Rethinking Revocation: Adoption from a New Perspective

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Adoption transformed my feelings about infertility and my understanding of what parental love is all about. For years I had felt that there was only one less-than-tragic outcome of my infertility battle, and that was to reverse the damage that had been done to my body, the damage that stood in the way of pregnancy. I had felt that there was only one really satisfactory route to parenthood, and that was for me to conceive and give birth. I had assumed that the love I felt for my first [biologic] child had significantly to do with biologic connection. The experience of loving him was wrapped up in a package that included pregnancy, childbirth, nursing, and the genetic link that meant I recognized his eyes and face and personality as familial. Adoption posed terrifying questions. Could I love in the same way a child who had not been part of me and was not born from my body? Could I feel that totality of commitment I associated with parental love toward a child who came to me as a baby stranger? Or did the form of attachment I had known with my first child arise out of the biologic inevitability felt in the progression from sexual intercourse to pregnancy to childbirth, and out of the genetic link between us?

I discovered that the thing I know as parental love grows out of the experience of nurturing, and that adoptive parenting is in fundamental ways identical to biologic parenting. . . . I do not see biologic links as entirely irrelevant to parenting, but neither do I see an obvious hierarchical system for ranking biologic and adoptive parenting. . . . You do not in fact live on just because your egg or sperm has contributed to another life. . . . The sense of immortality that many seek in parenting seems to me to have more to do with the kind of identification that comes from our relationship with our children, and with the ways in which that relationship helps shape their being.¹

¹. ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING xvii-xviii (1993). Many of the themes woven throughout this Note were introduced to me in a speech I heard Elizabeth Barholet deliver to the Westchester Adoptive
I. INTRODUCTION

Parenthood is a role which most people take for granted that they will one day assume—a vision deeply rooted in American culture and continually reinforced by social norms. Additionally, the biological link between parents and children is taken for granted. Women are raised to see themselves as childbearers; men to see themselves as studs imbued with the power of procreation as a sign of masculinity. Such socialization has led to pervasive cultural themes: a woman must produce a child to give full resonance to her identity as a woman; a child must be raised by her biologic parent to achieve the success and identity that comes from a genetic heritage.

Not everyone, however, can actualize the vision of biologic parenthood. In this country, approximately one-sixth of all people of childbearing age are infertile. The inability to achieve the culturally promulgated desire to produce offspring is frequently devastating and leads many desperate people to zealously pursue new reproductive technologies that promise the “last tantalizing possibility” of biologic parenthood. On the other end of the spectrum are women who become pregnant but do not abort and yet do not want to parent. These

Parents' Committee, and later in a reading of Family Bonds. Both experiences influenced me greatly in preparing this Note.


3. Rothman, supra note 2, at 141-42; see also RICHARD DAWKINS, THE SELFISH GENE (1976) (noting that sociobiology teaches us that all human beings are genetically programmed for reproduction).


5. NATIONAL COMMITTEE FOR ADOPTION, ADOPTION FACTBOOK: UNITED STATES DATA, REGULATIONS, AND RESOURCES 157 (1989) [hereinafter FACTBOOK].

6. ROSENBERG, supra note 2, at 50-57; see also Tony Kornheiser, For Millions of Couples, the Curse of Infertility Breeds Pain, Pressure and Desperation, PEOPLE WKLY., Feb. 13, 1984, at 83.

7. See OFFICE OF TECHNOLOGY ASSESSMENT, CONGRESS OF THE UNITED STATES, INFERTILITY: MEDICAL AND SOCIAL CHOICES 10 (May 1988) [hereinafter OTA] (reporting that Americans spent over one billion dollars on infertility treatment in 1987); see also Melinda Beck et al., How Far Should We Push Mother Nature?, NEWSWEEK, Jan. 17, 1994, at 54 (reporting that currently there are approximately 300 assisted-fertility clinics in the U.S., which generate almost two billion dollars a year).
women are "bombard[ed] with the message that they should raise their children themselves at whatever cost" because "true" mothers do not "give away" or "abandon" their children. These messages often compel some women who have relinquished their children for adoption to try to void their consent and to reclaim their children after they have already been placed with other families. Courts sometimes bow to these attempts in the belief that children belong with their biologic mothers.

The myth perpetuated by a legal system that favors the rights of biologic mothers over adoptive ones, based purely on genealogy, is that women are to be valued primarily for their reproductive capacity. It reinforces the stereotypical notion that in parenthood, genetic links are more valuable than psychological ones, and promotes institutional biases in favor of biologic parenthood. This culturally created myth simultaneously reveals and constructs reality and reflects and refracts acknowledged yet unchallenged assumptions and prejudices about motherhood. Judges and legislators, both consciously and unconsciously, rely upon this myth in their decisions while sitting in the unique position of reinforcing or uprooting it. Indeed, the myth embodies some of the most deeply internalized assumptions about human nature.

This Note will explore the statutorily created institution of adoption from the perspective of adoptive parents. Part II will discuss the historical background of adoption. It will explore how adoptive parenting came to be stigmatized and subverted in our culture to the point that judges and legislators paternalistically have bent over backwards to preserve the biologic bond between parents and children. It will examine the legal and social obstacles that conspire to relegate adoption to a last resort form of becoming a parent.

Part III will examine the issues surrounding adoption revocation and review the history of consent withdrawal. Part IV will outline the legal options that address this problem as legislated in various juris-

8. BARTHOLET, supra note 1, at xxii-xxiii.
9. Karen Stabiner, The Baby Brokers, L.A. TIMES, Aug. 14, 1988 (Magazine), at 36 (reporting that this occurs in about ten percent of adoption cases, including both pre- and post-placement occurrences); see also infra text accompanying note 98.
10. There are no statistics but only anecdotal accounts on the results of these cases. See discussion infra part III.
11. See Katharine T. Bartlett, Re-Expressing Parenthood, 98 YALE L.J. 293 (1988) (discussing how concepts of parenthood lead judges to resolve parental custody disputes between biologic parents so that social relationships are downplayed).
dictions. Part V will propose a solution to reverse the patriarchally inspired bias against adoptive parents. Currently, individual state statutes provide time frames within which biologic parents can withdraw their consent to adoption.\(^2\) These range from a few days to several months, often directing the court to assess the situation in light of the child’s “best interest.”\(^3\) Some provide for revocation when consent has been given under fraud, duress, or coercion.\(^4\)

This Note proposes that adoption revocations should only be sanctioned when the biologic mother’s consent was obtained by fraud, duress, or coercion as practiced by the adoptive parents or their agents. Such a standard will promote finality in child-placement cases. To do otherwise is to denigrate adoptive parenting and disempower women by maintaining a system whereby judges step in to “save” biologic mothers from their own decisions. The law must de-mythologize the image, fashioned under the influence of patriarchal ideology, of the innocent Madonna and her child, and help society focus on the image of a child raised by loving, capable parents.

II. AN OVERVIEW OF ADOPTION

A. The History of Adoption

The practice of adoption, as we know it today, grew out of ominous beginnings. Unlike most other state law, the American law of adoption did not derive from British common law,\(^5\) but rather from the Babylonian Code of Hammurabi and Roman law,\(^6\) where adoption was governed by the principle “adoptio naturam imitatur”—“adoption imitates nature.”\(^7\) The earliest analogue to adoption in Britain were the Elizabethan Poor Laws, under which orphaned children were “bound out” as indentured servants to work in

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12. See infra pp. 752-57.
13. See infra pp. 753-54.
15. ARTHUR SOROSKY ET AL., THE ADOPTION TRIANGLE: SEALED OR OPEN RECORDS: HOW THEY AFFECT ADOPTEES, BIRTH PARENTS, AND ADOPTIVE PARENTS 28 (rev. ed., Corona Publishing Co. 1984). England did not provide for adoption by law until 1926. This has been attributed to the English culture’s high regard for blood lineage. Id.
16. The Code of Hammurabi provided: “If a man take a child in his name, adopt and rear him as a son, the grown-up son may not be demanded back. If a man adopt a child as his son, after he has taken him, he transgresses against his foster-father; that adopted son shall return to the house of his own father.” 11 ENCYCLOPEDIA BRITANNICA Law 135 (1947).

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exchange for food, shelter, and education. This indenture system was imported to colonial America. In the early 1800s, indenturing was a popular means of providing for parentless children. Early laws allowed poor parents to sell their children like property to be used as cheap labor, while children who could not be sold were often put in asylums with the poor and mentally ill.

In the mid-nineteenth century, a minister named Charles Loring Brace founded the Children's Aid Society and instituted an "orphan train" movement that sent thousands of abandoned children to live in the midwest, the south, and Texas. These children were taken to town meeting halls where, frozen with fright, they were made to perform skits for groups of potential adopters who took home the child of their choice. These children were never formally adopted so that either the adopter or the child could end the relationship at any time.

The first American adoption statute was enacted in Massachusetts in 1851 and was modeled after Roman adoption law. Unlike adoption laws in other cultures, this statute imposed strict qualifications for adoptive parents to ensure the welfare of the children. It also aimed to protect the rights of adopters who previously had no legal recourse if a birthmother tried to undo an adoption. By 1931, adoption was legally provided for in every state in the country.

18. FACTBOOK, supra note 5, at 18.
19. Id.; see also Presser, supra note 17, at 472-78 (noting that industrialization brought many economic changes which caused an increase in the number of neglected children).
22. These orphan trains existed until 1929. Id. at 923-24.
23. Id. at 924.
24. Id.
25. MASS. GEN. LAWS ANN. ch. 324 (1851). This pioneering statute required written consent of birthparents, joint petition by both adoptive parents, a decree of adoption by a judge, and legal and complete severance between the child and the birthparents. FACTBOOK, supra note 5, at 18.
26. Adoption is a revered form of family in Pacific island cultures. In Tahiti, for example, twenty-five to forty percent of all children are adopted in a practice that is considered at the top of the family hierarchy. BARTHOLET, supra note 1, at 169-70.
27. Dickson, supra note 21, at 924. Historically, adoption was based upon the needs of the adopters, such as "to prevent the extinction of a family bloodline and to facilitate property transmission." Id.
28. Id.
29. Id. at 925.
B. The Current System

In an agency adoption, a birthmother gives her child to a publicly licensed agency, which places the child with a family of the agency's choosing.\(^{30}\) Usually, the child is placed in foster care until the birthmother's consent becomes irrevocable.\(^{31}\) The adoption becomes final by judicial decree predicated upon a satisfactory finding by a social worker.\(^{32}\) Agency adoptions are generally disfavored because of their rigid bureaucratic selection procedures and long waits for healthy infants.\(^{33}\)

In independent adoptions, a birthmother places her child with a family of her choice, usually through a doctor or lawyer acting as an intermediary.\(^{34}\) Amongst the adopters expenses are legal fees and the birthmother's medical expenses.\(^{35}\) The adopters typically take the infant home directly from the hospital. Most states require adoptive parents to undergo a social work investigation of parental fitness before the adoption can be finalized.\(^{36}\) The wait for a healthy infant in independent adoptions is generally three months to two years,\(^ {37}\) but the implications of a birthmother revoking consent to adoption in independent adoptions are more serious because the adoptive parents have already bonded with the child.\(^{38}\)

C. Cultural Distortions of the System

Adoption's unsavory history combined with the historical stereotyping of birthmothers, adoptive parents, and children, has contributed greatly to society's negative perception of adoption and continues to influence adoption law and practice.\(^{39}\)

\(^{30}\) Id. at 934.

\(^{31}\) Id.

\(^{32}\) Id.

\(^{33}\) See Factbook, supra note 5, at 175. The wait for a healthy newborn in agency adoptions can be as short as two years or as long as ten years. Id.


\(^{35}\) Id. at 91-94 (listing the various expenses that may arise during an independent adoption).

\(^{36}\) Factbook, supra note 5, at 20.

\(^{37}\) Id. at 175.

\(^{38}\) See Dickson, supra note 21, at 968.

\(^{39}\) Id. at 925-26. Much of the information and many of the ideas for this section were garnered from Dickson's article.
1. Birthmothers

Historically, women were valued exclusively for their reproductive capacity.\textsuperscript{40} It was considered their obligation to bear children within a marriage and a sin to do so outside of marriage.\textsuperscript{41} As a result, nonmarital pregnancy has historically been considered nearly criminal in American law and society.\textsuperscript{42} In the eighteenth and nineteenth centuries, unwed mothers and their children were often punished by being publicly displayed in the town square.\textsuperscript{43} Popular myths described unwed mothers as misguided, masochistic, ignorant, and uncontrollable.\textsuperscript{44}

Today these portrayals have largely been rejected, supplanted by a recognition that single women get pregnant by choice or by accident and not as a result of an inferior nature. Additionally, the woman who places her child for adoption is not always poor and exploitable. She is usually a young, middle-class woman who became pregnant accidently.\textsuperscript{45}

There are many studies that depict the pain suffered by birthmothers who place their children for adoption, yet very few of these studies provide a basis of comparison with the experience of women in similar circumstances who kept their children.\textsuperscript{46} One study that provided such a unique, relevant comparison revealed that single birthmothers who placed their children for adoption, when compared with single mothers who kept their children, were generally more likely to finish high school, less likely to live in poverty or receive public assistance, and no more likely to suffer psychologically as a result of their decisions.\textsuperscript{47} According to one 1986 study, over six

\begin{itemize}
\item \textsuperscript{40} Carmel Shalev, Birth Power, The Case For Surrogacy 21 (1989).
\item \textsuperscript{41} Id. at 26. "In marriage a woman's motherhood was revered and idolized; outside marriage it was abhorred and condemned. As a result, women were divided, often along lines of class and race, into two classes—virtuous madonna (virgin) and fallen whore."
\item \textsuperscript{42} See Dickson, supra note 21, at 926-29.
\item \textsuperscript{43} Id. at 926; see also Nathaniel Hawthorne, The Scarlet Letter (5th ed. 1990) (fictionalizing such harsh treatment in the tale of Hester Prynne).
\item \textsuperscript{44} See Shalev, supra note 40, at 31.
\item \textsuperscript{45} David K. Leavitt, The Model Adoption Act: Return to a Balanced View of Adoption, 19 Fam. L. Q. 141, 144 (1985). The statistical basis of these facts must be viewed, however, in light of the current policy debate targeting "illegitimacy" and "out-of-wedlock" births/single-parent-families as the root cause of the most serious social problems.
\item \textsuperscript{46} Bartholeit, supra note 1, at 177. A study of mothers who kept their children might reveal the pain of raising an unwanted child alone, without an education or a job.
\item \textsuperscript{47} Factbook, supra note 5, at 148-49. "In one study, mothers who relinquished their babies scored higher on standardized personality tests . . . and were thus considered healthier
\end{itemize}
million American homes were headed by a single mother, sixty-six percent of whom also worked outside the home. In contrast, only ten percent of single teenage mothers who kept their babies were employed and surviving without welfare. Ninety percent of these single mothers never completed high school.

2. Adoptive Parents

Adoptive parents are motivated to adopt, in most instances, because they are unable to produce a child due to sterility, repeated miscarriages, hysterectomies, or other more complex conditions resulting in infertility. Just as unwed mothers were seen as “violat[ing] the natural order” of life, married women who did not bear children were historically vilified. Motherhood has been culturally mythologized to the point where it has been perceived as the defining characteristic of a woman’s existence, such that women who remained childless were shunned by society. In ancient Christian tradition, the ability to bear a lot of children was a sign of God’s grace, while infertility was considered the manifestation of sin and punishment.

During the 1800s, sterility was sometimes blamed on a woman’s

48. Leavitt, supra note 45, at 143.
49. Id.
50. Id.
51. SOROSKY ET AL., supra note 15, at 73; see also BARTHOLET, supra note 1, at xx, 172 (noting that adoptive families are thus often begun on a foundation of human despair, as many adoptive parents feel forced to pursue this form of parenting due to a physical “inadequacy”).
52. Dickson, supra note 21, at 929-31.
53. In 1870, a doctor described reproduction in this way: It is “as if the Almighty, in creating the female sex, had taken the uterus and built up a woman around it.” Caroll Smith-Rosenberg & Charles Rosenberg, The Female Animal: Medical and Biological Views of Woman and Her Role in Nineteenth-Century America, 60 J. AM. HIST. 332, 335 (1983) (quoting M.L. HOLBROOK, PARTURITION WITHOUT PAIN: A CODE OF DIRECTIONS FOR ESCAPING FROM THE PRIMAL CURSE 14-15 (1882)). Noted legal scholar, Martha Fineman, echoes this: “Motherhood has a [powerful symbolic] impact on all women. . . . It comes from the durability and tenacity of the assumptions made about any individual woman that we are forged in the context of the cultural and social forces that define the ‘essential’ or idealized woman.” Martha Fineman, Images of Mother in Poverty Discourses, 1991 DUKE L.J. 274, 276 (1991).
55. See SHALEV, supra note 40, at 27.
56. GOLD, supra note 54, at 28.
immorality or sexual perversion. Doctors even linked sterility to a woman's involvement in business or politics, as if a woman's brain and reproductive organs could not develop simultaneously. This view has a modern analogue in the popular myth that infertility results from stress or other psychosomatic defects.

The biologic reductivism manifest in this emphasis on fertility and procreation as the definitional marker for womanhood serves to circumscribe a woman's societal value. The imperative that women be mothers and children be biologic is a powerful social directive, with which close to five million women cannot comply. By focusing on women's reproductive capacity or incapacity, society reinforces stereotypical notions of women valued mainly as childbearers. As reproductive medical technology advances, genetic links are further deified and a reconceptualization of parenthood as based on loving relationships rather than biology is obstructed. As a result, infertile women feel pressured to pursue biologic parenthood rather than explore the possibility of adopting. Such pressure devalues adoptive child-parent relationships and promotes institutional biases favoring biologic parenthood.

The cultural themes perpetrated herein are reflected in a legal system that operates by erecting a series of barriers that separate adoptive parents from the children they seek to parent. Fitness screening, locating children, racial and cultural matching, financial obligations, and protracted litigation regarding ultimate parental rights are

58. See id. at 340-43.
59. GOLD, supra note 54, at 67. Infertile couples are always initially told that if they would just relax, they would get pregnant.
61. See OTA, supra note 7, at 10.
62. See generally BARTHOLET, supra note 1, at 187-229 (discussing the fact that infertile couples are strongly dissuaded from adopting by their desire for biologic parenthood). See FACTBOOK, supra note 5, at 157 (explaining that many interested couples are discouraged from adopting “due to long waits and restrictive criteria for prospective adoptive parents”).
63. BARTHOLET, supra note 1, at 164-65.
all obstacles that adoptive parents must have the endurance to overcome in their quest to adopt a child. In custody disputes, this same system rarely gives the presumption of legal parenthood to a nonbiologic parent.

Adoptive parents must face the stigma that they are exploiting poor, ignorant birthmothers. There is a strong public misperception that adoptions, particularly independent ones, are arranged by a channel of unscrupulous lawyers trafficking in babies for adoptive parents willing to pay the price, at the expense of victimized birthmothers. While poverty has in the past caused many women to place their children for adoption, this is less true today, and while the opportunity for exploitation may exist, it is not a foregone conclusion in each case of adoption.

Adopters must also overcome the stigma that adoptive parenting is somehow inferior to biologic parenting; that they are not their child's "real" parents. Yet, in actuality, the quality of "attachment relationships" between adoptive or nonadoptive parents and their children has been studied and found to be indistinguishable. Adoptive parents build their parental bonds on social, rather than genetic, ties. The sanctity of such bonds has recently been acknowledged by scholars who have noted that in today's world the importance of a parent's role is based as much on psychology and intention as it is on biology.

3. Adopted Children
Most adoptees are the offspring of unwed mothers, and at one time were deemed "illegitimate" and "filius nullius—the child of no one." Historically, they were considered tainted by their mothers’
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sins and presumed to have inherited their mothers’ inferior natures.75 This view of adopted children is reflected in the perception of an “adopted child syndrome,” a view that holds that adopted children are flawed in some way, more prone to criminal behavior, and that all adopted children’s problems can be blamed on their adoption.76 This view has been further promulgated by the few, yet notorious, adoptees who have used the “adopted child syndrome” as a defense in a criminal trial.77 Most psychologists agree, however, that this syndrome does not in fact exist.78

The media often portrays adoptees as rootless searchers, “condemned to a life-long identity crisis by the secretive nature” of adoption.79 However, studies show that in reality adopted children rank higher in standard measures of adjustment and self-esteem than children raised in foster care or by birthmothers who once considered adoption but decided against it.80

The problem with many studies of adoption is that they fail to account for the many subgroups of adopted children81 (e.g., children adopted at birth, children adopted after the age of three, children removed from abusive homes and then adopted), whose members may have problems for reasons other than their adoption.82 In 1985, Leslie Stein and Janet Hoopes studied a group of teenagers who had been adopted before the age of two and compared them with a group

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75. Id.
76. FACTBOOK, supra note 5, at 205-06.
78. FACTBOOK, supra note 5, at 206.
79. Leavitt, supra note 45, at 142-43.
80. Bohman & Sigvardsson, supra note 70, at 100-06.
81. Adoption as a contemporary institution can be entirely vindicated by a comparison of the groups of children born illegitimate who were adopted and who were not adopted. To be born illegitimate and to be adopted is to have an advantage which is shown in social adjustment, attainment and health. The striking success of adoption as an institution is shown by the marked extent to which adopted children mirror their not-adopted social class peers rather than the group of illegitimate children from whom they were originally drawn.
Leavitt, supra note 45, at 143 (quoting SEGLOW, PRINGLE, & WEDGE, GROWING UP ADOPTED 171 (1972)).
82. Id.
of teenagers raised in biologic families of the same socioeconomic class. They found no difference in measurements of identity formation and adjustment and found that it was the quality of the parent-child relationship, not the adoptive status, that predicted success. When Stein and Hoopes asked the group of adopted children how it felt to be adopted, most responded positively, but as one noted, "It's not adoption that is the problem, but what other people think of adopted kids."

D. Social Stigmas

The stigma surrounding adoption is a product of generations of social conditioning. Today, adoption and the parties to it are virtual victims of cultural distortion embodied in institutional forms. Birthmothers are conditioned to keep their children, to the extent that less than one percent of children born in this country are placed for adoption. The infertile are encouraged and driven by the medical community and their own social conditioning, which equates their ability to bear children with their value as human beings, to pursue infertility treatment ad infinitum. Generally, it is only after exhausting all of their medical options that prospective parents even consider adoption.

Adoptive parents and children are constantly assaulted by the media messages that their families are inferior to biologically bound ones. Even popular fairy tales portray nonbiologic mothers (e.g., stepmothers) as ugly, cold, and abusive. They feed their children poison apples and treat them like slaves; the children suffer until they escape or are rescued by their birthparents.

83. BARTHOLET, supra note 1, at 180 & n.36 (citing LESLIE M. STEIN & JANET L. HOOPES, IDENTITY FORMATION IN THE ADOPTED ADOLESCENT 34-46 (Child Welfare League of America ed., 1985)).
84. Id.
85. Id. at 182 n.39.
86. Id. at 164.
87. Id. Only two percent of babies born to single mothers are placed for adoption. Id.
88. OTA, supra note 7, at 4-5. Visits to doctors for infertility treatments increased threefold in the past three decades while infertility rates remained stable.
89. See BARTHOLET, supra note 1, at 24.
90. There are a plethora of television talk shows that dramatize the search and reunion theme and of movies that satirize the adoptive child's behavioral problems, e.g., PROBLEM CHILD (Universal Studios 1990).
91. BARTHOLET, supra note 1, at 165 & n.2 (referring to Rapunzel, Hansel and Gretel, Snow White, and Cinderella).
The language used in discussing adoption also reinforces the bias in favor of biologic parenting. Adoptive children are asked, "Do you know who your ‘real’ parents are?" In casual conversation and legislation, birthparents are often referred to as the "natural" parents.\textsuperscript{92} Adoptive parents are sometimes asked, "Are you still trying to have a child of your own?" and "What made you decide to adopt?" as if the adopted child were on loan and their motives in adopting were somehow more suspicious than those of people who have children biologically. Ideally, adoption should be looked upon as simply another method of bringing a child into a family (other methods being cesarean section and natural childbirth) but in reality, the adoptive status of a child is frequently mentioned needlessly, even when it has no relevance to the issue at hand. Consequently, the stigma surrounding adoption is worsened.\textsuperscript{93}

### III. CONSENT WITHDRAWAL AND ADOPTION REVOCATION

In independent adoptions, adoptive parents do not procure irrevocable parental rights until the adoption is finalized by judicial decree.\textsuperscript{94} This finalization may not occur for months or even years after a child has been placed in a new home.\textsuperscript{95} By allowing a birthmother as long as six months or a year to revoke her consent to adoption, the law encourages her to change her mind.\textsuperscript{96} Such patriarchal laws, often given broad interpretative deference by traditionalist judges, use a birthmother’s culture of victimization and rescue against all women. Every time a judge reverses an adoption under these circumstances, other birthmothers are encouraged to change their minds.

At the same time, adoptive parents are expected to bond with and love a child while she is with them, but to immediately give up custody when the biologic parent later reverses her prior decision.\textsuperscript{97} Such laws cast “adoptors [sic] in the role of unwilling, unknowing temporary babysitters,”\textsuperscript{98} and subvert the ultimate policy goal of stability and finality in adoptions.\textsuperscript{99}

\textsuperscript{92} E.g., HAW. REV. STAT. § 578-14 (1985).
\textsuperscript{93} Adoptive Parents Committee, Inc./New York City Chapter, Positive Adoption Language, on file with author.
\textsuperscript{94} Dickson, supra note 21, at 965.
\textsuperscript{95} Id.
\textsuperscript{96} Id. at 978.
\textsuperscript{97} Id. at 968.
\textsuperscript{98} Id. at 979.
\textsuperscript{99} See In re A.M., 264 Cal. Rptr. 666, 667 (Ct. App. 1989) (citing the importance of
A. The Story of Baby Boy M.

Stephanie M. was an unmarried 15-year-old high school student when she became pregnant in 1988. Her 19-year-old boyfriend, Steven A., broke up with her when she told him of the pregnancy. She told her mother and stepfather of her condition when she was in her seventh month, and with their approval and assistance she placed her baby boy, born in January of 1989, with adopters, the W’s. The W’s cared for and loved Baby Boy M. as their own. Five months later, Stephanie and Steven got back together. They attended premarital counseling sessions and Steven enrolled in Alcoholics Anonymous. They then asked for the return of the baby and the W’s refused. The trial court rendered judgment in favor of the W’s. On appeal, however, the court reversed, holding that the offer to permit the adoption of the child, the making of arrangements for the adoption of the child, and the failure to support the child do not prove an intent to abandon, sufficient to terminate parental rights. The judge ruled that “the relationship between the natural mother and her child should not be terminated through an adoption proceeding unless and until the mother has indicated her consent thereto. . . .” Thus, at the age of one and one-half years, Baby Boy M. was removed from the only parents he had ever known and returned to Stephanie and Steven.101


101. See id. Critics argue that much of the pain and tragedy of protracted custody battles could be avoided if the adoptive parents would just return the baby immediately upon learning of a birthmother’s change of mind. Nancy Gibbs, In Whose Best Interest?, TIME, July 19, 1993, at 47. However, such arguments ignore the length of time that the child may already have spent with the new family and the relationship that may have developed in that time. Further, what parent would unquestioningly give up a child in a custody battle when there is a reasonable expectation that they will obtain judicial relief?
B. The Pain of Revocation

The Baby Boy M. case is not unusual. Adoption cases in which birthmothers attempt to revoke previously granted consents are emotionally wrenching and legally sensitive. It is difficult to accurately determine how often such disputes occur since adoption proceedings are usually closed to the public and most cases are not reported. One network television report estimated that birthmothers change their minds after placement in fifteen percent of independent adoptions in California.

The emotions of a birthmother who places her child for adoption have been discussed, and are frequently the subject of media reports and movies. The increasingly popular search movement, which encourages adoptees and birthparents to seek each other out for a relationship later on in life, has one fundamental message at its core: adoptive parents are not the real parents of the adopted child. Furthermore, it conveys the message that adoptive children and their real parents suffer will immeasurable pain until they find each other and reestablish a biologic bond that can never be severed.

The tragedy experienced by adopters in revocation cases is less publicized, yet should not be underestimated. Adoptive parents

102. See generally CLARK, supra note 73.
105. See CLARK, supra note 73, at 603.
106. FACTBOOK, supra note 5, at 170; see also Stabiner, supra note 9, at 35 (estimating that birthmothers change their minds in up to 10 percent of cases, including both pre- and post-placement occurrences). But see Jon D. Hull, The Ties That Traumatize, TIME, Apr. 12, 1993, at 48 (reporting that the National Council for Adoption estimates that less than one percent of the fifty thousand U.S. adoptions each year are contested).
107. For example, birthmothers were recently given a forum to describe the regret and remorse they have experienced as a result of placing their children for adoption. 60 Minutes (CBS television broadcast, Jan. 3, 1994).
108. See SOROSKY ET AL., supra note 15, at 47-72.
109. The trauma suffered by adopters when birthmothers change their minds has been largely minimized by researchers. For example, Professor Sanford Katz wrote in 1964 that taking a child from an adoptive home after a significant period of time could result in “disappointment” or “hardship” when the adopters “had become fond of him.” Janet Dickson suggests that this language is more suggestive of a relationship with a pet dog than with a child. Dickson, supra note 21, at 968 n.263 (referring to Sanford N. Katz, Community Decision-Makers and the Promotion of Values in the Adoption of Children, 4 J. Fam. L. 7, 10 (1964)).
plan and wait for their child for years.\textsuperscript{110} They love, parent, and bond with their child from the moment she is handed to them. When a child is taken away after living with the adoptive parents for a period of time, it is reasonable to imagine that the pain of the adopters is akin to the pain a biologic parent would experience if a child were removed for no legal reason.\textsuperscript{111} This pain may be increased because the adopters may have already dealt with the grief of infertility; a process psychologists report is as emotionally traumatic as the loss of a child.\textsuperscript{112}

Adopters also suffer financially in revocation cases. Adoption expenses, including legal fees and payments for the birthmother's support and medical costs, are usually burdensome\textsuperscript{113} and most often nonrefundable.\textsuperscript{114}

\section*{C. Rationales Behind Laws That Allow Revocation}

Several assumptions implicitly underlie a legal culture that allows a birthmother significant deference to change her decision to give her child to adoptive parents. The most pervasive rationale is that adopters have no right to adopt in the first place, while biologic parents have a "fundamental right to raise their children."\textsuperscript{115} An adoptive parent thus does not become a "real parent" with attendant rights until the adoption has been finalized. This rationale dismisses the rights and feelings of adopters during the adoption process as irrelevant, and is closely related to the disturbing rationale that children belong with their biologic parents at any cost due to the "mystical bond" that endures between a birthmother and her baby, which no stranger can recreate.\textsuperscript{116} This rationale is proven false by the fact that biologically unrelated people, such as stepparents, frequently establish successful bonding relationships with children, while biologic

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., Komheiser, \textit{supra} note 6.
\item Dickson, \textit{supra} note 21, at 968.
\item \textit{Gilman}, \textit{supra} note 34, at 13-14.
\item Independent adoptions cost from $2,000 to $20,000. \textit{Factbook}, \textit{supra} note 5, at 172.
\item Mitchell A. Charney, \textit{The Rebirth of Private Adoptions}, 71 A.B.A. J. 52, 54 (1985). Since payments for a birthmother's expenses are considered voluntary and not in exchange for a baby, they are nonrefundable if a birthmother changes her mind. This could potentially lead to episodes of extortion on the part of an unscrupulous birthmother.
\item \textit{In re} Timothy W., 272 Cal. Rptr. 906, 910 (Ct. App. 1990).
\end{enumerate}
\end{footnotesize}
parents are often unable to effectively relate to their own children. 117

The most disturbing unspoken assumption behind lenient revocation policies is that a "normal" woman would not give up her baby for adoption,118 or if she did, she would regret it for the rest of her life. Thus, "the law 'owes [her] every possible opportunity to avoid making such a mistake."119 This attitude is both demeaning and discriminatory and representative of a legal culture that disempowers women by holding that they are deficient in those skills necessary to make important decisions.120

Before the mid-18th century, this view was expressed through the image of woman as the "weaker vessel."121 Women were considered to be creatures of "intense sexuality and . . . fundamental irrationality" who required guidance from men to prevent them from "slipp[ing] into collusion with evil."122 After the Enlightenment, "women's intellectual inferiority came to be expressed as an inability to engage in rigorous abstract thinking."123 Society's inability to accept a woman's decision to relinquish her child for adoption implies that women are incompetent to act as rational moral agents.124 This implication is reinforced by a judicial system that steps in to correct a woman's "mistake" for her, even in the face of compelling legal reasons to do the exact opposite.125

The decision to place a child in an adoptive home is never

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117. See Dickson, supra note 21, at 983.
118. See Stabiner, supra note 9, at 36.

The public perception is that it is unnatural to give away a child: Why have women, if not to birth their babies? People think that's the way things should be. The social work corollary is that any woman who will [place a baby for adoption] cannot possibly be normal and needs weeks of psychiatric care and foster care to give her more time to change her mind. The system is utterly humiliating and unfulfilling.

Id.
119. Leavitt, supra note 45, at 144.
121. Id.
122. Id.
123. Id.; see also Marie Ashe, Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law, 13 Nova L. Rev. 355, 372 (1989) (posing that the legal regulation of reproductive experience raises questions such as, "May women be entrusted to exercise such power [and to make such decisions]?").
124. Shalev, supra note 40, at 11.
easy, but once it is made, volitionally and with purpose, the decision should be irrevocable. The first goal of the law should be to make the choice to place a child for adoption a free one, not dictated by the external pressures of the situation. The second goal should be to ensure that this freely made choice is final. The right to make such determinations implies the duty to stand by such determinations.

D. History of Withdrawal of Consent Cases

The right to withdraw consent to an adoption is governed by state statutes, which frequently direct courts to base their decisions on the child’s "best interests,"—a very amorphous standard. Many states allow revocation when consent was given under fraud, duress, mistake, undue influence, or some other condition where consent has been vitiated.

Jurisdictions vary in their recognition or preclusion of the right to withdraw a valid consent depending largely upon attendant circumstances and policy considerations—e.g., how much weight the court gives to the policy favoring the maintenance of genetic ties. When biologic parents are allowed to withdraw valid consents to adoption, the entire institution of adoption is threatened since adoptive parents are discouraged from adopting out of fear of losing a child they grow to love. Further, prospective adopters might even be subject to extortion by those threatening to withdraw a previously granted consent. When biologic parents are allowed to reverse an adoption on the grounds that their parents or other relatives forced them to execute the relinquishment papers, the stage can be set for

128. See, e.g., Fla. Stat. Ann. § 63.082(5) (West 1985) ("Consent may be withdrawn only when the court finds that the consent was obtained by fraud or duress.").
129. 2 Am. Jur. 2d, Adoption § 103-10 (1994).
[T]he policy of the law should be to assist in every way in establishing a satisfactory parent-child and family relationship. Adoptive parents should not be discouraged by a construction of the law which would cause them to fear the consequences of accepting a child because of the knowledge that the fate of their efforts would be at the will of the natural parent.

Id.

131. In re Hecker, 448 S.W.2d 280, 286 (Mo. Ct. App. 1969). In such cases, "[s]eeds for blackmail and extortion [are] planted."
collusion between the birthmother and her relatives to allege such fraud or coercion to the detriment of innocent adoptive parents and children.\textsuperscript{132}

Early cases of this nature held that consent was absolutely revocable until a final adoption decree was granted.\textsuperscript{133} Courts routinely held that a mere change of mind on the part of the biologic mother was sufficient grounds for withdrawal of consent.\textsuperscript{134} In \textit{Green v. Paul}, \textsuperscript{135} the court concluded that consent, as required for an adoption, must be continual, such that withdrawal of consent at any stage of an adoption is tantamount to consent having never been given.\textsuperscript{136} The court noted that adoption laws must be strictly construed "as they are in derogation of the natural right of the parent to his child."\textsuperscript{137} The sanctity of the biologic bond was legally preserved even in the face of clear neglect and expressed intent to surrender parental status.

Other early cases of this nature were decided on the principles of contract law,\textsuperscript{138} whereby if courts found that a mother freely signed a release for adoption, it was as binding as any other contract and could not be arbitrarily voided absent misrepresentation or duress.

Among the most troubling of these earlier cases are those that allowed revocation by giving inordinate weight to the maintenance of the blood relationship.\textsuperscript{139} In \textit{Kropp v. Shepsky}, the court held that a birthmother could regain custody of her child because the right of "natural" parents to raise their children is "fundamental."\textsuperscript{140} In \textit{Scarpetta v. Spence-Chapin Adoption Service},\textsuperscript{141} the court held that a birthmother could revoke her consent based on the presumption that

\begin{itemize}
\item \textsuperscript{132} SENATOR MICHAEL J. TULLY, JR., NEW YORK STATE SENATE INTRODUCER'S MEMORANDUM IN SUPPORT OF SENATE BILL \#149, 1993 N.Y. Assembly Bill No. 8887, 215th General Assembly (1993).
\item \textsuperscript{133} See, e.g., Small v. Andrews, 530 P.2d 540 (Or. Ct. App. 1975) (holding that the natural parent is absolutely entitled to withdraw consent at any time prior to an entry of decree).
\item \textsuperscript{134} See, e.g., \textit{In re Adoption of Thompson}, 283 P.2d 493 (Kan. 1955); \textit{Green v. Paul}, 31 So. 2d 819 (La. 1947).
\item \textsuperscript{135} \textit{Green}, 31 So. 2d 819.
\item \textsuperscript{136} \textit{Id}.
\item \textsuperscript{137} \textit{Id.} at 821-22 n.2.
\item \textsuperscript{138} See, e.g., \textit{In re Adoption of F.}, 488 P.2d 130 (Uah 1971). \textit{But see Warner v. Ward}, 401 S.W.2d 62, 63 (Ky. 1966) (holding that under traditional contract principles, an infant 16-year-old birthmother could avoid her commitment to consent due to her age).
\item \textsuperscript{139} See, e.g., \textit{People ex rel. Kropp v. Shepsky}, 113 N.E.2d 801 (N.Y. 1953).
\item \textsuperscript{140} \textit{Id.} at 803.
\item \textsuperscript{141} 269 N.E.2d 787 (N.Y. 1971), \textit{cert. denied and appeal dismissed}, 404 U.S. 805 (1971).
\end{itemize}
children "belong" with their "natural" mothers. The court noted that

"the status of a natural parent" is so important "that in determining the best interests of the child, it may counterbalance, even outweigh, superior material and cultural advantages which may be afforded by adoptive parents . . . For experience teaches us that a mother's love is one factor which will endure: possibly endure after other claimed material advantages and emotional attachments may have proven transient."

Many courts, reflecting general societal attitudes, still operate under a traditionalist system that gives the presumption in custody cases to biologic mothers. What should change first, societal attitudes or the law? It seems clear that laws must be rewritten to demythologize biologic ties of parenthood before society can recognize and assimilate, into its cultural subconscious, the notion that children belong in loving homes and biologic parents are no better or worse than adoptive ones, based purely on their genetic status.

IV. LEGAL OPTIONS

A. Statutory Comparison

Jurisdictions vary in their legal response to adoption revocation requests. The statutes range from those that favor adoptive parents' rights to those that give the most deference possible to birthparents. Each option along the spectrum has a significant effect on the permanence of adoptive relationships.

1. Statutes that Grant Biologic Parents Broad Freedom to Change Their Minds

Some jurisdictions allow birthmothers the absolute right to revoke consent to adoption until the time when a court has issued a final decree of adoption. In one Pennsylvania case, a teenage girl whose boyfriend broke up with her upon learning of her pregnancy...

142. Id. at 792.


144. See, e.g., 23 PA. CONS. STAT. ANN. § 2711(c) (1991) ("A consent to an adoption may only be revoked prior to the earlier of either the entry of a decree of termination of parental rights or the entry of a decree of adoption."); see also TEX. FAM. CODE ANN. § 15.03(d) (West 1993).

cy, placed her child for adoption with a couple who had sought to adopt.\textsuperscript{146} Several months later, the teenager and her boyfriend reconciled and filed a petition to regain custody of the child. The court found that, despite their youth, and the father’s alcohol problem, the young couple were fit parents, and ordered the adoptive parents to return the child.\textsuperscript{147} In announcing their decision, the court noted a factually analogous case in which an adopted child was also returned to her biologic mother.\textsuperscript{148} The language of that ruling betrays a paternalistic attitude:

The relationship between parent and child should be broken only with the greatest reluctance. Here, we think it would be most unjust to hold the mother to her promise . . . . She was very young. She consented to give her child for adoption only in response to her parents’ urging. She received no outside or professional counseling to guide her in making so agonizing a decision.\textsuperscript{149}

In a recent Texas case,\textsuperscript{150} the Court of Appeals reversed a year-old trial court ruling in favor of the adoptive parents and ordered the child returned to her birthmother. The court stated that even though the mother signed an affidavit of relinquishment of parental rights and gave her baby to the adoptive parents, such actions were not evidence of abandonment sufficient to deny her parental rights.\textsuperscript{151} The court based its conclusion on the theories that “parents retain a vital interest in preventing the irretrievable destruction of their family life” and “a natural parent’s desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than a property right.”\textsuperscript{152} The status of the adoptive parents as parents was thus voided.

2. Statutes that Give Courts Discretion to Act Based on the Best Interests of the Child

Many jurisdictions permit withdrawal of consent where the court determines it is in the “best interests” of the child.\textsuperscript{153} Just what is

\begin{itemize}
  \item 146. \textit{Id.} at 1366.
  \item 147. \textit{Id.} at 1377-78.
  \item 149. \textit{Cades}, 432 A.2d at 1016.
  \item 151. \textit{Id.} at 193.
  \item 152. \textit{Id.} at 195.
  \item 153. \textit{See, e.g.,} ALA. CODE § 26-10A-14 (1975); ARK. CODE ANN. § 9-9-209 (Michie 1987); CAL. CIV. CODE § 226a (West 1982); DEL. CODE ANN. tit. 13, § 915 (1974); IND.
meant by this standard is often a matter of debate. In a seminal work on the subject, psychologists J. Goldstein, A. Solnit, and A. Freud define this term as what would be least detrimental to the child’s development of a sense of security, emotional well-being, continuity in care, and opportunity to bond with at least one adult who is or will become the child’s psychological parent.\textsuperscript{154} They argue that once a child is being nurtured in a loving home, even an adoptive one, it is absolutely not in the child’s best interests to be removed and placed in a new home, even one of a birthparent.\textsuperscript{155}

The New Hampshire Supreme Court upheld an adoption on “best interest” grounds. The court considered the effect that the withdrawal of consent would have on the child, including the trauma the child could experience by repeated moves, (e.g., separation anxiety), and the age of the child, and found that in light of the psychological impact that an interference with bonding would have on the child, the child’s best interests would be served by not allowing a withdrawal of consent by the biologic parents.\textsuperscript{156}

\textbf{3. Statutes that Permit Revocation Only in Cases of Fraud}

Other jurisdictions make consent to adoption irrevocable unless the biologic parent can prove that the consent was procured through fraud or duress.\textsuperscript{157} Duress was found to vitiate a previous consent to adoption in the case of \textit{In re G.},\textsuperscript{158} where the court returned an infant to his birthmother noting that consent must be given free from duress and that, in adoption cases in general, there is a shadowy border area known as “force of circumstances.” In this case, the force of circumstances was a marriage separation and financial difficulties.

Several other cases have been decided in favor of the birthmother, where the court has found that consent to adoption was not given freely, though due to circumstances not in the control of

\textsuperscript{154} JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTEREST OF THE CHILD 21 (1979).
\textsuperscript{155} Id.
\textsuperscript{156} In re Adoption of Baby C., 480 A.2d 101 (N.H. 1984); cf. \textit{In re T.E.B.R.} and M.R., 664 S.W.2d 609 (Mo. Ct. App. 1984).
\textsuperscript{157} See, e.g., ARIZ. REV. STAT. ANN. § 8-106(E) (1993); FLA. STAT. ANN. § 63.082(5) (West 1993); ILL. ANN. STAT. ch. 750, para. 50/11 (Smith-Hurd 1988); KAN. STAT. ANN. § 59-2102(c) (1993); MINSN. STAT. ANN. § 259.24(6a) (West 1980); VA. CODE ANN. § 63.1-255 (Michie 1993); W. VA. CODE § 48-4-5(a) (1993); WYOM. STAT. § 1-22-109(d) (1993).
\textsuperscript{158} 389 S.W.2d 63 (Mo. Ct. App. 1965).
the adoptive parents. Generally, in these cases the biologic parents were allowed to reclaim the children they placed for adoption due to fraud or coercion practiced by their own relatives.

For example, in the case of *In re Female F.D.*, the birthmother gave consent for the adoption of her child under constant pressure to do so by her family. The court allowed her to change her mind and reclaim the child. But in doing so, the court also noted that "[n]otwithstanding a finding of duress which would invalidate the consent, there has been no showing of any unfitness or other circumstance on the part of the natural mother which would prevent her from withdrawing her consent." Thus, the standard for terminating parental rights, namely unfitness, was also used to sanction revocation of consent.

In *Adoption of Robin*, the birthmother consented to adoption after her stepmother threatened to kill both her and her father if she refused. The court deemed this grounds for voiding the adoption.

Other cases have been decided in favor of the biologic parents due to some act of fraud or coercion practiced by the adoptive parents, their agents, or some other person acting on their behalf. In *In re A.S.*, the biologic parents of a child were allowed to vacate an order relinquishing their parental rights and consenting to adoption upon a showing that Child Protective Services, through its case worker, deceived them into consenting to the adoption. Through acts, omissions, and concealments, the social worker misinformed the par-

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160. 433 N.Y.S.2d 318.

161. Id. at 323.

162. 571 P.2d 850 (Okla. 1977).

163. See Huebert v. Marshall, 270 N.E.2d 464 (Ill. App. Ct. 1971) (holding that consent given by a birthmother while under the influence of weight-loss medication was not freely given); *In re. J.M.P.*, 528 So. 2d 1002 (La. 1988), later proceeding, 536 So. 2d 424 (holding that consent given after birthmother's parents refused to allow her to bring baby to live in their home was not freely given); Wuertz v. Craig, 458 So. 2d 1311 (La. 1984) (holding that consent given upon grandmother's threat of criminal child abuse charges—which charges were not even substantiated—was voidable). But see *In re Danielson*, 427 N.Y.S.2d 572, 575 (1980) (finding that the birthmother surrendered her child due to her husband's coercive threat to leave her if she kept the child and ruling that her motive for acquiescence was her love for her husband, which she chose over the love for her child).

ents that their child had cerebral palsy, which induced them to consent to the adoption. Such fraud, practiced by an agent requesting consent, undermined the integrity of the relinquishment, and was deemed sufficient grounds for vitiation.

In the case of In re Cheryl E., a birthmother gave consent only after the adoption social worker took improper initiative in pursuing the consent, including visiting the mother's home before birth and without notice, refusing to meet with the father at the hospital, obtaining consent in a parked car during a pressured meeting, and misrepresenting that signing the consent papers would still allow the mother one year in which to change her mind.

In Sorentino v. Family and Children's Society of Elizabeth, an adoption agency supervisor coerced the birthmother into signing a surrender of her child for adoption by threatening her with harassment and litigation, and failing to properly inform her of her options for care of her child other than irrevocable surrender or return to the mother. In such cases it is easier to accept the courts' rulings because the adoptive parents were, in a sense, estopped from benefitting from the misdeeds of agents acting on their behalf.

In In re Jackson, the court refused to reverse a biologic mother's surrender of her three children because she failed to prove that her consent was obtained through fraud or duress on the part of the party before whom such consent was acknowledged. In this case, there were no adoptive parents yet, but neither the judge nor the Illinois Department of Children and Family Services induced the mother, through wrongful act, threat, or fraud, to surrender her parental rights.

In In re Adoption of Kindgren, the court affirmed an order to vacate the biologic mother's consent to adoption. Evidence that the mother had been given $10,000 by the adoptive parents and grandmother in exchange for her consent to the adoption was sufficient to establish that the consent was executed fraudulently and as a result of duress, as practiced by the adoptive parents and their agent. The court opined that such a "payment of a consideration for the relinqu-

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165. 207 Cal. Rptr. 728 (Ct. App. 1984).
168. Id. at 1369.
169. Id. at 1370.
171. Id. at 488.
quishment” was in violation of a public policy against the buying or selling of a human being.¹⁷²

In Meadows v. East (In re Adoption of Baby Boy East), ¹⁷³ the court reviewed a lower court ruling that allowed a biologic mother of a newborn baby to reclaim her child from the adoptive parents. On appeal, the court determined that since the mother gave her consent freely and voluntarily, absent any improper actions by the adoptive parents or others acting on their behalf, the revocation was of no legal effect.¹⁷⁴

As the court in McCurdy v. Albertina Kerr Homes, Inc. inferred,¹⁷⁵ the fraud/duress benchmark can only lead to the demise of the institution of adoption altogether. Indeed what biologic parent ever consents to the adoption of her child in the absence of some degree of duress in circumstances, persuasion by a third party, or emotional turmoil?

V. PROPOSAL

In 1986, New York State Senator Michael J. Tully, Jr., sponsored a bill to amend the New York Domestic Relations Law in regard to voiding consent to an adoption that resulted from fraud, duress, or coercion.¹⁷⁶ The bill, which has remained in legislative committee for years, would allow consent to adoption to be voided only when the fraud, duress, or coercion was practiced by the adoptive parents, their agents, or any other person acting on their behalf, or for lack of mental capacity on the part of the person giving consent at the time the consent was given. This restriction is currently the law in Alabama,¹⁷⁷ Illinois,¹⁷⁸ and Washington.¹⁷⁹

¹⁷². Id. at 489 (quoting Gray v. Maxwell, 293 N.W.2d 90, 95 (Neb. 1980)).
¹⁷⁴. Id. at 763; see also Kinkead v. Lee, 509 So. 2d 247 (Ala. Civ. App. 1987).
   The consent or relinquishment, once signed or confirmed, may not be withdrawn except . . . upon a showing that the consent or relinquishment was obtained by fraud, duress, mistake, or under influence on the part of a petitioner or his agent or the agency to whom or for whose benefit it was given. . . . The court shall not apply any presumption or preference in favor of the natural parents in reviewing an action brought under this section.
   Id.
   A consent to adoption by a parent, including a minor . . . shall be irrevocable
In Illinois, the legislative aim in adopting this restriction on revocation was to bolster the public policy favoring stability and certainty in adoptions. It also recognized the need to provide a secure environment for an adopted child and to protect the parties from the complex psychological problems inherent in permitting a reversal of a valid adoption. In Kathy O. v. Counseling & Family Services, the court upheld the legislative aim in refusing to set aside an adoption agreed to by the birthmother under coercion by her parents. The court held that duress or fraud by a party other than the adoptive parents or their agents, does not affect the validity of consent.

When a birthmother seeks to void consent to an adoption and the child is ultimately removed from the home she has known since birth and moved into a strange home, the psychological implications for the child are grave. Psychologists report increased incidence of anacritic depression, whose symptoms include social retardation and depressive withdrawal in these children. In such cases, the best interests of the child appear to be sacrificed, not served. A legislative pronouncement with uniform application on the acceptable grounds for revocation of adoption consents would ensure that the child’s interests are neither balanced against, nor subordinated to, the adults’ interests in the case. Proposals that call for a shortening of the time period in which adoption revocation disputes must be resolved appear on the surface to be well-founded, but in reality exhibit another bias against adoptive parents, because often, custody decisions are based on the development of a strong bond over time. With shorter resolution periods, the chance for legally recognized psychological bonds to form is lessened.

unless it shall have been obtained by fraud or duress on the part of the person before whom such consent, surrender, or other document equivalent to a surrender is acknowledged . . . or on the part of the adopting parents or their agents.

Id.

179. WASH. REV. CODE ANN. § 26.33.160 (West 1993) ("Within one year after approval, a consent may be revoked for fraud or duress practiced by the person, department, or agency requesting the consent, or for lack of mental competency on the part of the person giving the consent at the time the consent was given.").


182. See Zolla and Strick, supra note 125, at 20.

183. Id. But see Nerys Patterson, Accidental Justice for Jessica DeBoer, N.Y.TIMES, July 13, 1993 (arguing that the pain of being rent from one’s biologic parents is greater than the pain of being removed from an adoptive home).

184. See generally GOLDSTEIN ET AL., supra note 154.
VI. CONCLUSION

Most modern adoption statutes are predicated upon the goal of protecting the nebulous "best interests" of the child. They aim to protect the rights of birthmothers by providing that consent to adoption must be given according to strict statutory requirements. They also aim to ensure the safe and permanent care of children. However, the statutes, as applied by the courts, lack uniformity. The wide divergence in judicial decisions in this area stems in part from vague statutory language, such as the notion of "best interests." Because statutes are often vague and not applied uniformly, the fate of adopted children and their parents is usually left to the discretion of individual judges. Thus, the role the courts play in the evolution of social policies regarding adoption and parenting is distinctive, while overlapping that of the legislative branch.

In 1991, a high school student named Gina Pellegrino fled a Connecticut hospital where, registered under a phony name, she had hours before given birth to a baby girl. A search was made, through news publications and other means, for the baby's parents, but no one came forward and no one was found. Thus, Pellegrino's parental rights were terminated and the abandoned baby was placed for adoption. Four months later, Pellegrino surfaced and sued to regain custody, which would mean taking the baby out of the only secure home she had ever known and sending her to live in a homeless shelter. In a decision that can only be explained by the judge's blind worship of the mystique of blood ties, that is just what the court did. Clearly, many courts rule in adoption custody cases for paternalistic rea-
sons, such as to protect a perceived exploited birthmother and to preserve the mythically revered biologic bonds of parenthood. In the interests of preserving the value of self-determination, however, courts should refrain from acting for paternalistic reasons in this area, especially in the absence of legislative direction.

The politics manifest in the adoption scheme are often difficult to reconcile, with “conservatives” often waiving pro-adoption banners merely as a pretextual subversion of abortion rights and “liberals” denigrating adoption as exploitive, often as a pretextual elevation of abortion rights.

As Bartholet posits, ideally, adoption should be viewed as a critical aspect of a woman’s reproductive freedom, which adds to the realm of “choice” by enabling those who become pregnant but do not want to parent, to give their children to those who want to be parents. Women should be able to make this choice without being assaulted by the message that they are doing something gravely wrong, or that the only way to achieve a “sense of personhood” is to achieve a biologic pregnancy at any cost.

The decision to relinquish parental rights and place a child for adoption is complex, considered, and certainly painful, resulting often from a long emotional and physical siege of frustration, exhaustion, and ambivalence. Absent fraud on the part of those benefitting from this decision, when a woman is allowed to change her mind, by claiming that she did not understand the effects of her action or that she was lacking in those faculties necessary to make such an important decision, she contributes to the subordination (political, rather than economic or sexual) of all women. Concededly, the mother in such a situation does not likely consider what her actions will mean to the perpetration of gender oppression. She simply wants her baby back. But the role that legal institutions play in impeding or producing social change is unique and far-reaching. A paternalistic legal system that steps in to save a woman from her feeble-minded mistakes disempowers women and contributes to a cultural denigration of adoption. Most significantly, however, such a system causes society to lose sight of a crucial fact: Adoption makes children part of families.

191. Id.
192. BARTHOLET, supra note 1, at xxi.
193. Id.
194. Id., at xxii.
who want them—families created with tremendous effort, intent, and passion. Rethinking revocation benefits these children.

Mindy Schulman Roman