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Legal Measures to Eliminate Transnational Trading of Infants for Adoption: An Analysis of Anti-Infant Trading Statutes in the United States

AHILEMAH JONET*

The trading of infants from one country to parents in another country has reached epidemic proportions in recent years. A witness testifying before Congress in 1974 estimated that 5,000 children had been sold for adoption purposes.¹ Few legal measures have been taken to eliminate the illicit transnational trade of infants. The measures taken by the international community, as reflected by the declarations and conventions of the United Nations, are inadequate to control this trade. These instruments merely state a general prohibition against trafficking in children and rely heavily on national laws to provide specific legal measures.²

Many nations prohibit and criminalize the trading of infants for

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1. *Sale of Children in Interstate and Foreign Commerce: Hearings on H.R. 2826 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 29 (1977) (statement of Dr. Marvin R. Crow, Director of Illinois Children's Home & Aid Society) [hereinafter *Hearings*].

The United Nations reported on the commercial sale of babies from Colombia, Peru, and Sri Lanka for adoption by potential parents in foreign countries. In 1983, communiques from *Reuters* and *Agence France Presse* described elements of a network in the Republic of China designed to procure babies and young children, to meet the demands for them in Europe, North America, and Australia. The *New York Times* also exposed "rings" in Colombia, El Salvador, Mexico, and other Latin American countries that kidnapped and sold children for export to the United States. See, e.g., *N.Y. Times*, July 26, 1984, at A1, col. 3; *N.Y. Times*, Oct. 29, 1987, at B1, col. 2.

There appears to be a consensus among experts regarding the difficulty of discerning just how prevalent infant trading really is. See, e.g., *N.Y. Times*, July 26, 1984, at A1, col. 3 (quoting statement by Dr. William Pearce, President of the National Committee for Adoption); *Hearings, supra* (statements by various witnesses at House hearings on baby selling problems and related issues).

2. See, e.g., United Nations Convention on the Rights of the Child, reprinted in 28 I.L.M. 1448 (1989). Article 35 provides "States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form." *Id.* at 1469.

adoption through detailed statutory provisions. However, such prohibitions have not deterred infant traders or natural and adoptive parents. By analyzing anti-infant trading statutes, this Article provides an explanation for the failure of national legal measures to eliminate infant trading.³ In particular, this Article focuses on specific state adoption statutes in an attempt to identify the basic problems involved in the implementation of anti-infant trading statutes.

I. LAWS ON ADOPTIVE PLACEMENTS IN THE UNITED STATES: AN INTRODUCTION

The placement of a child with adoptive parents is a critical step in the adoption process.⁴ This is also the area where profit opportunities for intermediaries are greatest. There is a general belief among state legislatures that infant-trading activities can be controlled through placement procedures.⁵ However, the states' approaches are varied.⁶ Only six states have concluded that the best way to eliminate infant trading is to allow only licensed agencies and state welfare departments to place children in adoptive homes.⁷ Intermediary placement, commonly known as independent adoption, is not permitted in these states.⁸

The remaining states have found it unnecessary to abolish intermediary placement to eliminate the commercial elements from the

3. The United States is used as a case study because:

(1) the United States is most frequently cited as the destination for the adoptive children. See, e.g., *Christian Sci. Monitor*, Sept. 20, 1982;

(2) in comparison with infant trading activities in the Third World, where infants are crudely sold and purchased by baby peddlers, infant trading in the United States can be characterized as sophisticated because the trading involves intermediaries who make trading appear to be a legitimate activity; and

(3) the United States illustrates the jurisdictional difficulties presented by the implementation of a policy where the national government and the various states do not coordinate legislation.

4. The determination to make a particular adoptive placement should be made by a person trained to evaluate whether the placement will be in the best interests of the child, the birth mother, and the adoptive parents.

5. This agreement is reflected by the policy that underlies the Interstate Compact on the Placement of Children. In order to prevent interstate trading of children, the compact requires state agencies to comply with the applicable laws of the receiving state governing the placement of children. See, e.g., Hartfield, *The Role of Interstate Compact on the Placement of Children in Interstate Adoption*, 68 NEB. L. REV. 292, 298 (1989).

6. *Hearings*, *supra* note 1, at 57.

7. CONN. GEN. STAT. ANN. § 45-63(a)(3) (West 1989); DEL. CODE ANN. tit. 13, § 904 (1986); GA. CODE ANN. § 74-421 (1975); MASS. GEN. LAWS ANN. ch. 210, § 11A (West 1987); MICH. COMP. LAWS § 710.54 (1979); MINN. STAT. ANN. § 257.05 (West 1982).

8. See sources cited *supra* note 7.

placement process. Rather, these states enacted strict compensation regulations to prevent profiteering.⁹ Generally, these regulations limit the amount of compensation that may be paid to intermediaries for arranging adoptive placements. In addition, some states impose criminal penalties for violation of placement procedures.¹⁰ This Article analyzes these three categories of adoption statutes: statutes outlawing independent adoption, statutes regulating independent adoption, and statutes criminalizing illicit placement.

II. STATUTES OUTLAWING INDEPENDENT ADOPTION: THE CONNECTICUT APPROACH

Connecticut is one of the few states which prohibits independent adoption.¹¹ Under the Connecticut adoption statute,¹² the probate court will only accept an adoption application when the child is placed for adoption by the Commissioner of Children and Youth Services ("Commissioner") or by a child-placing agency ("placement agency").¹³ There are, however, two exceptions to this requirement: when the child involved is related to the adoptive parents¹⁴ or when the Adoption Review Board¹⁵ waives the requirement at the request of the adoptive parents or a probate judge.¹⁶

A 1985 amendment to the statute made it easier for the adoptive parents to acquire a child. Adoptive parents are now allowed to identify or locate an adoptable child on their own.¹⁷ To prevent abuses, however, the placement of the child must be made by the Commissioner or a placement agency, unless the case comes within one of the two exceptions. In addition, the amendment provides that such placement is to be made in accordance with regulations promulgated by

9. See *infra* text accompanying note 78.

10. See *infra* text accompanying notes 126-30.

11. See *supra* text accompanying note 7.

12. CONN. GEN. STAT. ANN. §§ 45-61 to 45-69n (West 1981 & Supp. 1990).

13. *Id.* § 45-63(a)(3); Zeller, *Latin American Adoptions in Connecticut—Is There Any Room for Lawyers?*, 10 U. BRIDGEPORT L. REV. 115, 120 (1989).

14. CONN. GEN. STAT. ANN. § 45-63(a)(3). Even biological parents are not permitted to place their children with close relatives unless they have been given a waiver of the requirement by the Adoption Review Board. Telephone interview with Mary Solera, Social Worker at the Connecticut Department of Children Services (June 23, 1989).

15. For a description of the composition and powers of the Adoption Review Board, see CONN. GEN. STAT. ANN. §§ 45-69c, 45-69d (West 1981).

16. *Id.* § 45-69d(a).

17. *Id.* § 45-63(a)(3) (West Supp. 1990).

the Commissioner.¹⁸ These regulations are aimed at preventing abuses in the adoption process, including the elimination of infant trading. For example, Regulation 45-63 provides that only a child placement agency is permitted:

(i) to offer, give, request, receive, or accept payment of cash or other consideration, directly or indirectly, for the identification or location of a specific child or children for prospective parents or for information regarding birth mother . . . and

(ii) to advertise regarding the availability of their adoption services and/or for the placement of a child for the purpose of adoption.¹⁹

In addition, Regulation 45-63 prohibits a birth mother from profiting from the placement of her child. She may receive compensation only for those expenses necessarily incurred as a result of the pregnancy.²⁰ A maximum amount is specified for some expenses, such as living expenses.²¹ The payments must be filed directly with the court, which then distributes the money to the birth mother.²² The birth mother, adoptive parents, and an agency representative are required to sign a financial affidavit concerning any payments received or made.²³ Although the adoption statute and Regulation 45-63 are designed to prevent and prohibit baby trading, these measures can be circumvented by the use of loopholes. These loopholes include exemption of adoptive parents from punishment, statutory encouragement of solicitation by adoptive parents, allowance of reasonable fees for placement, and the inapplicability of the statute to transnational adoption. These loopholes work to encourage continued infant trading.

A. *Provision that Punishes All But Adoptive Parents*

If an adoptive parent fails to abide by the placement requirements, one of the following may occur. First, the adoption applica-

18. CONN. AGENCIES REGS. § 45-63(a)(3) (1987). The Commissioner's regulations were adopted on June 19, 1986.

19. *Id.* § 45-63-6(a). This section also permits the Department of Children and Youth Services to advertise. *Id.*

20. *Id.* § 45-63-8.

21. Section 45-63-8(a) permits payment of the birth mother's living expenses of up to 25% of the AFDC monthly grant with the total payments not to exceed two months maximum grant payments for a pregnant woman. *Id.* § 45-63-8(a).

22. *Id.*

23. *Id.* § 45-63-10.

tion may be denied by the probate court.²⁴ Second, the probate judge, on his own account, may apply to the Adoption Review Board to request that the placement requirement be waived;²⁵ if it is so waived, the judge may proceed to hear the application. Finally, the adoptive parent may apply to the Adoption Review Board for review of the case if the probate judge does not seek a waiver or if the waiver sought was denied.²⁶

Therefore, the possibility exists that the adoption order may be denied; however, this is unlikely. Thus, there is no compelling reason for the adoptive parents to abide by the placement requirement, since the penalty section of the statute does not apply to them. The statute exempts adoptive parents from punishment, however, it punishes the birth mother and the intermediary. The statute states: "Any person who places a child for adoption in violation of section 45-63 or 45-69d or assists in such a placement shall be fined not more than five thousand dollars or imprisoned not less than one year nor more than five years or both."²⁷

This section, the only penalty provision in the statute, punishes only the intermediaries or baby brokers. Because adoptive parents do not "place" a child for adoption,²⁸ this section does not apply to

24. See CONN. GEN. STAT. ANN. § 45-63(c)(2).

25. Section 45-69d(b) provides: "Any judge of probate who has been presented to him [sic] an application for adoption which may not proceed because the child has been so placed may apply in writing to the adoption review board for a waiver of such requirement." *Id.* § 45-69d(b).

The waiver may not be granted if the board "determines that the proceeding would violate the public policy of the state against the obtaining of children by illegal means for adoption purposes." *Id.* § 45-69d(g). There are only a few reported cases that deal with this section. A number of New York cases discussing a similar section demonstrate the reluctance of the courts to deny parents the adoption orders even though evidence indicates that the adoptive parents violated the statute.

The punishment for adoption agencies is revocation of the license to operate adoption services. See CONN. AGENCIES REGS. § 45-63-3(b) (1987).

26. CONN. GEN. STAT. ANN. § 45-69d(e) provides:

Any party to the adoption proceedings shall have the right to present such evidence as is deemed necessary and relevant to the board. After hearing the evidence the board may deny the application or approve the application in which case the chairman shall notify the court of probate that the adoption may proceed and that the requirement of placement by the commissioner of children and youth services or a child-placing agency is waived.

Id.

27. *Id.* § 45-63c.

28. Under Regulation 45-63-1, "placement for adoption" is defined as the act of giving custody, or arranging for the giving of custody of a child by any person, child placing agency or department to another person, child placing agency or department for the purpose of adoption. CONN. AGENCIES REGS. § 45-63-1.

them.²⁹ The statute could, however, apply to a birth mother because she "places" her child for adoption. The plain meaning of the statute, therefore, suggests that the birth mother can be subject to criminal liability.

B. *Provision Encouraging Solicitation of Infants*

Connecticut has a unique adoption law which explicitly encourages prospective adoptive parents to identify³⁰ or locate³¹ a specific adoptable child, birth parent, or expectant birth mother.³² To identify or locate a child under this provision would, most likely, require the adoptive parents to use some type of advertising.³³ Thus, as a result of acquiescence by lawmakers, adoptive parents or their agents can solicit for adoptable children.

Adoptive parents often advertise, particularly through word-of-mouth. It is through this word-of-mouth advertising that black market adoptions prosper. Although adoptive parents are technically prohibited from offering money or other forms of compensation for the identification of an adoptable child, in practice this prohibition is impossible to enforce.

C. *Reasonable Compensation Provision*

Under the Connecticut statute, physicians and attorneys may receive reasonable compensation for services they customarily perform, other than locating the child.³⁴ The inclusion of the words "reasonable" and "customarily" subject this statute to wide interpretation. It is significant that physicians and attorneys are not restricted to their professional fees. Although the adoptive parents, the birth mother, and the agency must sign a sworn financial affidavit, physicians and attorneys are exempted from this requirement. The statute does not

29. There is only a general prohibition under § 45-63-3 which includes "to offer" and "to give." *Id.* § 45-63-3.

30. Regulation 45-63 defines "identify" as giving, sharing, or obtaining any information regarding a specific child, birth parent, or expectant birth mother for the purpose of adoption. CONN. AGENCIES REGS. § 45-63.

31. "Locate" is defined as engaging in the process of searching for a child for the purpose of adoption. *Id.*

32. *See id.* § 45-63-2; *see also* Zeller, *supra* note 13, at 121. Adoption agencies are considered to be a source of adoptable children. Many Connecticut-based agencies that handle transnational adoptions, however, do not offer child-finding services.

33. This is inconsistent with Regulation 45-63-6(a), which prohibits advertising. No penalty, however, has been prescribed for violations of this prohibition. Also, the prohibition only applies to public media advertising.

34. CONN. AGENCIES REGS. § 45-63-3.

include a provision empowering the court to compel the professionals to disclose their fees or subject their fees to judicial review. Instead, the law relies on the ethics of the professionals involved to enforce the restrictions in the statute. This lack of review for professional fees, which relies on disclosure by the adoptive parents, has proven ineffective in discouraging professionals from the temptation of profiting from the adoption process.

D. Inapplicability to Transnational Adoption

As previously explained, one reason for Connecticut's prohibition of independent adoption is to curb baby trading. This prohibition, however, does not apply to transnational adoptions. Adoptions that are valid under a foreign country's laws are valid in Connecticut, regardless of the existence of local agency participation.

The Connecticut statute allows the court to hear a petition for validation of a foreign adoption order that has been finalized in the foreign jurisdiction. Validation is common when the child cannot obtain United States citizenship because the adoptive parents failed to have personal contact with the child prior to the adoption proceeding.³⁵ The Connecticut provision implicitly allows adoption without the presence of the parents in the foreign jurisdiction, as long as such adoptions are permitted in that jurisdiction.³⁶ The Connecticut statute and Regulation 45-63 do not require the court to question the adoptive parents about the methods used to acquire the child. Although this omission does not necessarily encourage adoptive parents to engage in questionable practices, it does reveal the indifference to potential abuse. Moreover, the prohibition of independent adoptions only applies to intrastate and interstate adoptions, not international proceedings. This suggests that Connecticut legislators do not feel that foreign children need protection from the abuses of independent adoption.³⁷

Outlawing independent adoptions is viewed as a drastic measure

35. CONN. GEN. STAT. ANN. § 45-63d.

36. To be admitted as an "immediate relative," a foreign child must be "adopted abroad by a United States citizen . . . who personally saw and observed the child prior to or during the adoption proceedings . . ." 8 U.S.C. § 1101(b)(1)(F) (1988).

37. This also demonstrates that the United States has a strong policy favoring transnational adoption. It should be noted that the federal government's role is limited to the activities of the Immigration and Naturalization Service ("INS"). The INS will refuse to naturalize a child whose adoptive parents did not personally observe the child prior to the adoption proceeding. *See supra* note 36.

to curb the black market in babies,³⁸ but Connecticut has taken this radical step. However, the success of this type of legislation depends largely on enforcement. The Connecticut statute, as with similar statutes, suffers from lack of enforcement. The lack of legal action in this area is not surprising, as it is unlikely that complaints will be forthcoming from either an intermediary who has profited, the adoptive parents who have obtained a child, the child itself, or the birth mother. Independent of these enforcement problems, the deliberately placed loopholes, discussed above, are fatal to any effort to eliminate commercialism in adoption.

III. STATUTES REGULATING INDEPENDENT ADOPTION: THE NEW YORK APPROACH

Most states permit both independent and agency adoptions. Independent adoptions are, however, regulated to prevent the development of a black market in baby trading.³⁹ For example, statutes may regulate independent adoption by: 1) restricting persons who may place children for adoption⁴⁰ or limiting their role in the adoption process;⁴¹ 2) requiring that placement be made only after an investigation by the prescribed authority,⁴² that all expenses be disclosed in court,⁴³ that a pre-placement report be submitted to the court,⁴⁴ and that permission for placement be approved by a court before an intermediary places a child in an adoptive home;⁴⁵ or 3) prohibiting service fees, other than medical, legal, or reasonable living expenses.⁴⁶ The statutory regulation of independent adoption will be examined by analyzing the approach taken in the state of New York.

A. Private Placement Adoptions

In New York, private placement adoptions "serve a valuable pur-

38. See, e.g., Note, *Independent Adoption: The Inadequacies of State Law*, 63 WASH. U.L.Q. 753 (1985).

39. Some commentators claim that independent adoption can only protect the parties if it is regulated. See, e.g., Note, *supra* note 38, at 766. Some other commentators conclude that regulating independent adoption cannot eliminate the black market in babies. See Article, *Black Market Adoptions*, 22 CATH. LAW. 48 (1976).

40. See, e.g., ALA. CODE § 38-7-3 (Supp. 1990).

41. See, e.g., UTAH CODE ANN. § 62A-4-202 (1989).

42. See, e.g., NEV. REV. STAT. § 127.280 (1986).

43. See, e.g., CAL. CIV. CODE § 226.6 (West Supp. 1989).

44. See, e.g., FLA. STAT. ANN. § 63.092(1) (West Supp. 1987).

45. See, e.g., KY. REV. STAT. ANN. § 199.470(4) (Michie Bobbs-Merrill 1988).

46. See, e.g., TENN. CODE ANN. § 36-1-135 (1984).

pose and fulfill an obvious need of its citizens."⁴⁷ New York has been concerned with the dangers of independent placements since 1949.⁴⁸ This concern is addressed in New York's Domestic Relations Law ("DRL") and Social Services Law ("SSL"). These statutes attempt to safeguard the interests of the child and prohibit baby selling.⁴⁹

The SSL specifically prohibits anyone other than an authorized agent to accept, receive, or pay any compensation, directly or indirectly, in connection with the adoption of a child.⁵⁰ However, this provision does not prevent the payment of medical, legal, and other related fees and expenses.⁵¹ In addition, the SSL requires the adoptive parents:

[T]o present an affidavit describing all fees, compensation and other remunerations paid by such parent or parents on account of or incidental to the birth or care of the adoptive child, the preg-

47. *In re Adoption of Baby Boy M.G.*, 135 Misc. 2d 252, 254, 515 N.Y.S.2d 198, 199 (Sur. Ct. 1987). The court stated that "in 1986, this court alone processed 244 private placement adoptions and only 120 agency adoptions." *Id.* at 254, 515 N.Y.S.2d at 199.

48. *In re Adoption of E.W.C.*, 89 Misc. 2d 64, 75, 389 N.Y.S.2d 743, 751 (Sur. Ct. 1976).

49. New York is also attempting to restrict the importation of interstate trafficking in babies and has adopted the Interstate Compact on the Placement of Children. N.Y. Soc. SERV. LAW § 374-a (McKinney 1989).

50. *Id.* § 374-6.

51. *Id.* §§ 374-6, 374-2; see also *In re Adoption of E.W.C.*, 89 Misc. 2d at 75, 389 N.Y.S.2d at 751 (discussing the legislative history of sections 374-2 and 374-6). The court states:

In commenting on legislation of this type, the report of Special Committee on Social Welfare and Relief of the Joint Legislative Committee on Interstate Cooperation for the Year 1949 . . . states . . . : "[T]wo types of placements are possible under present New York State Law: (1) placements by authorized agencies . . . and (2) placements by parents, guardians or relatives within the second degree, or by intermediaries, acting on behalf of the parent or guardian. This latter group are referred to as 'voluntary' or 'independent' placements. Where they involve the payment of money in consideration of the placement, they are commonly referred to as 'black market' or 'bootleg' placements." And again at page 55 of the same report, the following comment is made: "Insofar as the activities of intermediaries are concerned, your Committee believes that where they involve the payment or receipt of money they are unjustifiable and should be prohibited. The buying and selling of human beings was supposed to have been stopped in this country in 1865. Your Committee can see no justification for permitting trafficking in babies."

Id.

See also *In re Jose L.*, 126 Misc. 2d 612, 483 N.Y.S.2d 929 (Fam. Ct. 1984) (holding that New York state policy prohibits individuals from receiving or paying compensation either in connection with an adoption or for assistance to a guardian in the placement of a child for adoption); *In re Juan P.H.C.*, 130 Misc. 2d 387, 496 N.Y.S.2d 630 (Sur. Ct. 1985) (holding that there is a strong public policy interest precluding the exchange of funds in the placement of a child for adoption beyond the amount necessary for reasonable expenses); *In re Adoption of Anonymous*, 133 Misc. 2d 741, 507 N.Y.S.2d 968 (Sur. Ct. 1986) (holding that the natural mother was not entitled to reimbursement from the adoptive parents for lost wages which she claimed she would have earned during the pregnancy).

nancy 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.⁵²

Similarly, the attorney must file an affidavit "describing all fees, compensation and other remuneration received by him on account of or incidental to the placement or adoption of the child or assistance in arrangements for such placement or adoption."⁵³

Applying this requirement, an appellate court has held that an attorney representing adoptive parents is entitled to reasonable fees for consultation and legal services.⁵⁴ However, the attorney may not receive compensation for the actual adoption of the child.⁵⁵ Another court has held that an attorney does not violate the adoption statute when he counsels clients on how to legitimately locate an adoptable child and advises them of the legal hurdles involved in private adoption.⁵⁶

The DRL provides a method to ensure that prior to an adoption, the consent of the birth parents is validly obtained. For such parental consent to be valid, it must be obtained either under the court's supervision, by judicial consent, or before a notary public.⁵⁷ In the case of judicial consent, the judge must question the birth mother to ascertain whether she understands the consequences of her consent to the adoption of her child.⁵⁸ It is anticipated that this procedure will curb, if not eliminate, the practice of financially inducing birth mothers to consent to the adoption of their children.⁵⁹ Extrajudicial consent must be executed or acknowledged before a notary public or other

52. N.Y. SOC. SERV. LAW § 374-6. Lost wages are not considered incidental to pregnancy and delivery. See *In re Adoption of Anonymous*, 133 Misc. 2d at 742, 507 N.Y.S.2d at 969; *In re Adoption of Alyssa L.B.*, 131 Misc. 2d 755, 501 N.Y.S.2d 595 (Sur. Ct. 1986).

53. N.Y. DOM. REL. LAW § 7 (McKinney 1988).

54. *In re Male Infant B.*, 96 A.D.2d 1055, 466 N.Y.S.2d 482 (1983) (N.Y. App. Div. 1983).

55. *Id.*; cf. *People v. Michelman*, 93 Misc. 2d 297, 403 N.Y.S.2d 417 (Sur. Ct. 1978) (evidence that lawyer placed newborns for a fee with couples seeking a child for adoption and that his role was not limited to that of an attorney or friend of the natural mother).

56. *In re Adoption of Baby Boy M.G.*, 135 Misc. 2d at 252, 544, 515 N.Y.S.2d at 199.

57. N.Y. DOM. REL. LAW § 115-b.

58. *Id.* § 115-b(2)(a), (b).

59. Financially inducing a birth mother to consent is common in United States black market adoptions. See *Hearings*, *supra* note 1, at 7; N.Y. Times, Oct. 29, 1987, at B1, col. 2 (reporting how a child broker placed nationwide classified advertisements in newspapers and made arrangements with pregnant women, adoptive couples, and lawyers by telephone from his home in Florida); see also N.Y. DOM. REL. LAW § 115-b.

officer authorized to accept proof of deeds.⁶⁰ Under either procedure, the birth mother must make an appearance to be interviewed.

New York permits the adoption of children from other states and foreign countries.⁶¹ In these cases, the statute is primarily aimed at ensuring a stable home for the child.⁶² In foreign adoptions, the statute requires the adoptive parents to pass a pre-adoption investigation.⁶³ The court will order such an investigation when the adoptive parents present the court with a verified, written application. This application includes the names and addresses of any intermediaries through whom the adoptive parents learned of the existence of the child.⁶⁴ The investigator designated by the court will then examine the statements in the application. The investigator's report also contains the amount of compensation paid for the placement of the child.⁶⁵

The risks of private placement adoptions are well known.⁶⁶ Poor placement resulting from lack of home study, failure to safeguard the rights and interests of birth parents, pressures exerted by intermediaries upon birth parents, and the uncertainty and distress prospective adoptive parents often experience, are a few of the reasons private placement is opposed. The largest abuse in these adoptions, however, is the intermediaries' exploitation of the parties and subsequent profiting from the placement. New York is the forerunner in devising effective laws to eliminate this abuse. However, even New York's statutes fail to address these concerns adequately.

The only restriction New York places on participation in adoptive placement relates to engagement for profit.⁶⁷ The lack of additional restrictions makes it difficult to design effective regulations or enforce the general purpose of the statute. Arguably, the true focus of independent adoption is to service the need of the adoptive parents.⁶⁸ The absence of additional restrictions reflects an intent to provide

60. N.Y. DOM. REL. LAW § 115-b(4)(b). It is doubtful, however, that the procedure will prevent intermediaries from exercising undue influence on birth mothers.

61. *See id.* § 115-a.

62. *See id.* § 115-a(4).

63. *Id.* § 115-a(1)(a).

64. *Id.* § 115-a.

65. *See id.* This section applies to both agency placement and private placement. Authorized adoption agencies are exempted from this provision.

66. *See supra* text accompanying notes 48-49.

67. New York law defines private placement adoption as "any adoption other than that of a minor who has been placed by an authorized agency." N.Y. DOM. REL. LAW § 109.

68. *See, e.g., Howe, Adoption Practices, Issues and Law, 1958-1983*, 17 FAM. L.Q. 173, 181 (1983).

adoptive parents with the services of a wide variety of intermediaries.⁶⁹

The law permits child placement to be performed by anyone. Therefore, it does not provide an effective mechanism to control intermediaries, except arguably attorneys,⁷⁰ from profiting from the placement. Only a general prohibition is imposed; no provision requires the intermediary to present an affidavit, similar to that of the adoptive parents and the attorney. Thus, courts will only be informed of any unauthorized payment if the adoptive parents include the item on their own affidavits. This procedure depends on an honor system which, as will be shown, cannot be relied upon as an effective regulatory mechanism when the adoptive parents have emotional pressures and motivations.

The law places a heavy burden on the investigator appointed to conduct pre-adoption investigations. To locate adoptable children, adoptive parents rely heavily on intermediaries who are financially rewarded for their illicit services. These facts are not usually revealed to authorities, and in fact, adoptive parents often conceal the involvement of an intermediary.⁷¹ Even if this information is provided by the adoptive parents, the investigator must determine if an illicit payment has been made, a task which the court itself finds hard to do. The SSL does not require any vocational qualifications for the person appointed as investigator. The large amount of discretion vested in the investigator, coupled with the lack of any formal requirement of a vocational background, renders it difficult to achieve consistency in evaluating the adoption process.⁷² Under this system, the responsibility of deterring wrongdoing depends on the personal qualities and eth-

69. Many legislators did not consider the possibility of completely abolishing independent adoption as a solution to the problem of baby trading because this would be cutting services to adoptive parents who deserve to have children. See, e.g., *Anti-Fraudulent Adoption Practices Act: Hearings on S. 2299 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 145 [hereinafter *Senate Hearings*].

70. In New York, the County Surrogate's Court has formulated a rule to minimize the profit motive in adoptions. The rule requires the petitioner's attorney to state the amount of the attorney's fee and the number of other adoption proceedings in which the attorney participated. In *In re Adoption of E.W.C.*, the court stated, "such a special rule in this court will provide some assistance in preventing abuses in private-placement adoptions and will recommend its adoption by The Administrative Board of the Judicial Conference. . . ." *In re Adoption of E.W.C.*, 89 Misc. 2d at 64, 77, 389 N.Y.S.2d at 752. Further, the court stated that when an attorney charges an excessive fee unrelated to the actual services rendered, the attorney violates the *Code of Professional Responsibility*. *Id.*; see also Podolski, *Abolishing Baby Buying: Limiting Independent Adoption Placement*, 9 FAM. L. Q. 547-52 (1975).

71. Podolski, *supra* note 70, at 547-52.

72. See *id.* at 551.

ics of the particular investigator. Vesting the responsibility to monitor adoptions in the investigator alone, makes it even more difficult to eliminate infant trading, because the investigator himself may be corrupt. This further hinders the ability to identify adoption abuses.⁷³

Even if the prospective adoptive parents improperly pay fees for placement of a foreign baby, the court can still grant the pre-adoption certificate because the improprieties and charges of placement fees for a foreign infant by an adoption agency do not mandate a sanction of denial of a pre-adoption certificate where "there is not otherwise any question about [the] appropriateness of the [adoptive parent] having custody of the child, and where it is likely that she will prove to be an appropriate adoptive parent" ⁷⁴ The court's unwillingness to deny the application of adoptive parents undermines the effectiveness of the provision. This judicial failure carries over into other legal measures in the adoption system.

B. Failures of the System

The state as sovereign assumes, through its judicial arm, a role as *parens patriae*.⁷⁵ The state ensures that the best interests of the child are the primary consideration in deciding whether to grant an adoption petition.⁷⁶ By not enacting stringent rules, however, the state unintentionally aids activity which dehumanizes children. This is initially evident from the state's failure to provide effective punishment for those involved in baby selling activities, including the adoptive and birth parents. New York classifies violations of adoption placement provisions as misdemeanors. From the perspective of law en-

73. The legislature enacted the pre-adoption investigation requirement mainly to protect the children involved. The legislature intends to protect children from abusive adoptive homes. This is especially crucial when the children are foreign born. When the law determines that the parties are fit parents before the foreign child is brought into the state, the possibility that the court will deny the adoption petition is minimized. See *In re Adoption of Pyung B.*, 83 Misc. 2d 794, 371 N.Y.S.2d 993 (Fam. Ct. 1975).

It is in the best interests of the state to avoid harsh, if not tragic, results because the denial of an adoption petition causes the responsibility for care of the child to fall on the state. In ensuring the success of independent adoption, therefore, the state also ensures that public funds are not spent on foster care for foreign children.

74. *In re Juan P.H.C.*, 130 Misc. 2d 387, 390-91, 496 N.Y.S.2d 630, 633 (Sur. Ct. 1985).

75. In *In re Adoption of H.*, 69 Misc. 2d 304, 330 N.Y.S.2d 235 (Fam. Ct. 1972), the court held that its function is not to rubber-stamp adoption petitions, but to act as *parens patriae* and to approve the adoption only if the court is convinced that the child's best interests will be promoted by the adoption. *Id.* at 307, 330 N.Y.S.2d at 241; see also *In re Adoption of Donald U.*, 105 A.D.2d 875, 482 N.Y.S.2d 74 (N.Y. App. Div. 1984).

76. N.Y. DOM. REL. LAW § 114.

forcement, misdemeanor cases have low priority because the energy and money spent prosecuting them are not commensurate with the penalty upon conviction.⁷⁷

The state also aids illegal infant trading by not providing more restrictive compensation provisions. The requirement of reporting expenses is a means of controlling unreasonable or illegal fees by subjecting them to administrative and judicial scrutiny. New York has the least restrictive statute restricting fees and compensation for child placement. In other jurisdictions, restrictive compensation law is more effective because it stipulates the kind of fees that may be paid in connection with an adoption. The law used in a minority of states, which expressly prohibits payment of any compensation, is even more effective. Some states following this latter approach make an exception and allow compensation to be paid to the state or a licensed agency.⁷⁸

The problem with the New York reporting system is that it merely puts the parties, particularly adoptive parents, on an honor system. In an independent placement situation, therefore, "a couple desiring to adopt regardless of the cost might be tempted to avoid such reporting requirements in order to expedite the adoption."⁷⁹

C. *Professional as Intermediary*

The most difficult issue in regulating compensation in independent placements is the propriety of the intermediary. When the intermediary is not a lawyer or doctor, an illicit payment can be easily identified; any money exchanged is presumed to be illicit since placement for money is strictly prohibited. Unlike a doctor or lawyer, a nonprofessional intermediary cannot legally assert that the money is for professional services rendered. This facilitates the prosecution of such cases because the burden on the prosecution is not onerous.

In contrast, the statute allows a professional to charge reasonable medical or legal fees.⁸⁰ The problems with this approach are determining when a fee is a "professional" fee, instead of a "placement"

77. *Senate Hearings, supra* note 69, at 76 (statement by Joseph Vincent Morello, Assistant District Attorney, New York, New York).

78. Such restrictions are usually found in jurisdictions that prohibit independent third-party placements.

79. *See Comment, Independent Adoptions: Is the Black and White Beginning to Appear in the Controversy over Gray-Market Adoptions?*, 18 DUQ. L. REV. 629, 638 (1979-1980); *Hearings, supra* note 1, at 58 (explaining how adoptive parents circumvent the law against payment of compensation).

80. *See* N.Y. DOM. REL. LAW § 115(7).

fee, and defining "reasonable." The legislative policy clearly is to prevent profits from being earned from placement and to allow professionals to charge proper fees for their services. The legislature left it to the court to determine what is reasonable.⁸¹ This has presented the court with some difficulties.⁸² For instance, in *In re Adoption of Unnamed Baby Boy*,⁸³ the court attempted to define a "reasonable" fee and assess the role played by the professional involved.⁸⁴ The court held that if the professional had played a principal part in the adoption, he would be denied the fees claimed.⁸⁵ The court, however, failed to define the criteria for identifying a "principal role."

The difficulty in evaluating the role of the intermediary is compounded when an attorney is involved.⁸⁶ The courts have been cautious when assessing an attorney's involvement. Rather than determining the propriety of the fee, the courts simply refuse to resolve the issue by passing the responsibility to act to the "proper authorities" for investigation and enforcement.⁸⁷ However, enforcement officials' treatment of the problem shows that they cannot be relied on to give effect to the adoption statute's intent.⁸⁸

The court of appeals has held that the court has the authority to scrutinize the amount charged by an attorney for legal services and to reduce a fee that exceeds the reasonable value for those services.⁸⁹ This alone, however, does not prevent adoptive parents from revealing only the legitimate fees paid and concealing additional illegal fees paid

81. *Hearings*, *supra* note 1, at 43.

82. *See In re Adoption of E.W.C.*, 89 Misc. 2d 64, 389 N.Y.S.2d 743 (Sur. Ct. 1976). The court stated, "[w]hile there may be some difficulty in determining whether a fee charged by a professional man is for his professional services or for the placement itself, nevertheless a fee that is clearly excessive and is not related to the lawyer's actual services is a violation of the Code of Professional Responsibility. . . ." *Id.* at 77, 389 N.Y.S.2d at 752.

83. 110 A.D.2d 1019, 488 N.Y.S.2d 118 (N.Y. App. Div. 1985).

84. *Id.* at 1019, 488 N.Y.S.2d at 119.

85. *Id.*

86. *Hearings*, *supra* note 1, at 19, 36 (statements by Joseph Vincent Morello); *see also* Comment, *supra* note 79, at 638.

87. *In re Adoption of E.W.C.*, 89 Misc. 2d at 77, 389 N.Y.S.2d at 752.

88. Despite the media's attention to occasional investigation of the black market area of independent adoption, this type of crime and other abuses of adoption law are apparently not given a high priority within the offices having the authority to prosecute violators. The fact that the offense is only a misdemeanor is one reason for this low priority. *See Senate Hearings*, *supra* note 69; *see also* Comment, *supra* note 79, at 640; Podolski, *supra* note 70, at 59, 60.

Professionals consider themselves to be capable of regulating their own conduct, but are often reluctant to expose one another. Any code of ethical conduct, therefore, cannot help to control activities of professionals.

89. *In re Male Infant B.*, 96 A.D.2d 1055, 466 N.Y.S.2d 482 (N.Y. App. Div. 1983).

to the attorney.⁹⁰ This problem of determining a "reasonable" fee can simply be avoided by imposing a statutory limitation on compensation for placement-related fees.⁹¹

D. Prohibition Against Buying Foreign Children

New York supports the adoption of foreign children by its citizens. However, its law does not contain sufficient measures to prevent trafficking of children into the state for adoption. The only provision addressing abuses arising from transnational adoption is DRL section 115-a. This section requires an adoptive parent, intending to adopt an eligible orphan⁹² entering the United States with non-quota immigrant status, to obtain a pre-adoption certificate. The purpose of this section is to satisfy federal immigration requirements⁹³ and to ensure that the child is placed in a good home;⁹⁴ it is not intended to curb infant trading. Courts often grant the adoption certificate despite a violation of the rule prohibiting illegitimate payment for the placement of a child.⁹⁵ In these cases, the courts have stressed the mandatory requirement of a pre-adoption certification, while overlooking many subsidiary rules contained within that requirement. The courts' statutory application has been inconsistent at best.⁹⁶

90. This fact usually comes to the court's attention in a criminal prosecution, a rare occurrence. See, e.g., *People v. Michelman*, 93 Misc. 2d 297, 403 N.Y.S.2d 417 (Sur. Ct. 1978).

91. See generally Comment, *supra* note 79, at 638. Most New York surrogate judges reject the idea of a statutory limitation. They consider themselves bound by their own guidelines provided by the *Code of Professional Responsibility*.

92. 8 U.S.C. § 1101(b)(1)(F) (1988) provides that adoptive parents can seek admission of a child for adoption by classifying the child as an immediate family member. To qualify, the child must be "under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 201(b), . . . who is an orphan because of the death or disappearance of . . . both parents . . ." *Id.*

93. In *In re Adoption of Pyung B.*, 83 Misc. 2d 794, 371 N.Y.S.2d 993 (Fam. Ct. 1975), the foreign child entered the United States on a visa issued by the federal government. Before such a visa can be issued, the child must qualify as a child under the definition given in the Immigration and Nationalization Act. That definition requires the adoptive parents to comply with the pre-adoptive requirements of the state of proposed residence of the child. 8 U.S.C. § 1101(b)(1)(F).

94. *In re Adoption of Pyung B.*, 83 Misc. 2d at 796, 371 N.Y.S.2d at 996.

95. *Id.* Failure to obtain pre-adoption certification will lead to the denial of the petition for adoption. No order of adoption may be made until one year after the court has received the adoption petition. *Id.* at 996, 371 N.Y.S.2d at 997.

96. It appears that the courts decide when to strictly adhere to the statute and when not to. The choice of interpretation is often governed by a desire to empathize with the adoptive parents. Strict interpretation is used to prevent tainting the conduct of the adoptive parents with criminality. A liberal interpretation is used where another interpretation will deprive the adoptive parents of the infant.

The desire of the lawmakers and courts to help adoptive parents has led to the development of a policy favoring transnational adoption. This policy, however, overlooks the methods used in procuring foreign children and the potential trauma inflicted on foreign birth mothers. Although the regulations of independent adoption are also designed to protect birth mothers, the protection is confined within national borders.

Legislative bodies have repeatedly expressed abhorrence of activities that reduce children to commodities. The villains are the infant traders, and the victims are the adoptive parents. Legislators find it difficult to reconcile the classic dilemma of an adoptive parent, who is motivated by the natural desire to rear a child, but buys a child out of desperation. The legislators blame the infant seller who takes advantage of the adoptive parents' desperation. Because of this, laws emerge that exonerate the adoptive parents and provide them with a defense of mental incapacity. The judiciary shares this legislative perspective.

In *People v. Scopas*,⁹⁷ a grand jury indicted the defendants for allegedly "placing out" children.⁹⁸ An order vacating and setting aside the indictment was granted and affirmed by both the Appellate Division of the Supreme Court and the New York Court of Appeals.⁹⁹ There was testimony before the grand jury that couples seeking to adopt an orphan were referred to the defendants' office where they were shown photographs of orphaned Greek children.¹⁰⁰ Couples made their selection from these photographs and agreed to pay the defendants to arrange an adoption.¹⁰¹ The defendants then arranged for the legal adoption of the children by proxy in Greece. They also provided transportation for the children to New York, where the children were then released to the adoptive parents. The court of appeals held that no offense was committed because the adoption of the children occurred in Greece. Therefore, there was no violation because the placement had occurred prior to the children's arrival in New York.

97. 11 N.Y.2d 120, 181 N.E.2d 754, 227 N.Y.S.2d 5 (1962).

98. Under the former New York Penal Code and the SSL, "placing out" meant "to arrange for free care of a child in a family other than that of the child's parent . . . for the purpose of adoption or for the purpose of providing care." *Id.* at 122, 181 N.E.2d at 755, 227 N.Y.S.2d at 6-7.

99. *Id.*

100. *Id.* at 124, 181 N.E.2d at 755, 227 N.Y.S.2d at 8 (Burke, J., dissenting).

101. *Id.*

The . . . alleged "placing out" occurred after the adopted children had arrived in New York and then immediately in the family of their adoptive parents and not, to use the statutory language, "in a family *other* than that of the child's parent." Such "placing out" was clearly not for the purpose of providing care, as the adoptive parents were under a legal obligation to provide parental care; nor was it "for the purpose of adoption" as that had already occurred.¹⁰²

The court distinguished between placing out a child for the purpose of adoption and placing out a child with persons who, in the contemplation of the law, are parents. According to the court, placing a child with persons that the law considers to be their parents does not violate the statute.¹⁰³ The court reasoned that "had [the Legislature envisioned a situation such as this, it would have been proscribed by appropriate language."¹⁰⁴ The court justified this strict statutory construction with an interpretation rule which requires the court to narrowly construe a statute that creates a crime out of an act or omission.¹⁰⁵ This interpretation enables the court to avoid tainting the adoptive parents' conduct with criminality: "a contrary construction would taint the conduct of the parents with criminality, since the statute likewise makes it a crime to *pay* or *give* any compensation for placing out a child."¹⁰⁶

In *In re Adoption of E.W.C.*,¹⁰⁷ the parties sought a dismissal of an adoption proceeding because the attorney for the adoptive parents acted unlawfully by "placing out" the infant in violation of SSL section 374. In examining the history of the legislation, the surrogate court¹⁰⁸ stated that the real dangers in such placements "are the lack of any social concern for the rights of the mother and the failure to select proper adoptive parents for the child."¹⁰⁹ The court failed to recognize that such activity constitutes infant trading. The court referred to part of the report that viewed the involvement of intermediaries in such placements as unjustifiable and in need of prohibition because it was tantamount to "the buying and selling of

102. *Scopas*, 11 N.Y.2d at 122, 181 N.E.2d at 755, 227 N.Y.S.2d at 7.

103. *Id.*

104. *Id.*

105. *Id.* at 123, 181 N.E.2d at 754, 227 N.Y.S.2d at 7.

106. *Id.*

107. 89 Misc. 2d 64, 389 N.Y.S.2d 743 (Sur. Ct. 1976).

108. In some states, "surrogate" is the name given to the judicial officer who has jurisdiction over guardianship and probate matters. BLACK'S LAW DICTIONARY 1296 (5th ed. 1979).

109. *In re Adoption of E.W.C.*, 89 Misc. at 76, 389 N.Y.S.2d at 751.

human beings."¹¹⁰ Nevertheless, the court concluded that the attorney's potential violation of section 374 did not require the refusal of the adoption.

New York courts have been consistent in the treatment of adoptive parents. For example, in *In re Adoption of Juan P.H.C.*,¹¹¹ the court found that the adoptive parents had paid an exorbitant sum to facilitate the adoption of an El Salvadorian child.¹¹² The evidence showed that intermediaries profited significantly from the placement.¹¹³ The court, however, not only granted the adoption petition, but also treated the adoptive parents as the victims of "the procedures of the placement agency and/or by those who control the child in a foreign country. . . ."¹¹⁴

Similarly, in *In re Adoption of Carballo by Tersigni*,¹¹⁵ the court held that, although the intermediary involved placed the child for a fee in violation of SSL section 374(2), a pre-adoption certificate would still be granted.¹¹⁶ In *Tersigni*, the court took a stern view of the intermediaries who charged a placement fee, but did not criminally sanction the intermediary, stating that the court lacked jurisdiction.¹¹⁷ Instead, the court merely ordered the attorney involved to reimburse the adoptive parents for all fees paid.

What is the proper role of the court in adoption?¹¹⁸ Recently, in *Adoption of H.*,¹¹⁹ a family court noted that its function was not simply to rubber-stamp an adoption petition. This is particularly true when the court is examining private placement adoptions.

[A]s in the case at bar, [the adoption] is entirely arranged by attorneys for the adoption petitioner and *no one* has the duty or function of considering, prior to the child's placement and the filing of the adoption petition, whether the adoption is to the child's interest as distinguished from the petitioner's. Thus, with no one representing the child's interest or welfare, the exercise of the State's

110. *Id.* at 75, 389 N.Y.S.2d at 751.

111. 130 Misc. 2d 387, 496 N.Y.S.2d 630 (Sur. Ct. 1985).

112. *Id.* at 388-89, 496 N.Y.S.2d at 631-33.

113. *Id.*

114. *Id.* at 390, 496 N.Y.S.2d at 633.

115. 137 Misc. 2d 553, 521 N.Y.S.2d 375 (Fam. Ct. 1987).

116. *Id.*

117. *Id.*

118. In agency adoptions the court plays a less important role. It primarily ensures that the natural parent voluntarily surrendered the child to the agency. See *New York ex rel. Scapetta v. Spence-Chaplin Adoption Service, Inc.*, 28 N.Y.2d 185, 321 N.Y.S.2d 65 (1971), *cert. denied*, 404 U.S. 805 (1971).

119. 69 Misc. 2d 304, 330 N.Y.S.2d 235 (Fam. Ct. 1972).

power as *parens patriae* as provided in section 116 is not only reasonable but obligatory.¹²⁰

This decision is unique because the court denied the petition for an adoption order. One decisive factor was the fact that this had been an unusual child adoption proceeding.

[A]n unmarried woman now aged 42 petitioned to adopt an unrelated baby obtained from Florida, now 13 months old. The agonizing and unprecedented question presented to this Court is whether under a proper interpretation of the Domestic Relations Law, Baby H, should be removed from the adoption petitioner, and placed through an authorized child-care agency with a husband and wife who are highly desirable parents for her.¹²¹

The court did not believe that the welfare of the child would be promoted because the petitioner was a single, middle-aged woman of modest means, whose impending marriage was considered merely a device to facilitate the adoption.¹²² The court's reasoning appears to be based on an intent to respect the wishes of the birth mother, who indicated that she wanted the child to be adopted by a married couple.¹²³ This decision contrasts with the approach of the other courts, which consistently ignore the birth mother's plea and overlook criminal or other questionable behavior of adoptive parents due to their desperation to be a parent.

The cases examined above, with the exception of *Scopas*, are non-criminal cases in which either the adoptive parents petitioned the court for specific orders or the birth mothers applied to revoke their consent to the adoption. The courts have shown extreme reluctance to deny the orders requested by the adoptive parents.¹²⁴ In favoring the adoptive parents, the courts appear to condone, or at least tacitly overlook, the unlawful behavior of the adoptive parents. The courts

120. *Id.* at 307, 330 N.Y.S.2d at 241.

121. *Id.* at 305, 330 N.Y.S.2d at 238-39.

122. *Id.* at 312-13, 330 N.Y.S.2d at 245-47.

123. Although the decision was reversed and remanded on the issue of whether the petitioner's projected marriage had occurred, the appellate division did not expressly disapprove the views expressed by the family court regarding the marital status and possible financial difficulties of the adoptive parent. *See In re Hipps*, 39 A.D.2d 898, 333 N.Y.S.2d 846 (N.Y. App. Div. 1972). Moreover, in *O'Rourke v. Kirby*, 54 N.Y.2d 8, 429 N.E.2d 85, 444 N.Y.S.2d 566 (1981), the court of appeals held that there was substantial evidence to support a state agency's decision to remove a child from her foster mother after the agency denied the foster mother's adoption application on the basis of her age, single parenthood, and financial difficulties. *Id.* at 16, 429 N.E.2d at 89, 444 N.Y.S.2d at 570.

124. Comment, *supra* note 79, at 646 (if a child is obtained "illegally" it does not mean that the adoptive parents will be prevented from legally adopting the child at a later date).

often treat the adoptive parents as belonging to a class of persons that needs protection. Moreover, when the intermediaries are attorneys, the courts have been reluctant to find criminal conduct even where statutes have been violated.

The rules concerning independent placement adoption contain many deliberate loopholes and inconsistencies. Recent statutory amendments relating to private placement attempt only to prevent child abuse by prospective adoptive parents and are not designed to prevent baby selling activities.¹²⁵ The provisions that do exist are generally ineffective because of lack of enforcement. Further, courts appear unwilling to assist the lawmakers in promoting a policy against infant trading. The effectiveness of the current provisions depends largely on two factors: the honesty of the parties involved, including the adoptive parents, and the effectiveness of the system of reporting expenses to the court.

IV. STATUTES CRIMINALIZING ILLICIT PLACEMENT OF CHILDREN

The evils of trafficking in babies have been battled by various legal measures, including criminal sanctions.¹²⁶ Most states provide statutory penalties for violations of adoptive placement procedures. Accordingly, penalties exist for violation of statutes regulating: placement of children for purposes of adoption without a license;¹²⁷ payment or receipt of compensation for placement;¹²⁸ advertising placement services without a license to place children for adoption;¹²⁹ and inducing a parent to part with his or her child.¹³⁰ The sanctions imposed vary, but they can generally be divided into two categories:

125. For example, the main objective of the 1988 amendment to section 115-c of the DRL was to ensure "all private placement adoptions are brought quickly into court after custody has been transferred to the proposed adoptive parents so that the court may assess the propriety of the temporary guardianship by the proposed adoptive parents." Scheinkman, *Supplementary Practice Commentary*, note following N.Y. DOM. REL. LAW § 115-c, at 47 (McKinney Supp. 1990).

126. See, e.g., Note, *supra* note 38, at 765. However, this measure also fails to curb the black-marketing of babies. One reason for this failure stems from the absence of federal laws criminalizing the acceptance of compensation for adoption. See, e.g., Article, *supra* note 39, at 68.

127. See, e.g., ALA. CODE § 38-7-16 (1975); FLA. STAT. ANN. § 63.212(1)(a) (West Supp. 1990).

128. See, e.g., FLA. STAT. ANN. § 63.212(1)(d) (West Supp. 1990).

129. See, e.g., MASS. GEN. LAWS ANN. ch. 210, § 11A (West 1987); GA. CODE ANN. § 19-8-19 (1985).

130. See, e.g., GA. CODE ANN. § 19-8-19 (1985).

sanctions insufficient to support compliance and penalties that punish violations. The sanctions provided by the New York criminal law are examples of sanctions that are insufficient to support compliance. The Massachusetts law is a contrasting example of a strict system of penalties.¹³¹

A. *The New York Approach*

Section 389 of the New York SSL provides:

Any person, corporation, society, institution or other organization who or which violates the provisions of subdivision six of section three hundred seventy-four of this chapter shall be guilty of misdemeanor, for the first such offense. Any person, corporation, society, institution or other organization who or which violates the provisions of subdivision six of section three hundred seventy-four of this chapter, after having been once convicted of violating such provisions, shall be guilty of a felony.¹³²

Under section 55.10 of the New York Penal Law, violation of section 389 is a class A misdemeanor.¹³³ Section 389 further provides that a person previously convicted of a violation of this section may have the offense elevated to a felony.¹³⁴ The first reported case of criminal prosecution for baby selling, *People v. Slater*,¹³⁵ was decided in 1953. In *Slater*, the defendants were convicted of receiving compensation for illegally placing children for adoption.¹³⁶ The defendants argued that it was prejudicial error to admit the testimony of the adoptive parents because they were accomplices.¹³⁷ The court summarily dismissed this argument.¹³⁸

131. Connecticut law represents a middle ground approach. "Any person who places a child for adoption in violation of section 45-63 or 45-69d or assists in such a placement shall be fined not more than five thousand dollars or imprisoned not less than one year nor more than five years or both." CONN. GEN. STAT. ANN. § 45-63c (West Supp. 1990).

132. N.Y. SOC. SERV. LAW § 389 (McKinney 1988).

133. New York Penal Law § 70.15 provides, "when such a sentence is imposed for an offense defined outside the chapter, and deemed to be a class A misdemeanor pursuant to section 55.10 of this chapter, the term shall be fixed by the court, and shall not exceed one year." N.Y. PENAL LAW § 70.15 (McKinney 1988).

134. New York Penal Law § 55.10 classifies this as a class E felony. Section 70 of the Penal Law provides "[f]or any class E felony offense, the minimum period of an indeterminate sentence of imprisonment must be not less than 1 year nor more than 1/3 of the maximum term imposed, and the maximum term must be not less than 3 nor more than 4 years." N.Y. PENAL LAW § 70. The maximum penalty for habitual baby sellers is only four years.

135. 304 N.Y. 896, 110 N.E.2d 503 (1953).

136. *Id.*

137. *Id.*

138. The court gave no reason for dismissing this argument. *Id.*

The next case involving criminal conduct for the selling of babies did not occur until a decade later in *Scopas*.¹³⁹ As observed earlier, one of the reasons why the majority in *Scopas* created a loophole in the statute was to avoid tainting the conduct of the adoptive parents with criminality.¹⁴⁰ Unfortunately, this strict interpretation of the statute is also beneficial to the defendants who trade in infants. *Scopas* renders it impossible to convict an American intermediary who purchases an infant abroad and brings the child to the United States for re-adoption, if the adoption has been finalized by a foreign court. Thus, the *Scopas* majority ignored the realities of foreign countries which have little law aimed at curbing child trading. The court's underlying rationale was that the legislative policy against trading infants was aimed only at protecting American children. Thus, the majority's holding further encourages intermediaries to look for infants in foreign countries.¹⁴¹

More than two decades after *Scopas*, a surrogate court was presented with an opportunity to apply the *Scopas* holding. In *In re Adoption of E.W.C.*,¹⁴² the natural mother attempted to revoke her consent to her child's adoption. She argued that the adoption petition should be refused because of the child's unlawful placement. The court agreed that an unlawful placement, in violation of section 374(6) is a criminal act. However, the court refused to review the *Scopas* decision because it lacked jurisdiction in criminal matters. The facts of the *In re E.W.C.* case clearly showed that the adoptive parents made an illegal payment, however, their adoption petition was still granted.

Even in the few cases in which the intermediaries were convicted, the courts seem to agree with the majority in *Scopas*. In *People v. Michelman*,¹⁴³ for example, the intermediary was convicted of illegal placement. The court examined the *Scopas* majority opinion, but did

139. 11 N.Y.2d 120, 181 N.E.2d 754, 227 N.Y.S.2d 5 (1962).

140. In *Scopas*, the dissent found the majority's interpretation of the statutes to be erroneous. The dissent believed that the legislature intended to cover the situation which the majority held excluded from the application of the statutes. The dissent stated, "[t]here can be no doubt that it was the intent of the Legislature to prevent and prohibit all arrangements, involving compensation, taking place prior to the actual adoption, since it considered such operations socially undesirable and contrary to State policy." *Id.* at 125, 181 N.E.2d at 756, 227 N.Y.S.2d at 9.

141. The United States policy on admission of foreign adoptive children and the practice of the United States Department of State concerning such adoptions may encourage the adoption of foreign children by Americans. See generally *Senate Hearings, supra* note 69.

142. 89 Misc. 2d 64, 389 N.Y.S.2d 743 (Sur. Ct. 1976).

143. 93 Misc. 2d 297, 403 N.Y.S. 2d 417 (Sur. Ct. 1978).

not express an opinion as to its validity. The court sustained the defendant's conviction because the defendant unlawfully placed the child before the completion of the adoption. The court stated:

In *Scopas*, the adoption took place in Greece and was then followed by the placement within this State. The majority concluded that since the adoption had been previously accomplished, the placement was with parents and not in violation of law. The minority wrote that this loophole should not be available and stated "a trade in human beings was not intended to be permitted, and cannot be condoned, regardless of how circuitous a route the practice is conducted."

In the instant cases, the adoption succeeded and did not precede the placements and neither holding in *Scopas* is helpful to the defendant.¹⁴⁴

Recently, a family court judge in *Tersigni*¹⁴⁵ held that the reasoning of the *Scopas* dissent is now controlling. This case, however, involved a civil matter in which a strict statutory construction was not required. In *Tersigni*, a petition was filed for a pre-adoption certificate. The court stated that:

[i]n a civil case such as this, however, the focus of the Court is on the integrity of the adoption process and assuring that the public policy of this State, as that policy has been enunciated by the Legislature, is carried out. The legislative history and very wording of Social Services Law Section 374 and Section 371 indicate clearly to this Court that the act of arranging for a child to be placed in a family other than his birth family is prohibited, unless those arrangements are effectuated by persons or entities specifically authorized. The reality that arrangements and a link up between child and adoptive parent have been done by one not authorized by statute is not cured by the fact that the child, at the time of actual entry into this country, may have been adopted abroad. In order to best carry out the legislative intent in this civil proceeding, the reasoning of the dissent in *Scopas* . . . is adopted by this Court and is followed.¹⁴⁶

The court found overwhelming evidence of child trafficking but, because it lacked criminal jurisdiction, the court merely ordered the intermediary to reimburse the adoptive parents for all fees paid.¹⁴⁷

144. *Id.* at 300, 403 N.Y.S. 2d at 419.

145. 137 Misc. 2d 553, 521 N.Y.S.2d 375 (Fam. Ct. 1987).

146. *Id.* at 556-57, 521 N.Y.S.2d at 377.

147. *Id.* at 558, 521 N.Y.S.2d at 378.

The court did not consider the adoptive parents' participation in the unlawful placement in deciding to grant the pre-adoption certificate.

Thus, the courts have refused to penalize adoptive parents for illegal adoptions and have only occasionally imposed penalties on intermediaries. This is contrary to the specific wording of SSL section 389 which requires that the court hold a person liable "for paying and giving any unauthorized person any compensation or thing of value in connection with the placing out or adoption."¹⁴⁸ The absence of cases in which people were charged under this section reflects the reluctance of law enforcement to prosecute such cases. This reluctance may be the result of the frustration caused by the failure to secure convictions and the court's unwillingness to apply the law.¹⁴⁹

B. The Massachusetts Approach

Unlike New York, Massachusetts law criminalizes both the advertising of a child for adoption and receiving payment for placing a child for adoption.¹⁵⁰ Penalties are provided in DRL section 11A:

Any person or entity other than a duly authorized agent or employee of the department of social services or child care or placement agency licensed under the provisions of chapter twenty-eight A, who causes to be published in the commonwealth an advertisement or notice of children offered or wanted for adoption, or in any way offers to place, locate or dispose of children offered or wanted for adoption, or who holds himself out in any way as being able to place, locate or dispose of children for adoption shall be punished by a fine of not less than one hundred nor more than one thousand dollars. Any such person who shall accept payment in the form of monetary or other consideration in return for placing a child for adoption shall be punished by a fine of not less than five thousand and not more than thirty thousand dollars, or by imprisonment in jail or house of correction for not more than two and one-half years or in the state prison for not more than five years, or both.

The Massachusetts law provides stringent penalties. In theory, this law can be used to deter trading in children; however, its effectiveness depends on law enforcement's willingness to prosecute violations. As of now, there are no reported cases in which a person has been charged with this offense.

148. N.Y. SOC. SERV. LAW § 389 (McKinney 1988).

149. *Hearings*, *supra* note 1, at 18 (statement by Joseph Vincent Morello describing the problem faced by New York enforcement officials in implementing the law).

150. MASS. GEN. LAWS ANN. ch. 210, § 11A (West 1987).

V. THE LEGISLATORS, THE JUDGES, AND THE FAILURE:
A CONCLUSION

This Article has evaluated the effectiveness of various approaches to adoption placement in curbing infant trafficking. The legislators, although believing that trafficking in infants is reprehensible, condone the trafficking if the children end up in adoptive homes. The adoptive parents are then viewed as rescuers of these children, and the baby traders are viewed as villains. This accounts for the courts' unwillingness to punish the adoptive parents and to grant adoption petitions despite statutory violations. Because infants continue to be traded, this position clearly needs to be reconsidered. Moreover, legislators fail to set standards for the courts to apply, causing loopholes in the adoption statutes.

Although most of the statutes are unambiguous, the courts are reluctant to apply them. New York courts rely upon principles of statutory construction to avoid giving effect to the intent of the statute. This avoids criminalizing the conduct of the adoptive parents and permits the adoption to proceed. The courts believe their role requires them to apply the statutes strictly,¹⁵¹ yet the courts occasionally violate this rule of interpretation. Although the courts are free to adopt any rule of interpretation, they also have a responsibility to promote state policy and to implement the law.¹⁵²

Judges find it difficult to promote the policy against infant trading because the interests of both the adoptive parents and the child must be considered. Faced with tragic choices, judges often put the interests of the adoptive parents first and place liability entirely on the baby traders. In exonerating the adoptive parents, judges undermine the basic policy of placing a high value on human dignity.

151. See, e.g., *Appeal of Woodward*, 81 Conn. 152, 70 A. 453 (1908); *In re Adoption of Robert Paul P.*, 63 N.Y.2d 233, 471 N.E.2d 424, 481 N.Y.S.2d 652 (1985).

152. Along with the loopholes in state adoption statutes, critics have also raised the problems of enforcement. There are valid reasons why arresting violators of placement statutes are not a priority for law enforcement. The most commonly mentioned reasons are the problems of obtaining witnesses and lack of law enforcement personnel.