Supp. 1975) (petitioner need not be resident of New York); WASH. REV. CODE § 26.32.020 (1961) (petition may be brought where petitioner is resident or where adoptee is domiciled). See also Comment, *The Inade-*

portation<sup>63</sup> and exportation<sup>64</sup> of children, and controls over placement, an intermediary may evade the law simply by crossing state lines.

#### PROPOSALS FOR REFORM

In view of the foregoing, it is clear that the gray market remains fraught with a number of unsolved problems. First, there is a definite need to define the intermediary and delineate the role he may play in the adoption process. Next, it is necessary for each state to strengthen its statutes regulating private placements.<sup>65</sup> Third, states must set standards ensuring that the consent of natural parents who relinquish their child is truly voluntary. Finally, the states must develop a policy governing interstate placements and adoptions, and use their best efforts to effectuate the legislation enacted.

#### *The Intermediary*

More than one state is unclear concerning the permissible role of the intermediary in the adoption process. In some cases the avowed policy of a state and the language of its statutes are at variance with the actual practice within the state. For example, New York's policy appears to be one of curtailment of private placements; its statute provides that with the exception of a placement by the natural parent, a relative, or a guardian, only a licensed agency may make a placement.<sup>66</sup> In practice, however, even if the intermediary makes all the arrangements, he is not considered to have violated the law as long as he does not physically hand the child over to the adopting parents.<sup>67</sup> In an attempt to alleviate some of the confusion

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*quacy of Domicile As a Jurisdictional Base in Adoption Proceedings*, 17 *RUTGERS L. REV.* 761 (1963). Because of the need for a thorough investigation, there is much merit to the suggestion that persons should not be permitted to adopt in states other than their own. *Moppets*, *supra* note 2, at 726.

<sup>63</sup> Several states have laws regulating importation of children for adoption. Generally, before a child may be brought into the state for purposes of adoption, these laws require permission of the state. *See, e.g.*, KY. REV. STAT. ANN. § 199.350(1) (1970); MINN. STAT. ANN. § 267.05 (1957). TENN. CODE ANN. §§ 14-1505 to 1507 (1973). Some jurisdictions require a bond, the purpose of which is to allow the receiving state to avoid responsibility for support of the child should the adoption fail. *See, e.g.*, KY. REV. STAT. ANN. § 199.350(1) (1970) (requires bond of \$10,000); VA. REV. STAT. ANN. § 63.1-207 (1973), *as amended*, (Supp. 1975) (bond of up to \$2500 permitted). The Virginia statute, however, is inapplicable to children imported from states which are signatories to the Interstate Compact on the Placement of Children, *discussed in notes 97-109 and accompanying text infra*.

<sup>64</sup> Exportation statutes, which require state approval before a child may be sent out of state for adoption purposes, have been enacted by a small number of states. *See, e.g.*, TENN. CODE ANN. § 14-1508 (1973); VA. CODE ANN. § 63.1-208 (1973) (consent of commissioner of department of welfare).

<sup>65</sup> For a discussion of present statutes, see notes 41-51 and accompanying text *supra*.

<sup>66</sup> N.Y. SOC. SERV. LAW § 374 (McKinney 1976).

<sup>67</sup> Even when the attorney physically hands the child over to the adopting parents, few courts

regarding the intermediary, the Attorney General of New York State recently declared that the activities of a lawyer in obtaining children by means of contacts with doctors and hospitals and subsequently arranging for their adoption constitutes a violation of the statute prohibiting private placements.<sup>68</sup>

The lack of clarity in this area is not peculiar to New York. For example, in New Jersey, it is a misdemeanor to act as an intermediary in child placement, but the natural mother may place the child with strangers known to her only through the intermediary.<sup>69</sup>

In states such as New York and New Jersey, the policy regarding intermediaries needs legislative clarification. If it is determined that the state's policy is to allow only bona fide placements by the natural parents, the statute should specify that an intermediary shall neither place a child nor *cause a child to be placed*.<sup>70</sup> On the other hand, if the state determines that private placements are desirable, it should not be necessary to indulge in the fiction of placement by the natural parent. Rather, the existence of

will deny the adoption petition for that reason alone. For one such denial, see *In re Anonymous*, 46 Misc. 2d 928, 261 N.Y.S.2d 439 (Family Ct. Dutchess County 1965).

<sup>68</sup> Letter from Louis J. Lefkowitz, attorney general of New York State, to Bernard Shapiro, executive director, New York State Board of Social Welfare, Jan. 9, 1975, copy on file in the St. John's Law Review Office. The attorney had arranged 11 adoptions. In each case, he had contacted doctors in California, visited the pregnant woman once before birth and once after, and arranged for the release of the child to him. He then sent the adoptive parents to California where the baby was delivered to them by a private nurse. The attorney general's opinion stated that the attorney's activities were in violation of N.Y. Soc. SERV. LAW § 374(2) (McKinney 1976), which prohibits individuals other than parents, relatives, and guardians from "placing out" children; *id.* § 374(6) which prohibits accepting compensation for placing out a child; and *id.* § 382(2), which prohibits individuals from bringing children into New York for purposes of adoption.

<sup>69</sup> Jean Whitmire, supervisor of New Jersey's Bureau of Resource Development, stated that a violation of N.J. STAT. ANN. § 2A:96-6 (1969), which prohibits placement by an intermediary, was seldom alleged in situations wherein the natural mother handed the child to adoptive parents, even if they were complete strangers to her. Letter from Jean Whitmire to the *St. John's Law Review*, Nov. 10, 1975. Ms. Whitmire also stated that only flagrant violations of this statute were prosecuted. In fact, it appears from the scarcity of cases that prosecutions under § 2A:96-6 seldom occur unless the intermediary has also accepted compensation for placing a child, a violation of N.J. STAT. ANN. § 2A:96-7 (1969). A case involving § 2A:96-6, however, is currently pending. *State v. Livingston*, No. 820-75 (N.J. Super. Ct., filed Oct. 20, 1975).

<sup>70</sup> North Dakota presently forbids an intermediary from causing a child to be placed. The former law had provided: "No person shall place any child other than his or her own in family homes for adoption or otherwise without a license to do so from the social service board. . . ." N.D. CENT. CODE § 50-12-17 (1974), *as amended*, (Supp. 1975). Violation of this statute was a felony. It was clear, however, that the law could easily be circumvented by an intermediary who would actually effect the placement without physically making the transfer. Letter from Reuben Carlson, administrator of Child Welfare Services, Social Service Board of North Dakota, to the *St. John's Law Review*, Oct. 29, 1975. Consequently, the law was amended to read: "No person shall place or *cause to be placed* any child. . . ." N.D. CENT. CODE § 50-12-17 (Supp. 1975), *amending* N.D. CENT. CODE § 50-12-17 (1974) (emphasis added).



gray-market adoptions should be acknowledged, and such transactions should be subjected to statutory controls and close judicial scrutiny.

### *Strengthening Laws Prohibiting Black-Market Transactions*

In most states, it is a crime to receive compensation for placing a child for adoption.<sup>71</sup> It is submitted that criminal penalties should also be enacted to cover adoptive parents who pay to have a child placed in their homes.<sup>72</sup> Adoptive parents who obtain a child through private placement should be permitted to recompense the child's natural mother for her living and medical expenses, and to pay a reasonable legal fee to the attorney handling the adoption, but no more. Parents who pay for babies contribute to the successful operation of the black market regardless of their intentions and motives, and they should not be exempted from the criminal sanctions applicable to the intermediary.

### *Consent*

Occasionally, problems are caused by the revocation of consent by the natural mother. One such case which received nationwide notoriety was the "Baby Lenore" case decided by the New York Court of Appeals in 1971.<sup>73</sup> Although this case involved an agency adoption, it highlighted the problem of consent in both agency and independent adoptions. After surrendering her child to an agency which placed the child for adoption, the natural mother promptly attempted to revoke her surrender. The Court of Appeals allowed her to do so.<sup>74</sup> Although the child had been in the custody

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<sup>71</sup> See, e.g., ARIZ. REV. STAT. ANN. § 8-126(c) (1956); COLO. REV. STAT. ANN. § 19-4115 (1974); N.J. REV. STAT. § 2A:96-7 (1969); N.C. GEN. STAT. § 48-37 (Supp. 1974); OKLA. STAT. tit. 21, § 866(1) (Supp. 1975). Curiously, New York dropped from its Penal Law a series of sections including one which made it a crime to accept money for placing a child for adoption. Ch. 678, § 3, [1949] N.Y. Laws 1545 (repealed 1965). A first violation of this section was a misdemeanor, while subsequent offenses were felonies.

<sup>72</sup> Generally, the adoptive parents have not been named in penal statutes. In the proposed federal statutes, which would criminalize interstate black-market activities, the natural mother and adoptive parents are expressly exempted from criminal liability. See Grove, *supra* note 2, at 127-29; notes 110-113 *infra*.

<sup>73</sup> *People ex rel. Scarpetta v. Spence-Chapin Adoption Serv.*, 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S.2d 65 (1971).

<sup>74</sup> After discussing the positions taken by various states on the question of revocation of surrender to an agency, the court found that New York's statute, ch. 792, § 1, [1966] N.Y. Laws 1724-25 (McKinney), as amended, N.Y. SOC. SERV. LAW § 384 (McKinney 1976), allowed revocation under close judicial supervision until the actual adoption took place. *People ex rel. Scarpetta v. Spence-Chapin Adoption Serv.*, 28 N.Y.2d 185, 191, 269 N.E.2d 787, 790, 321 N.Y.S.2d 65, 69 (1971). Since an adoption generally cannot be granted until 6 months after placement, N.Y. DOM. REL. LAW § 112(6) (McKinney Supp. 1975), an unstable situation existed. Pursuant to the statute, it is possible for an agency to petition the surrogate to "approve" a surrender; such approval renders it irrevocable after notice and opportunity to be heard had been offered to the consenting party. N.Y. SOC. SERV. LAW § 384(4) (McKinney 1976). However, no such petition had been made in *Scarpetta*.

of the adoptive parents for almost a year by the time the Court of Appeals' decision was filed, the court found that her best interests would be served by returning her to her natural mother.<sup>75</sup> Notwithstanding the adverse publicity generated by the New York case<sup>76</sup> and the abundance of commentary on the question of consent,<sup>77</sup> the consent laws of the various states manifest a disturbing lack of procedural safeguards. Where an intermediary may obtain a consent from a natural mother simply by having her sign a prepared document, the validity of that consent is questionable.<sup>78</sup> This is particularly true if the consent is signed, as it often is, while the natural mother is in a physically weak and emotionally vulnerable position.<sup>79</sup> Consent should therefore be required to be given in the presence of either a judge<sup>80</sup> or an agency representative to ensure that it is truly voluntary.<sup>81</sup>

### *Interstate Controls*

Since the most stringent state laws will be ineffective if they can be circumvented by simply crossing state lines, it is imperative that strong interstate measures be developed to control the gray market and to elimi-

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<sup>75</sup> After this decision, the adopting family fled the jurisdiction and was eventually awarded a decree of adoption by a Florida court, which ruled that the New York decision was not entitled to full faith and credit. Comment, *Adoptive Parent Versus Natural Parent: Severing the Gordian Knot of Voluntary Surrenders*, 18 CATH. LAW. 90, 107 (1972).

Following *Scarpetta*, the New York legislature changed the statutory provisions relating to revocation of consent. For a discussion of the legislative history of the amendments, see 1972 N.Y. LEGIS. ANNUAL 360. Currently, in an independent adoption, an "irrevocable" consent given in the presence of a judge becomes irrevocable immediately, whereas such a consent given without judicial supervision is revocable at the discretion of the court until 30 days after it is given. N.Y. DOM. REL. LAW § 115-b (McKinney Supp. 1975).

In an agency adoption, a surrender approved by the court cannot be subsequently challenged. One which states that it is irrevocable becomes so 30 days after it has been executed if the child has been placed in an adoptive home. N.Y. SOC. SERV. LAW § 384(4)-(5) (McKinney 1976). If a surrender does not qualify as irrevocable under these sections, it may presumably be revoked until the adoption is finalized.

<sup>76</sup> Thousands of letters were received by the sponsor of the New York amendments, Assemblyman Joseph R. Pisani, urging reform of the adoption law. 1972 N.Y. LEGIS. ANNUAL 203.

<sup>77</sup> See note 13 *supra*. Many commentators recommend that states adopt stringent consent requirements. See, e.g., R. Hunt, *Obstacles to Interstate Adoption* 9, Aug. 1972 [hereinafter cited as Hunt] (strongly suggesting consent should be both irrevocable and given before a court); *Moppets*, *supra* note 2, at 728-29 (suggesting that consent should be given before judge or representative of state welfare department); *Revocation of Parental Consent*, *supra* note 13, at 571 (suggesting that consent should be given before judge, social worker, or officer of welfare department).

<sup>78</sup> For cases involving successful challenges to such consents, see *Sampson v. Holton*, 185 N.W.2d 216 (Iowa, 1971); *In re P*, No. M-14-379 (N.J. County Ct., Morris County, Jan. 10, 1972), reprinted in Polow, *The Lawyer in the Adoption Process*, 6 FAMILY L.Q. 72 (1972).

<sup>79</sup> For a discussion of this problem, see *Revocation of Parental Consent*, *supra* note 13, at 570.

<sup>80</sup> See, e.g., COLO. REV. STAT. ANN. § 19-4-102 (1973); WIS. STAT. § 48.84 (Supp. 1975).

<sup>81</sup> See, e.g., CAL. CIV. CODE § 226.1(a) (West Supp. 1975); MINN. STAT. ANN. § 259.24(5) (Supp. 1976).

nate the black market. One of the solutions proposed to effectuate these goals is the enactment by all states of a uniform law on adoption.<sup>82</sup> Toward this end, a Uniform Adoption Act was promulgated in 1953. Unfortunately, it was adopted by only two states.<sup>83</sup> Consequently, a revision committee was formed to draft the Revised Uniform Adoption Act,<sup>84</sup> completed in 1969. This Act, like its predecessor, has been adopted in only two jurisdictions.<sup>85</sup> Its primary objective is the creation of a uniform law concerning such questions as who may adopt,<sup>86</sup> who may be adopted,<sup>87</sup> who must consent,<sup>88</sup> how consent must be obtained,<sup>89</sup> and where parties may bring the adoption proceeding.<sup>90</sup> Among its specific provisions are the following valuable requirements: that all parties disclose their fees and expenses;<sup>91</sup> that notice of the placement be given to a state agency;<sup>92</sup> and, that the adoptive parents wait 6 months before obtaining an adoption decree.<sup>93</sup>

The Act fails, however, to stipulate who may place a child, a crucial element in the control of the black market. Further, its general nonacceptance by the states renders its value as a solution to the black market dubious. It is submitted that the enactment of certain of its provisions, particularly those dealing with termination of parental rights,<sup>94</sup> notice of

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<sup>82</sup> For a commentary on the need for a uniform act, see O'Connell, *supra* note 40.

<sup>83</sup> MONT. REV. CODES ANN. §§ 61-201 *et seq.* (1970), *as amended*, (Supp. 1975); OKLA. STAT. ANN. tit. 10, §§ 60.1 *et seq.* (1966), *as amended*, (Supp. 1975).

<sup>84</sup> For a discussion of the revised Act, see O'Connell, *supra* note 40.

<sup>85</sup> N.M. STAT. ANN. §§ 22-2-20 *et seq.* (Supp. 1975); N.D. CENT. CODE §§ 14-15-01 *et seq.* (1971).

<sup>86</sup> Those who may adopt a child, according to the Act, include a husband and wife, an unmarried adult, the unmarried mother or father of the adoptee, and, in certain circumstances, a married person without the other spouse. UNIFORM ADOPTION ACT § 3.

<sup>87</sup> The Act provides that "[a]ny individual may be adopted." *Id.* § 2.

<sup>88</sup> The Act requires the consent of the mother, the father in many cases, the person with legal custody of the child or the court, and the adoptee if he is over 10 years of age. *Id.* § 5. Parental consent is not required if the parent has abandoned the child, failed to communicate with the child for 1 year, relinquished the right to consent, had parental rights terminated by the court, had been declared incompetent, or if the adoptee is over 18 and the court dispenses with consent. *Id.* § 6. Consent is also not required of either a guardian who fails to meet certain procedural requirements or the spouse of the adoptee in certain cases. *Id.*

<sup>89</sup> Consent must be before a judge or, in an agency adoption, before a "person authorized to take such acknowledgements." *Id.* § 7. Consent may be withdrawn any time before the adoption takes place if the court, after giving all interested parties notice and opportunity to be heard, finds that withdrawal of consent is in the best interest of the child. *Id.* § 8.

<sup>90</sup> The petition may be brought either in the place where "the petitioner or the individual to be adopted resides" or, in an agency adoption, where the agency is located. *Id.* § 4.

<sup>91</sup> The parties must report all expenditures made in connection with the adoption, including expenses incurred in birth, placement, and medical care and other services. *Id.* § 10.

<sup>92</sup> Notice must be given at least 20 days before the adoption hearing. *Id.* § 11.

<sup>93</sup> *Id.* § 12. The 6 month period begins *after* the appropriate state agency has been informed of the petitioner's custody of the child. *Id.* Should there for some reason exist a failure of parental relinquishment at the commencement of the investigation, the court will finally terminate the rights of the natural parents at the adoption hearing. *Id.* § 19.

<sup>94</sup> *Id.* §§ 5-7, 19.

placement,<sup>95</sup> and disclosure of fees,<sup>96</sup> would reduce the confusion which results from the present lack of uniformity.

A second potential solution to the interstate aspect of the black market lies in the Interstate Compact on the Placement of Children.<sup>97</sup> Unlike a uniform law which has as its goal conformity of state laws, the Interstate Compact recognizes the differences among states and attempts to harmonize them in cases involving an interstate adoption. It is important to note that since interstate regulation of adoptions affects not only the illicit activities of the black market, but also legitimate interstate agency and independent adoptions, any attempt to limit the black market will also impede bona fide interstate adoptions. Because of the large number of children who cannot be readily placed, *viz.* those who are handicapped, older, racially mixed, or emotionally disturbed, it is essential that states have access to prospective adoptive families in other states to provide homes for these children.<sup>98</sup> Thus, an interstate body of law must comprise a sensitive balance between two objectives: the elimination of unnecessary obstacles to interstate adoption and the avoidance of loopholes permitting the occurrence of illegal and black-market placements. The Interstate Compact was formulated to fulfill both of these purposes.<sup>99</sup>

Under the Interstate Compact, appropriate authorities of the state into which the child is sent are apprised *before the placement occurs* of the child's importation for adoption purposes.<sup>100</sup> All placements must conform with the laws of the receiving state;<sup>101</sup> consequently, an investigation of the

<sup>95</sup> *Id.* § 11.

<sup>96</sup> *Id.* § 10.

<sup>97</sup> The Interstate Compact on the Placement of Children was formulated by the New York State Joint Legislative Committee on Interstate Cooperation. It was approved by a 12-state conference in January 1960. Hunt, *supra* note 77, at 49.

<sup>98</sup> For discussion of the "hard-to-place" child, see Erickson, *Adoption Facilitating Service, A Method of Strengthening and Extending Services*, 48 J. CHILD WELFARE LEAGUE OF AM. 620 (1969); Gallagher, *The Adoption of Mentally Retarded Children*, CHILDREN, Jan./Feb. 1968, at 17; Gallagher, *Adoption Resources for Black Children*, CHILDREN, Mar./Apr. 1971, at 49; Kravik, *Adopting a Retarded Child: One Family's Experience*, CHILDREN TODAY, Sept./Oct. 1975, at 17; Nash, *Reflections on Interstate Operations*, CHILDREN TODAY, July/Aug. 1974, at 7. For a comprehensive list of adoption exchanges, see McNAMARA, *supra* note 3, at 64-73.

<sup>99</sup> For a discussion on the dual function of the Interstate Compact, see Hunt, *supra* note 77.

<sup>100</sup> INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN art. III(b) provides in pertinent part: Prior to sending, bringing or causing any child to be sent or brought into a receiving state for placement in foster care or as a preliminary to a possible adoption, the sending agency shall furnish the appropriate public authorities in the receiving state written notice of the intention to send, bring, or place the child in the receiving state.

The definition of a "sending agency" includes any person, agency, or other entity which causes a child to be brought into the receiving state. *Id.* art. II(b).

<sup>101</sup> *Id.*, art. III(a). This ensures that a receiving state with strict placement procedures will be able to enforce its laws when a child is brought into the state from another jurisdiction. For example, if an intermediary from a state which forbids private placements sends a child into a state which allows them, the placement is allowed. In the reverse situation, where an intermediary from a state which permits private placements sends a child into a state which

prospective home is conducted to discover whether the placement is against the best interests of the child.<sup>102</sup> Since the child will not be placed with an unfit family, the preplacement investigation lessens the chance that the court will grant an undesirable adoption merely to avoid the trauma of separating a child from adoptive parents with whom he or she has formed psychological ties.

Under the Interstate Compact, both the sending and the receiving states have jurisdiction over a violating party; this provision gives both states protection against marketeers who attempt to skirt the law.<sup>103</sup> Furthermore, in the event a problem arises, the sending state retains jurisdiction over the child until the adoption is finalized.<sup>104</sup>

The Interstate Compact is not without its problems. Although it was first signed by New York in 1960<sup>105</sup> and has since been signed by 29 other states,<sup>106</sup> its operation has not evolved beyond the nascent stage. The initial hurdle has been its lack of application since it extends only to transactions between two signatories. Furthermore, some state signatories appear to be unaware that they even belong to the Interstate Compact.<sup>107</sup> In addition to this less than complete acceptance by the states, the effectiveness of the

forbids them, presumably the placement would be prohibited. This situation gives rise to the de facto adoption discussed in text accompanying notes 35-38 *supra*. Since one of the functions of the Interstate Compact is to facilitate interstate adoptions of hard-to-place children, states may allow the adoption despite nonconformity with its laws by having the department which performs the preplacement investigation "make the placement." See note 36 and accompanying text *supra*.

<sup>102</sup> The Interstate Compact provides:

[T]he child shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child.

*Id.* art. III(d).

<sup>103</sup> *Id.* art. IV. Thus, even though a black marketeer transacts his "sale" in a state lacking criminal sanctions for such activities, the laws of the other state involved are applicable and may be enforced against him.

<sup>104</sup> *Id.* art. V. The purpose of this provision is to relieve the receiving state of financial liability in the event the adoption does not succeed.

<sup>105</sup> Hunt, *supra* note 77, at 49. The Compact has been enacted in New York as N.Y. SOC. SERV. LAW § 374-a (McKinney 1976).

<sup>106</sup> See, e.g., CAL. CIV. CODE, §§ 264-274 (West Supp. 1975); FLA. STAT. ANN. §§ 409.401-.405 (Supp. 1976); ILL. REV. STAT. ch. 23, §§ 2601-2609 (Supp. 1975); LA. REV. STAT. ANN. §§ 46:1700-1706 (West Supp. 1975); OHIO REV. CODE ANN. §§ 5103.20-.28 (Page Supp. 1975). For a complete listing of the signatories, see N.Y. SOC. SERV. LAW § 374(a), complementary legislation at 509 (McKinney 1976).

<sup>107</sup> It was noted in Hunt, *supra* note 77, at 7, that in a questionnaire sent out by the Adoption Resource Exchange of North America to gather information for the purpose of facilitating interstate placement of children, the majority of the respondents did not even mention the Interstate Compact. One respondent who did refer to it reported that some agencies in Interstate Compact states appear not to be aware of the state's membership. A similar observation was made with regard to certain judges who appear to be equally unaware that their state is an Interstate Compact member. 1975 Hearings, *supra* note 1, at 210.

Interstate Compact is further impaired by its reliance on the existence of strong state laws. For example, it does not prohibit realization of profit from child placement, nor does it require disclosure of expenses incurred in an adoption. Its provisions also expressly exclude from its scope placements by relatives,<sup>108</sup> an area in which the potential for abuse is great. Perhaps its major weakness, however, lies in its failure to provide penalties for violation of its terms, since there is no provision that an adoption not in conformity with its rules must be scrutinized or invalidated. In short, although the Interstate Compact is the seminal form of an agreement which could greatly diminish the incidence of black-market adoptions, its success will require thoughtful revision and greater cooperation on the part of each state.<sup>109</sup>

### *Federal Criminal Statutes*

Successful elimination of the black market probably cannot be achieved by state action alone. Passage of a federal law making it a crime to accept anything of value for placing children for adoption across state lines is also necessary.<sup>110</sup> Such a law has been proposed periodically since 1955,<sup>111</sup> but has never been enacted. The various bills that have been proposed, while leaving intact all state laws on adoption, would provide additional remedies against known black-market operators.<sup>112</sup> The enactment of a federal statute would facilitate prosecutions and assure the existence of jurisdiction over the interstate offender. Subject to the same problems of enforcement as state laws, a federal legislation should not be envisaged as a panacea for the problems of the black market. Nevertheless, if a federal statute were enacted and strictly enforced, it would be a major step toward eliminating black-market adoptions.

In April of 1975, a Senate subcommittee commenced hearings to determine whether federal legislation would present a feasible solution for the

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<sup>108</sup> INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN art. VIII(a).

<sup>109</sup> Some of the testimony presented before the Senate Subcommittee on Children and Youth in 1975 reflected the opinion that, although the Compact marks the beginning of meaningful control of interstate placements, it needs strengthening in order to operate effectively. See *1975 Hearings, supra* note 1, at 210. One attorney specializing in independent adoptions, however, testified that the Interstate Compact, in its present form, is becoming increasingly effective as more states adopt it. *Id.* at 198, 203.

<sup>110</sup> For a discussion of the proposed federal laws, see Grove, *supra* note 2, at 127-29. Although the proposed bills have expressly excepted natural and adopting parents from criminal sanctions, see note 72, *supra*, it is submitted that since the black market could not thrive without these participants they should be subject to criminal liability for black-market activities.

<sup>111</sup> See S. 624, 89th Cong., 1st Sess. (1965); S. 1541, 88th Cong., 2d Sess. (1964); S. 654, 87th Cong., 1st Sess. (1962); S. 3021, 84th Cong., 2d Sess. (1956). Each bill would have made unlawful certain acts relating to the placement of children for adoption across state lines.

<sup>112</sup> The proposed sanctions have included fines of up to \$10,000 and imprisonment up to 5 years. See bills cited in note 111 *supra*.

interstate black-market problem. Numerous witnesses, representing the media, agencies, law enforcement officials, private adoption lawyers, and adoptive parents were called to testify.<sup>113</sup> No bill has yet been introduced as a result of these hearings. It is strongly suggested, however, that the subcommittee recommend that federal legislation would be of assistance in diminishing the black market.

#### CONCLUSION

The black market in adoptions is a thriving business. Destructive of the best interests of parents, children, and society, such dealings in human flesh should be thwarted by strong, strictly enforced state laws and equally stringent barriers to interstate trade. State laws should clearly reflect state policy on gray-market adoptions, and courts should adhere to the stated policy. Although attempts to promulgate uniform adoption laws have been unsuccessful all states should join the Interstate Compact on the Placement of Children, thus extending the protection of their laws to children and families entering their boundaries. Finally, a statute should be added to the federal law criminalizing any interstate black-market activity. If state and federal governments show a determination to discover and punish black-market activities, this taint on civilized society can be removed.

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<sup>113</sup> See 1975 Hearings, *supra* note 1.