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Comment

Advertising for Adoption Placement: Gray Market Activities in a Gray Area of Constitutional Protection

I. INTRODUCTION

Adoption was not recognized at common law. However, all states now allow for adoption through statutes. This suggests that a legal system providing nurturing homes for children is generally recognized as beneficial and necessary. Further support for the proposition that a legal system providing nurturing homes is beneficial and necessary is found in the fact that, in the United States, adoption statutes have consistently been intended to protect the welfare of children, unlike Roman laws which served merely to prevent the extinction of family lines. The importance of adoption in the United States is also illustrated by the fact that most adoption statutes in the United States had been enacted by the first part of the twentieth century, ahead of similar parliamentary action in Great Britain.

Adoption is the overall legal process by which a parent who is not the natural parent of a child becomes legally recognized as that child’s parent. In the traditional situation, an infant who is to be adopted is relinquished by his or her natural mother and father and given over to a new set of adoptive parents who accept the legal responsibility to raise the child to adulthood. Typically, the

3. Katz, Rewriting the Adoption Story, 5 FAM. ADVOC. 9, 10 (1982).
5. Huard, supra note 1, at 746.
6. Huard, supra note 1, at 743.
events in an adoption are separable into two phases. First, there is
the physical placement of the child. Then there is the judicial pro-
ceeding to determine if the new parents' petition for adoption will
be granted.8

During the interim period before judicial approval of the new
parents' petition, the child is often in legal limbo: the natural par-
ents have relinquished their rights to the child, the adoptive par-
ents have physical custody of the child, but the newly formed family
has not yet been granted permanent status.9 Despite this lack
of legal certainty in the relationship, however, the child, particu-
larly if it is an infant, begins to establish psychological bonds with
the new custodial parents.10 If the parent-child bond is later bro-
ken because the prospective parents' adoption petition is not
granted, the child can experience severe psychological trauma.11 As
a result, the physical placement of a child is a crucial step in the
adoption process.

Several states regulate adoption advertising activities. The pur-
pose of this Comment is to evaluate the inherent legal problems
with adoption advertising and to determine whether such regula-
tions are justified. First, adoption placement methods will be re-
viewed. Next, statutes regulating both adoption placement and
adoption advertising will be examined. The adoption advertising
statutes will also be analyzed to determine whether such prohibi-
tions infringe upon the freedom of speech protected by the first
amendment to the United States Constitution. Finally, adoption
advertising methods that do not infringe upon constitutional free-
doms will be discussed.

II. METHODS OF ADOPTION PLACEMENT

All states permit the placement of children for adoption by
agencies, and most states also have a statutory procedure for li-
censing agencies which place children in adoptive homes. This type
of adoption placement is known as the "white market."12

8. Note, Babes and Barristers: Legal Ethics and Lawyer-Facilitated Independent
10. Note, Independent Adoption: Regulating the Middleman, 24 Washburn L.J. 327,
   334 (1985).
11. Comment, Independent Adoptions: Is the Black and White Beginning to Appear
12. Comment, Moppets on the Market: The Problem of Unregulated Adoption, 59
In 1975, it was estimated that more than seventy-five percent of adoptions in the United States took place through agencies. An adoption agency may be either publicly sponsored, as a department of the state government, or may be a private, non-profit entity. Both types of agencies are closely regulated by the state. In an agency adoption, the natural parents relinquish the child to the agency after the parents have been counseled. The agency then places the child with adoptive parents, selected by the agency after application and investigation procedures. This method of agency placement does not permit the natural parents to take part in deciding where the child will be placed.

Agency placement has been criticized not only because it is administratively expensive, but also because adoptive parents may have to wait three to seven years between their initial application and child placement due to the long waiting list of prospective adoptive parents. In addition, several reports of court cases have indicated that agencies have engaged in sharp competitive practices against private adoption placements.

Beginning in the early 1970's, agency and private adoptions in the United States decreased substantially in number, with as much as a fifty percent reduction being experienced in some states. The increased use of contraception and abortion have reduced the

15. Note, supra note 10, at 329. Counseling includes a discussion of alternatives available to the parents. Id.
17. Comment, supra note 11, at 646. See also Note, supra note 10, at 358; Note, supra note 8, at 972-74.
18. Comment, supra note 11, at 647. See also Landes & Posner, The Economics of the Baby Shortage, 7 J. LEGAL STUD. 323 (1978); Note, supra note 10, at 331.
19. See, e.g., San Diego County Dep't of Pub. Welfare v. Superior Court, 7 Cal. 3d 1, 6, 496 P.2d 453, 456, 101 Cal. Rptr. 541, 544 (1972) (agency employee convinced a natural mother to refuse consent to an independent adoption by the couple with whom her child had been placed because they were too old; thereafter the natural mother relinquished the child to the agency for adoptive placement); Terzian v. Superior Court, 10 Cal. App. 3d 286, 88 Cal. Rptr. 806 (1970) (county adoption agency was enabled to place a child with its own adoptive clients after it submitted an unfavorable report to the court on the custodial parents who had raised the child from birth to three years of age); In re Christina N., 98 A.D.2d 894, 470 N.Y.S.2d 882 (1983) (county agency removed a child from the custody of its natural mother and attempted to use her intent to place the child privately as evidence of neglect).
20. In 1970, approximately 175,000 children were adopted, 169,000 in 1971, and 140,000 in 1974. J. McNAMARA, supra note 13, at 25. See also Bodenheimer, New Trends and Requirements in Adoptive Law and Proposals for Legislative Change, 49 S. Cal. L. Rev. 10, 13 (1975). Adoptions by stepparents have increased, however, because of the greater number of divorces followed by remarriages. Id.
number of children available for adoption, and the social stigma against unmarried mothers keeping their babies has declined, all of which have contributed to the shortage of adoptable newborn infants.21 As the number of infants available to adoption agencies began to dwindle after 1970, there was a corresponding increase in the number of children who were placed without the intermediate step of agency involvement.22

The placement of adoptable children without the involvement of an agency has been the most controversial adoption practice and is known by various names: private placement, independent adoption and the "gray market."23 Private placement is the most common term used to describe this method of adoption, and is defined as that method of child placement which does not require the services of a licensed agency to act as an intermediary between the natural and adoptive parents.24 Private adoptions are also subject to state regulations.25

Most state private placement regulatory schemes attempt to limit a “black market” in babies to prevent hopeful adoptive parents from paying large fees to unscrupulous intermediaries.26 These regulatory schemes attempt to limit black market activities because of the fear that commercial greed will replace a concern for the child’s welfare.27 Despite prohibitions against black market activities, however, statutory provisions which allow the natural parents to place children directly with adoptive parents create an uncertain area which is known as the “gray market.”28

Economic factors may tend to support private placement when it is considered that states whose legislative adoption schemes prohibit private placements must appropriate greater funding to state agencies.29 This may be particularly significant because statistics and surveys do not conclusively show that agency placements are inherently more successful than private placements.30

22. J. McNamara, supra note 13, at 75. See also Baby Sales—For Big Profits, CHRISTIAN SCIENCE MONITOR, June 24, 1974, at 1.
24. Id.
26. Comment, supra note 11, at 630.
27. See Grove, supra note 23, at 118-19.
28. tenBroek, California’s Adoption Law and Programs, 6 HASTINGS L.J. 261, 337 (1955).
30. Podolski, Abolishing Baby Buying: Limiting Independent Adoption Placement, 9
adoptions usually only require twelve to eighteen months\textsuperscript{31} and have led to many successful family relationships.\textsuperscript{32} These factors combined with the economic concerns associated with exclusive agency placement support improving, not dismantling existing statutory methods for private placement.\textsuperscript{33}

Private adoptions and black market placements are also inadvertently encouraged by the restrictions which agencies place on their lists of adoptive couples. These restrictions include such limitations as refusing to make placements with parents who are beyond a maximum age or into a home where there already is one natural or adopted child.\textsuperscript{34} As a result, private placements rather than agency placements appear to be the modern trend.\textsuperscript{35}

Due to the modern trend towards private placement, there appear to be statistically fewer agency placements.\textsuperscript{36} This statistical perception coupled with a heavy demand on agencies by adopting parents, encourages the black market.\textsuperscript{37} Since the “black market” is universally agreed to be immoral and a practice to be discouraged,\textsuperscript{38} the majority of states now have statutory restrictions on the passage of money between the parties in an adoption placement.\textsuperscript{39}

III. Regulation of Adoption

A. Limitations on Placement

A few states provide for a totally “white market” approach to

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\textsuperscript{31} Fam. L.Q. 547, 548 n.2. (1975). No evidence has been found that private placements are less successful than those handled by agencies. Model State Adoption Act and Model State Adoption Procedures; Recommendations of the Model Adoption Legislation and Procedures Advisory Panel, 45 Fed. Reg. 10,622, 10,659 (1980).

\textsuperscript{32} Charney, supra note 25, at 71.

\textsuperscript{33} Grove, supra note 23, at 135.

\textsuperscript{34} Id. at 136.

\textsuperscript{35} Comment, supra note 11, at 647.

\textsuperscript{36} Charney, supra note 25, at 55. In some states as many as 80 percent of all newborn adoptions are private.

\textsuperscript{37} Id.

\textsuperscript{38} Podolski, supra note 30, at 547.


\textsuperscript{40} Meezan, Katz & Russo, supra note 2, at 182.
adoption by permitting only agency placements. A statute allowing only agency placements should logically prohibit placement by all intermediaries, agents or natural parents who are not licensed, and should include the imposition of criminal penalties for prohibited placement activities.

Generally, the severity level of punishment for violation of an adoption statute varies widely among the different statutes and at least one proposal would effectively equate illegal placement for profit with the crime of murder. The criminal sanctions against unlawful child placement in existing statutory schemes are treated independently from the adoption process and therefore lose some of their regulatory effectiveness. Relatively few cases holding persons criminally liable for such activities have been reported primarily due to sporadic enforcement of statutes which prohibit non-licensed placement of children. Activities that have been prosecuted have included significant participation in child placement, receipt of compensation for placement services, and exertion of undue influence over a natural mother to give up her child.

41. Note, supra note 29, at 376-77.
42. See, e.g., Note, supra note 29, at 397, which suggests a penalty of 25 to 50 years imprisonment for non-licensed advertising of placement services, and life imprisonment without parole for accepting consideration in a non-licensed child placement.
43. Comment, supra note 11, at 645 n.91.
Criminal sanctions which punish an individual who illegally places a child for adoption serve mainly to intimidate and limit the conduct of lawful citizens. These sanctions do little to limit black marketeers, who are remunerated for their acceptance of the risk of prosecution.48

Removal of the child from the custody of the adoptive parents has been suggested as the most effective means to enforce statutory limitations.47 Courts have sometimes resorted to this severe sanction in light of illegalities in the adoption procedure.48 However, courts have also refused to remove the child from its custodial home even where there has been a statutory violation if such action would not be in the best interests of the child.49 This is due to the fact that a court’s decision in granting a decree of adoption is an independent judgment as to what relationship will be in the child’s best interest and recognition that a bonded family relationship should not generally be destroyed even when there is a statutory infraction.50

In addition to the enforcement of criminal sanctions, courts have broad discretion in adoption proceedings and often exercise this discretion by approving adoption placements which have technically violated the statutes. Courts may also impose non-criminal sanctions against natural parents who request compensation as a condition of continuing pre-adoption consent. These sanctions may take the form of judicial refusal to grant the natural parent’s application for revocation of consent.51

which convictions were based was not disclosed by the appellate court).

46. Podolski, supra note 30, at 552.


48. See, e.g., In re Anonymous, 46 Misc. 2d 928, 261 N.Y.S.2d 438 (Fam. Ct. 1965), where failure to fulfill the statutory requirement of placement resulted in denial of the adoption; Gray v. Maxwell 206 Neb. 385, 293 N.W.2d 90 (1980), in which the court distinguished between the payment of expenses and a separate payment to the natural mother, and held that the latter aspect was against public policy to such an extent that the natural mother’s relinquishment would be invalid; In re Adoption of Seifner, 627 P.2d 456 (Okla. Ct. App. 1981), where the lack of an investigation of the adoptive parents resulted in an invalidation of the adoption decree.


50. Courts may ignore both criminal prohibitions and conditional agreements between an agency and adoptive parents to continue a placement which has become a bonded family relationship. See In re McDonald, 43 Cal.2d 447, 274 P.2d 860 (1954), where the adoption decree was affirmed although the adoptive father had committed suicide between the time of placement and the grant of the decree.

51. See In re Anonymous, 286 A.D. 161, 143 N.Y.S.2d 90, appeal denied, 286 A.D. 968,
Courts are often faced with situations involving non-agency intermediaries regardless whether private placements are permitted or prohibited. In some states which prohibit placement by intermediaries while allowing placement by the natural parents, the statutes have been liberally interpreted to permit the involvement of third parties as agents of the natural parents. Intermediaries may also play a role in eluding adoption statutes that purport to prevent private placement.

The court's role in an adoption proceeding is also very significant. A court reviewing a petition for adoption has the authority to look to the adoption process in its entirety and to apply the statutory standards to prior placement activities conducted in another state. Since the legislative purpose of an adoption statute often expressly states that an adoption statute should be broadly construed to promote the best interest of the child, a court may consider the child's interest to outweigh the punitive aspects of unlawful placement activities. A court may also rely on express

146 N.Y.S.2d 477 (App. Div. 1955). See also In re E.W.C., 89 Misc. 2d 64, 389 N.Y.S.2d 743 (Fam. Ct. 1976), where the court denied the natural mother's application for revocation of her consent to the adoption although the parents' attorney had illegally received compensation for the placement.

52. See, e.g., In re Minor, 338 Mass. 635, 156 N.E.2d 801 (1959), where it was held that a natural mother's significant role in placement did not prevent a physician from actually placing the child as her agent despite the statutory prohibition against intermediaries. But see 1953 Cal. Att'y Gen. Op. No. 23-35, which states that an unlicensed intermediary acting as an agent of the natural parents cannot place a child for adoption where the principal is bound by statute to give personal attention to such acts.

53. Grove, supra note 23, at 126.

54. See, e.g., In re Gates, 6 Kan. App. 2d 945, 636 P.2d 818 (1981), in which the court held that Kansas law would be applied to determine the validity of a consent executed in California.

55. See In re Adoption of Child by T., 164 N.J. Super. 476, 397 A.2d 341 (App. Div. 1978), where the court held that dismissal of a petition for adoption because the adoptive parents had received custody of the child through an unlicensed intermediary and had made a large payment to an out-of-state attorney was an abuse of discretion where the approval of the adoption would otherwise have been in the child's best interests. See also Or. Rev. Stat. ANN. § 109.305 (1984), which states that the adoption statute is not governed by the rule that statutes in derogation of common law must be strictly construed. But see In re CDT, 415 So.2d 315 (La. Ct. App. 1982), where the court reversed the trial court's decree of adoption due to formalities in the consent procedure, stating that adoption laws must be strictly construed in favor of parents because such laws are in derogation of natural rights; In re Anonymous, 46 Misc. 2d 928, 261 N.Y.S.2d 439 (Fam. Ct. 1965), where the court denied an adoption petition because the prospective adoptive parents had received custody of the child from an attorney who had solicited the arrangement of both the natural mother and physicians; Lemley v. Kaiser, 6 Ohio St. 3d 258, 452 N.E.2d 1304 (1983), in which the court stated that the procedure for independently placing a child for adoption is in derogation of the common law and must be strictly construed. The court issued a writ of habeas corpus directing the attorneys who had arranged an illegal private adoption to return the
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statutory directions to construe penal provisions strictly in setting aside a criminal complaint for the illegal placement of a child for the purpose of adoption.66

Society is benefited when all children are provided with adult care and homes which provide for the protection, guidance and growth of the child.67 Children who do not have a supportive family environment may become wards of the state, and an added burden to society.68 The social problems associated with caring for children who are without natural parents demands a solution that is psychologically, economically and legally efficient.69 As a result, courts are given a great deal of discretion to determine whether a previous placement should be granted legal permanence through the approval of an adoption petition.60 In making its decision, the court should command the submission of all information necessary to make a reasoned judgment including a determination whether to approve the adoption or to impose separate criminal sanctions.61 The variety of circumstances surrounding an adoption is more appropriately weighed by the court before making a judgment, and agency information and reports on the suitability of the adoptive home are typically limited to their role as evidence for the court's consideration.62 Therefore, the role of the court is to consider all the evidence, including the agency information, and to determine what is in the best interests of the child to be adopted.63

An adult's legal right to act as the parent of his biological child does not necessarily assure that the biological parent will provide


56. See, e.g., People v. Scopas, 11 N.Y.2d 120, 181 N.E.2d 754, 227 N.Y.S.2d 5 (1962), which involved an intercontinental scheme whereby children were legally adopted in Greece prior to joining their adoptive parents in New York; the court held that such activities do not entail the provision of care and therefore were not within the "placing out" prohibited by the statute. See also People v. Issachar, 24 Misc. 2d 826, 203 N.Y.S.2d 667 (Crim. Ct. 1960), in which the court felt constrained to a strict construction despite its expressed disapproval of the circuitous method of international adoption.

57. Katz, supra note 9. See also Huard, supra note 1, at 749.

58. Comment, supra note 12, at 718.


60. Note, supra note 1, at 780.


62. Comment, supra note 11, at 640 n.69.

63. Note, supra note 1, at 782.
continuous nurturing to the child. As a result, in determining the best interests of the child, courts have shifted from using their own vague generalizations to relying on psychological parenthood criteria. When a family unit is functioning properly, the best interests of the child are clearly satisfied by preserving that family.

A "psychological parent" concept was introduced in 1973, to support the argument that child placement decisions should be made before birth so that the child received consistent and dependable caregiving. A psychological best interest test has also been advocated to limit the natural parents' rights to remove a child from his custodial home when removal would be considered harmful. The courts, however, have found it difficult to intrude on the traditional right of the natural parents to choose their children's circumstances. Despite this hesitation however, courts have begun to weigh the needs and best interests of the child separately from those of the parents. Courts have looked favorably on a consistent family situation and familiarity with the daily environment because of the importance of these factors to a child. This also strongly supports the conclusion that the child's interests are best served by an initial placement immediately after birth that is well-planned and treated as permanent.

65. Id. at 497.
66. Such criteria describe the mutual interaction between parent and child in terms of love, attention, basic trust and confidence. Note, Adoption—Psychological v. Biological Parenthood in Determining the Best Interests Of The Child, 3 SETON HALL L. REV. 130, 135 (1971). In In re P, and Wife, 114 N.J.Super. 584, 277 A.2d. 566 (App. Div. 1971), the court specifically acknowledged the "focused relationship" and "affection relationship" phases during the first nine to eleven months of a child's life, during which period a separation from the acting mother would be severely traumatic. Id. at 594, 277 A. 2d at 571.
68. McNAMARA, supra note 13, at 136, citing GOLDSTEIN, FREUD & SOLNIT, supra note 67, at 45.
B. Other Regulations

In states which permit non-agency intermediaries, doctors or lawyers have been permitted to make referrals of natural parents to prospective adoptive parents and to receive professional fees for the medical or legal services provided in connection with the subsequent birth or adoption. However, unreasonable fees which are in fact compensation for the placement itself are generally violations of the state statute. Agreements to pay for the medical expenses incurred by the natural mother of a prospective adoptive child have been considered valid and enforceable. A natural mother may even be required to reimburse the adoptive parents for expenses paid on her behalf if she breaches the agreement by failing to voluntarily relinquish her rights to the child.

Successful private placements may be encouraged by requiring pre-placement investigation of the facts by a social agency or court appointed investigator. In this way, intermediaries in independent adoptions can be regulated so as to prevent irresponsible placements. However, requiring pre-placement studies of prospective parents in independent adoptions would entail government intrusion which may inhibit the private aspect of the placement as well as impose economic burdens on the state.

Many statutory adoption schemes require a probationary period between placement and the final adoption decree to permit an opportunity to evaluate the compatibility of the child and the adoptive home. Six months is typically deemed sufficient for the new family members to become accustomed to one another. Some

74. Id., n.36.
75. See, e.g., 171 Okla. Att'y Gen. Op. No. 336, stating the opinion that it is lawful for prospective adoptive parents to guarantee payment of hospital and medical expenses of a natural mother, within the statute against trafficking in children.
76. See Gordon v. Cutler, 324 Pa. Super. 35, 471 A.2d 449 (1983), where a natural mother was ordered to reimburse the adoptive parents for her medical expenses when she decided to keep the child. Id. at 38, 471 A.2d at 450. The court concluded that it was not "ipso facto" contrary to public policy for adoptive parents to conditionally pay the natural mother's hospital and medical expenses, because it was in the best interests of the child that the mother receive good medical care. Id. at 51-52, 471 A.2d at 457. The payment of the expenses was deemed to be on behalf of the child. Id. at 55, 471 A.2d at 458.
77. Podolski, supra note 46, at 549.
78. Id. at 551-52.
79. tenBroek, supra note 28, at 349.
statutes also treat the period prior to the final decree as a time for the natural parents to evaluate their decision by allowing the natural parents to revoke their consent until that time.\textsuperscript{82}

It has been suggested that all natural parents who expect to place their infants for adoption should be offered prenatal counseling.\textsuperscript{83} The theory behind this suggestion is that it is in the best interests of the child to be placed as quickly as possible after birth.\textsuperscript{84} Other proposed regulations would provide independent legal counsel to the the child to assure the child's status as a party to the adoption proceeding.\textsuperscript{85} Further, it has been argued that an independent person educated in the social sciences should also be appointed to represent the child in such proceedings to protect the child's social and psychological interests.\textsuperscript{86} However, the appointment of a guardian \textit{ad litem} is not usually a statutory requirement.\textsuperscript{87} Nor has independent legal counsel for the child been held to be a necessary constitutional protection.\textsuperscript{88}

C. Limitations on Advertising

Nearly one-third of the states have express limitations on adoption advertising.\textsuperscript{89} Some of the advertising prohibitions were spec-
cifically intended to limit private adoptions. More often, however, the prohibitions against adoption advertising appear to be related to a legislative desire to curb black market activities by limiting communication between natural parents and adoptive parents.

Georgia has the most restrictive adoption advertising statute. This statute makes it unlawful for any person other than a licensed child-placing agency to advertise publically or privately, including making oral statements, for an adoption. Virginia has the least restrictive statute. This statute prohibits a licensed child-welfare agency from distributing in any printed form an advertisement which contains any untrue, deceptive or misleading information. Statutes taking the middle ground usually permit advertising contingent upon the prior approval of a court or state administrative agency.

Adoption advertising is treated with many different levels of definition and specificity. The most general and inclusive statutes are those which prohibit unlicensed parties from advertising through any medium whatsoever. Other statutes appear to limit the meaning of unlicensed advertising to broadcast or printed forms of media for public or private distribution. The intended scope of some statutes encompasses only the use of public media by non-licensed parties. Still other statutes proscribe non-licensed adver-

90. tenBroek, supra note 28, at 304.
91. Note, supra note 10, at 345; Note, supra note 8.
tising without specific definition of the term.98

Advertising prohibitions do not by themselves prevent people from profiting from adoption placement.99 Prohibiting a person or organization from using advertising media does not guarantee an end to their undesirable activities.100 The placement of children can easily continue, despite a ban on advertising, through word of mouth solicitations of clients, and this form of communication is less capable of detection by enforcement officials.101

Few cases involving adoption advertising prosecutions have been reported.102 In one case, a state agency was prohibited from discriminating against a parent who had arranged an adoption using advertising because the adoption statute did not prohibit advertising.103

Surrogate mothers, who agree to place a child for adoption with the natural father's family prior to being artificially impregnated, are often solicited through advertising.104 Such arrangements are

radio, or other public medium\textsuperscript{\textregistered}); MASS. ANN. LAWS ch.28A § 14(West Supp. 1985)("cause to be published in a newspaper . . . or to be broadcast on a radio or television station in the commonwealth an advertisement or notice"); Nev. Rev. Stat. § 127.310(1979)("advertises in any periodical or newspaper, or by radio or other public medium"); N.H. Rev. Stat. Ann. § 170-E:14(Supp. 1983)("advertise or cause to be published an advertisement").


100. Note, supra note 10, at 352.
101. Id.
102. See, e.g., People v. Silverton, 71 Cal. App. 3d 790, reh'g denied, 139 Cal. Rptr. 584 (1977)(conviction for advertising adoption placement without a license affirmed).
103. See In re Christina N., 98 A.D. 2d 894, 470 N.Y.S. 2d 882(1983), in which the court affirmed an order to the county agent for the return of a child to the natural mother who intended to privately place the child for adoption. Id. at 896, 470 N.Y.S.2d at 884. The agency had attempted to characterize the mother's intent to arrange a private adoption as evidence of neglect that would justify the agency's removal of custody from the mother. Id. at 885, 470 N.Y.S.2d at 883. The court noted that the adoption statute clearly contemplated private adoptions and regulated the inherent placement risks through a scheme of mandatory investigation procedures. Id., 470 N.Y.S.2d at 884. The court affirmed the trial court's refusal to entertain testimony on the relative merits of different adoption methods as immaterial in a neglect proceeding. Id. at 896, N.Y.S.2d at 884. In this case the natural mother had made direct contact with the prospective adoptive parents, without an intermediary, by means of an advertisement in a local shopper's newspaper. Id. at 895, 470 N.Y.S. 2d at 883.
typically governed by existing state adoption statutes and often violate public policy standards.\textsuperscript{106} Specific legislation for application to surrogate mother situations which has been proposed has often failed to be enacted.\textsuperscript{106} However, some courts have held that surrogate motherhood contracts which provide for the payment of money to the natural mother in exchange for placing the baby with the natural father and step-mother are either void or voidable.\textsuperscript{107} Attorney general opinions have also concluded that the surrogate motherhood arrangement is a violation of adoption advertising statutes because such arrangements hold out inducements for mothers to part with their children.\textsuperscript{108} However, at least one commentator has concluded that prohibiting surrogate mothers from advertising is an impermissible limitation if the underlying activity is constitutionally protected.\textsuperscript{109}

\section*{D. Uniform Statutes}

Many commentators have focused on the inconsistency of statutory adoption schemes among the states.\textsuperscript{110} Uniform statutes have been promulgated, partly in the belief that states with less stringent adoption procedures may become havens for black market activities.\textsuperscript{111} Enacting uniform state procedures and practices is considered crucial to the curtailment of the black market and its abuses.\textsuperscript{112}


110. \textit{Note, supra} note 60, at 773.

111. Grove, \textit{supra} note 23, at 126.

112. Howe, \textit{supra} note 5, at 193.
The Uniform Adoption Act was proposed in 1953 and revised in 1969, but has not been adopted or followed by a majority of states.\(^\text{113}\) The Uniform Adoption Act places no restrictions on who may place or advertise for a child, but requires that the petition for adoption filed with the court include the name of the person who placed the child with the petitioning adoptive parent.\(^\text{114}\) The Uniform Adoption Act also regulates the adoption placement by including in the court’s evaluation an investigation made by an agency or other person appointed by the court.\(^\text{115}\)

Under the Uniform Adoption Act, an adoption decree may be entered six months after the date of an agency’s actual placement of a child, but the six month period does not begin to run for a private placement until the court or the state welfare department has been informed that the adoptive parents have taken custody of the child.\(^\text{116}\) The Act acknowledges that in the case of private placements, no investigation is possible prior to the placement because the court’s first notice of the private placement occurs when the adoption petition is filed and the child has already been placed.\(^\text{117}\) The Act further states that no post-placement investigation is required for agency directed placements if other evidence shows that the child and the adoptive home are suited to each other.\(^\text{118}\)

Under the Uniform Adoption Act, a natural parent’s consent cannot be withdrawn after the entry of a decree of adoption, but can be withdrawn before that time by court order if the court finds that withdrawal of consent is in the best interests of the child.\(^\text{119}\) This provision makes placement after consent of the natural parents fairly certain and places the child’s interests on a higher footing than those of the natural parents.\(^\text{120}\) The only penalty which the Uniform Adoption Act imposes on private placement is one of delay in granting the adoption petition if the court is not given prompt notice of the initial placement.\(^\text{121}\)

\(^{113}\) Only seven states, Alaska, Arkansas, Montana, New Mexico, North Dakota, Ohio and Oklahoma, have adopted statutes which are substantially similar to the Uniform Adoption Act. 9 U.L.A. 1 (Supp. 1985).


\(^{117}\) 9 U.L.A. 38, comm’rs’ note (1979).


\(^{120}\) Unif. Adoption Act § 8, 9 U.L.A. 33, comm’rs’ note (1979).

\(^{121}\) See Unif. Adoption Act § 12, 9 U.L.A. 38, 40 comm’rs’ note (1979).
that “black market” improprieties during the placement should not cause a denial of the adoption decree if the adoptive home is suitable and the new family situation is, in fact, in the best interests of the child.122

Under the Uniform Adoption Act, the petitioning adoptive parents must give the court a full accounting of all expenses incurred in connection with the prenatal care, birth or placement of the child, and for any other services relating to the placement or the adoption.123 The stated purpose of this section of the Act is to allow the court control over the expenditures involved in private placements, but not to invalidate the adoption if, in fact, the adoptive parents have made excessive payments to the natural mother or an intermediary as a condition for her consent to the placement.124 The Uniform Adoption Act also contains an all-inclusive statute of limitations that brings finality to most adoptions after one year.125

In 1978, a Model Act to Free Children for Permanent Placement was developed under a grant from the United States Department of Health, Education and Welfare.126 The Model Act grants total discretion to the court to validate any contractual agreement for the surrender of a child, using a standard that the interests of the child should prevail over those of the parents.127 The Model Act also introduces the concept of a “de facto parent” who has had continuous physical control of a child for one year and with whom the child has developed significant emotional ties.128 The inclusion of the de facto parent relationship is an allowance for the private placement situation and recognizes the importance of continuous psychological bonds to the development of a child.129 Unlike many existing state adoption statutes which require social investigation in all cases, the Model Act leaves the need for a psycho-social assessment of the child’s needs in cases of voluntary relinquishment to the sound discretion of the court.130

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122. Id.
127. Id. at 206-08.
128. Id. at 210, 212.
129. Id. at 223.
130. Id. at 235-36.
form Act of 1978 mandated the creation of an independent expert panel to recommend model adoption legislation to the Secretary of Health, Education, and Welfare.\textsuperscript{131} Its proposal for a Model State Adoption Act was presented in 1980, and represented the most recent effort to achieve uniformity of control over the adoption process.\textsuperscript{132} The Model State Adoption Act did not place any restriction on advertising for adoption placement. Adoption placements were permitted only by licensed agencies or natural parents, in accordance with the practices allowed in the majority of states.\textsuperscript{133} However, the Act did not prohibit the efforts of an intermediary in locating a potential adoptive home for a child, and recognized such parties as agents acting on behalf of the natural parents.\textsuperscript{134} Parents were required to notify the court within forty-eight hours of a private placement.\textsuperscript{135} These provisions appeared to be due to the opinion expressed by the drafting panel that a total prohibition of private placements would overburden agencies and their limited financial resources, and in addition would divert attention from homeless children with special needs, to infants.\textsuperscript{136} However, to prevent black market activities, the Model State Adoption Act also prohibited the exchange of compensation beyond legitimate expenses in connection with the placement of a child, and imposed harsh criminal penalties for such activity.\textsuperscript{137}

The Model State Adoption Act provided for efficiency without administrative intervention where the natural parents wished to directly and immediately place their newborn child into an adoptive home.\textsuperscript{138} This form of direct placement precluded any disrup-

\begin{itemize}
  \item \textsuperscript{131} 42 U.S.C. § 5112(a) (Supp. II 1978).
  \item \textsuperscript{132} 45 Fed. Reg. 10,622 (1980).
  \item \textsuperscript{133} 45 Fed. Reg. 10,659 (1980).
  \item \textsuperscript{134} \textit{Id}.
  \item \textsuperscript{135} 45 Fed. Reg. 10,662 (1980).
  \item \textsuperscript{136} 45 Fed. Reg. 10,659 (1980).
  \item \textsuperscript{137} 45 Fed. Reg. 10,656 (1980). Sections 107(f) and (g) provide as follows:
    \begin{enumerate}
      \item No person, agency, association, or corporation shall offer, give, request, receive, or accept payment of cash or other consideration for the procurement of a child for a prospective adoptive family, except that:
        \begin{enumerate}
          \item reasonable fees for professional services may be charged for services provided with respect to the placement of a child pursuant to Section 205 of this Act; and
          \item an agency, or the prospective adoptive parents of a child to be placed for adoption pursuant to Section 206 of this Act, may pay the actual medical expenses associated with the birth of the child to be placed for adoption.
        \end{enumerate}
    \end{enumerate}
    \begin{enumerate}
      \item Any violation of subsection (f) of this Section 107 shall be punished by a fine of no more than $20,000 or imprisonment of no longer than ten years, or both.
    \end{enumerate}
    \textit{Id}.
  \item \textsuperscript{138} 45 Fed. Reg. 10,659 (1980).
\end{itemize}
tion in the child's home life and was considered superior to the typical agency plan of providing foster care between birth and placement.\textsuperscript{139} The Model State Adoption Act also contained provisions protecting the identities of the adoptive parents, upon the consent of the natural parents.\textsuperscript{140} These provisions allowed contact between the child and its natural parents to be eliminated in order to strengthen the adoptive family relationship.\textsuperscript{141}

The Model State Adoption Act also did not let the passage of unlawful compensation destroy the adoption placement if a suitable parent-child relationship had been effected.\textsuperscript{142} The Act can therefore be seen as a reflection of the statutory scheme in effect in most states regarding adoption placements: permitting private placements under the scrutiny of the court, outlawing outright baby selling or buying, and making an effort to prohibit advertising as a part of child placement\textsuperscript{143}

More recently, the Adoption Committee of the Family Law Section of the National Conference of Commissioners on Uniform State Laws was directed in 1983 to draft a model act that treated agency and private adoptions in a balanced and non-preferential manner.\textsuperscript{144} Work on this model act has not been completed.

\section*{IV. CONSTITUTIONAL LIMITATIONS ON THE REGULATION OF ADVERTISING}

Courts have increasingly held that a greater proportion of advertising activities are within the protection of the first amendment.\textsuperscript{145} In general, speech may legitimately be restricted when its exercise interferes with other social values, personal rights or civil liberties.\textsuperscript{146} However, the Supreme Court has stated that sensitive tools must be utilized to separate protected and unprotected expres-

\begin{footnotesize}
139. Comment, \textit{supra} note 11, at 645.
141. \textit{Meezan, Katz \& Russo, supra} note 2, at 101-02.
142. 45 Fed. Reg. 10,663 (1980). Section 206(e)(3)(B) provides, in part, as follows: "[W]here a violation of Section 107(f) of this Act has occurred the court, in its discretion, may permit the child to remain in the custody of the adoptive parents if such a plan is in the interest of the child."
143. The legislation in its final form was entitled the \textit{Model Act for the Adoption of Children with Special Needs}, 46 Fed. Reg. 50,022 (1981). The draft proposal sections concerning private placements were omitted from the final version because they were not relevant to the new focus on facilitating the adoption of special needs children. \textit{Id}.
144. Howe, \textit{supra} note 5, at 195.
146. \textit{Id}.
\end{footnotesize}
Likewise, similarly sensitive tools must also be used to distinguish between commercial and noncommercial speech.\textsuperscript{148} Advertisement that is not purely commercial has been held to be protected by the first amendment.\textsuperscript{149} This is due to the fact that an advertisement of this type communicates valuable facts of general public interest, and is not merely an offer of a commercial transaction.\textsuperscript{150} The Supreme Court has recognized that it is necessary to apply a balancing approach to government restriction of speech in situations where pervasive regulations are necessary, such as the censorship of prisoner mail.\textsuperscript{151} In such cases, a two-step standard of review is required. First, the state must demonstrate a substantial governmental interest which is unrelated to the prohibition of free speech, and second, the speech restriction must be no broader than necessary to protect the relevant state interest.\textsuperscript{152} In \textit{Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council}, the Supreme Court held that commercial speech was protected by the first amendment, although commercial speech could be subject to regulation within limits.\textsuperscript{153} The Supreme Court has also held that the state may not restrain nondeceptive commercial speech merely to prevent a certain type of behavior by the recipients of the information.\textsuperscript{154} In \textit{Bates v. State Bar of Arizona},\textsuperscript{155} the Supreme Court held

\begin{itemize}
  \item \textsuperscript{147} Speiser v. Randall, 357 U.S. 513, 525 (1958).
  \item \textsuperscript{149} Bigelow v. Virginia, 421 U.S. 809 (1975). In Bigelow, the Court held unconstitutional a Virginia statute that prohibited publication of information that would encourage abortions. See also Note, 10 U. Rich. L. Rev. 427 (1976).
  \item \textsuperscript{150} 421 U.S. at 822. See also Carey v. Population Servs. Int’,l, 431 U.S. 678 (1977), (statute prohibiting contraceptives advertising was an unconstitutional restriction of the dissemination of information about legal products and services).
  \item \textsuperscript{151} See Procunier v. Martinez, 416 U.S. 396 (1974).
  \item \textsuperscript{152} Id. at 413.
  \item \textsuperscript{153} 425 U.S. 748 (1976).
  \item \textsuperscript{154} Id. at 773. The Court said, “What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information’s effect upon its disseminators and its recipients. Reserving other questions, we conclude that the answer to this one is in the negative.” Id.
  \item \textsuperscript{155} See Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977), where the Court held unconstitutional an ordinance that prohibited on-site residential “For Sale” and “Sold” signs. Id. at 97. The municipality had prohibited posting such signs because it feared that posting these signs would cause “white flight” from a racially integrated community. Id. at 86.
  \item \textsuperscript{156} 433 U.S. 350 (1977).
\end{itemize}
that a state disciplinary rule prohibiting lawyers from advertising prices was unconstitutionally overbroad. The Court stated that some regulation of commercial advertising by attorneys was permissible but that total prohibition, especially in the printed media, was not. The Court also said that special consideration had to be given to the regulation of advertising when it related to illegal activities and appeared on electronic broadcast media.

Later, in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Court invalidated a ban on all public utility advertising which promoted the use of electricity. A four-part test was applied, which the Court described as follows:

At the outset we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

The workings of this test were demonstrated in *Metromedia, Inc. v. City of San Diego*, where the Court held that a city’s general ban on billboards was invalid on its face because it prohibited noncommercial speech as well as commercial speech. The Court concluded that the city did not have the right to limit the locations of billboards based upon their noncommercial speech content. The Court recognized, however, that the city ordinance would have been valid to the extent it applied only to commercial speech.

Finally, in *Matter of R.M.J.*, the Supreme Court held that commercial speech falls into one of three categories: (1) inherently misleading or proven to be misleading, which the state may absolutely prohibit; (2) potentially misleading, for which the state may require a disclamatory explanation; or (3) not misleading, for which regulation must be justified by a substantial state interest.

157. Id. at 384.
158. Id.
159. 447 U.S. 557 (1980).
160. Id. at 571.
161. Id. at 566.
163. Id. at 521.
164. Id. at 515.
165. Id. at 512.
166. 455 U.S. 191 (1982).
167. Id. at 203.
In the last category, the Court concluded that only carefully drafted restrictions were appropriate so far as they were reasonably necessary to further the substantial interest of the state.\textsuperscript{168}

In *Oklahoma ex rel. Oklahoma Bar Association v. Schaffer*,\textsuperscript{169} the Supreme Court of Oklahoma held that an attorney's advertisement offering legal services for adoption proceedings was within the realm of constitutionally protected commercial speech.\textsuperscript{170} The Supreme Court of Oklahoma relied upon *Bates v. State Bar of Arizona* to determine that the state's power to restrain lawyer advertising was limited to that which was false, deceptive, misleading or which proposed an illegal transaction.\textsuperscript{171} The court also applied the more recent standard from *Matter of R.M.J.* to hold that the advertisements in question were neither misleading nor potentially deceptive and that no substantial state interest was posed to justify complete prohibition of lawyer advertising.\textsuperscript{172}

In *Adoption Hot Line, Inc. v. State*,\textsuperscript{173} the District Court of Appeals of Florida held that a permanent injunction against all advertising by an unlicensed adoption placement referral service was too broad and therefore was an impermissible violation of the first amendment freedom of speech.\textsuperscript{174} In a short opinion, the court stated that the total prohibition of all advertising had the effect of preventing even that advertising which applied to legitimate referral services.\textsuperscript{175} Without a showing by the state that a narrower restriction would be insufficient to protect the government's interest or that the advertising itself was misleading, the court concluded that a complete prohibition was unconstitutional.\textsuperscript{176} The court characterized the advertising in *Adoption Hot Line* as commercial speech.\textsuperscript{177}

\textsuperscript{168} *Id.* (footnote omitted). As the Court stated, "the State must assert a substantial interest and interference with speech must be in proportion to the interest served. . . . Restrictions must be narrowly drawn, and the State lawfully may regulate only to the extent regulation furthers the State's substantial interest." *Id.*

\textsuperscript{169} 648 P.2d 355 (Okla. 1982).

\textsuperscript{170} 648 P.2d at 359.

\textsuperscript{171} 648 P.2d at 357.

\textsuperscript{172} *Id.*


\textsuperscript{174} *Id.* at 1308-09.

\textsuperscript{175} *Id.* at 1308.

\textsuperscript{176} *Id.* at 1308-09.

\textsuperscript{177} *Id.* at 1309. The court cited several recent Supreme Court cases which dealt with commercial speech: Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981)(ordinance against all commercial signs was too broad); Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557 (1980)(commercial speech not misleading); Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977)(commercial speech may be reg-
Basically, in Adoption Hot Line the state sought an injunction against a couple who acted as a referral and counsel service for pregnant women by providing them with the names of doctors and lawyers who could thereupon act as intermediaries. The Florida statutory scheme at that time, which is still in force today, permitted licensed physicians and lawyers to act as intermediaries in adoption placements. However, the statutory scheme did not expressly prohibit advertising for adoption placements, but did protect against improper and unsuitable placements of children. The court in Adoption Hot Line held that a complete injunction against advertising to protect against effects based only on probability was overbroad.

Apparently, in response to the Adoption Hot Line case, the Florida statute was revised in 1984 to include an express prohibition against any type of advertising by anyone except the state government, a licensed agency or an intermediary. The effect of this amendment was to prohibit private parties from advertising for adoption placement, while allowing such activities on the part of attorneys and physicians.

Perhaps the most limiting statute proscribing advertising for adoption placement is that of Georgia. That statute goes so far as to outlaw oral statements that a person will adopt a child. Further, such conduct is treated as a felony with accompanying criminal penalties. However, the statute would seem to permit a pri-

181. 402 So. 2d at 1308.

It shall be unlawful for any person, organization, corporation, hospital, or association of any kind whatsoever which has not been established as a licensed child-placing agency by the Department of Human Resources to advertise, whether in a periodical, by television, by radio, or by any other public medium or by any private means, including letters, circulars, handbills, and oral statements, that the person, organization, corporation, hospital or association, will adopt children or will arrange for or cause children to be adopted or placed for adoption.

185. Ga. Code Ann. §19-8-19(c)(1982) states the penalty for violation of § 19-8-19(a), supra note 198, as follows: "Any person who violates subsection (a) or (b) of this Code section shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine not to exceed $10,000.00 or imprisoned for not more than ten years, or both, in the discre-
vate party to receive a child directly from the natural parent for the purpose of adoption.\textsuperscript{186} It strains logical reasoning to imagine that such an extreme prohibition of noncommercial speech could withstand a challenge under the constitutional standard reflected in \textit{Metromedia}.\textsuperscript{187} There is, however, no evidence that this statute has been attacked on a constitutional basis.

V. CONCLUSION

The Supreme Court has not yet articulated clear definitions of commercial and noncommercial speech.\textsuperscript{186} The distinction becomes crucial, however, if it is determined that it is constitutionally permissible to prohibit advertising for the sale of legal commercial products.\textsuperscript{188} Even if advertising for adoption placement is considered to fall within the realm of commercial speech, first amendment protection has been extended to such advertising in the printed media,\textsuperscript{189} mails,\textsuperscript{190} and on billboards.\textsuperscript{192} Such methods of adoption advertising are usually proscribed by the statutes discussed herein.

The modern trend among state statutory adoption schemes is to allow private placements but to control them through limitations on compensation and requirements for court ordered investigation of the placement. This trend is further evidenced in uniform statutes and can be effective without placing undue restrictions on advertising. Ideally, all states should seek uniformity in their procedures for and limitations of the adoption process, to reduce the

\textsuperscript{186} See \textit{GA. CODE ANN.} §19-8-3(a)(3) (1982).
\textsuperscript{187} See \textit{supra} notes 162 to 165 and accompanying text.
\textsuperscript{188} See \textit{supra} \textit{Central Hudson}, note 159, at 579-80 (Stevens, J., concurring). See also Comment, \textit{Jury Award Advertising - Political Speech or Commercial Speech?}, 15 \textit{CONN. L. REV.} 273 (1983).
\textsuperscript{190} See \textit{Bigelow}, 421 U.S. 809 (1975)(newspaper).
\textsuperscript{191} See \textit{Central Hudson}, 447 U.S. 577 (1980) (leaflets included with mailed utility bills).
advantage of avoiding particular limitations by arranging inter-state adoption placements.

Since courts must finalize adoptions in all states, denial of the adoption petition is the most effective sanction against parties who might attempt to evade the statutory restrictions. Courts should also reserve criminal penalties to punish the recipients of profits from unlawful placements rather than to destroy the family ties of parents and adoptive children who have submitted to excessive fee payments.

Advertising for adoption placements is an activity that is easily monitored by law enforcement agencies. Additionally, advertising can discourage those black market baby brokers who seek to profit from adoption placements by encouraging direct contact between adoptive parents and natural parents, without the need for an intermediary. Advertising as a method of arranging placements can also be used to maintain anonymity between the natural parents and the adoptive parents.

Outright prohibition of advertising for adoption placement is overbroad as well as inconsistent with the statutory schemes of those states which permit private placement. If advertising for adoption placements is to be regulated at all, restrictions on it should be limited to messages which advertise clearly unlawful profiteering practices. An alternative method of regulating advertisements would be to require prior court approval for such activities. However, such a system would overburden the courts and may be redundant if the court must review the placement again during the adoption proceeding. Constitutional protections of noncommercial speech are crucial to adoption advertising, and broad prohibitions against advertising are inconsistent with those principles.

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