Funded Adoption: A "Viable" Alternative to Abortion

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I. THE ILLUSION OF FREE CHOICE—ABORTION, ADOPTION, AND ECONOMIC REALITY

Since 1973, when the United States Supreme Court decided Roe v. Wade and thus “legalized” abortion, the simple expedient of elective abortion has become the popular method of mastering an otherwise awkward situation—unwanted pregnancy. It is impossible to estimate the number of American women who accept the medical, social, and financial risks of both carrying to term a pregnancy characterized as “unwanted” and then keeping the child, for better or worse. Nevertheless, when motherhood is not chosen, abortion is far more common than adoption—the usual solution of an earlier generation.

Even if a woman has justifiable reasons for rejecting the

2. Roe v. Wade held that the power of the state to regulate abortion through criminal statutes is limited by the due process clause of the fourteenth amendment. This limitation is greatest during the first trimester of pregnancy, when a woman’s right of privacy, including the right to terminate her pregnancy upon consultation with her physician, cannot be overridden by the state. As the pregnancy enters the second trimester, the state’s interest in promoting the health of the mother becomes compelling and regulations reasonably related to protecting maternal health will be upheld. When the fetus finally reaches the stage of viability, the state’s interest in protecting the potential human life becomes compelling, and the state may regulate or even prohibit abortions, except those medically necessary to preserve the life or health of the mother. Id. at 164-65.

According to an official from the Department of Health, Education, and Welfare (HEW), there were about 150,000 adoptions in 1973, the most recent year for which fairly accurate data are available. Opportunities for Adoption Act of 1977: Hearings on S. 961 Before the Subcomm. on Child and Human Development of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. 24 (1977) (statement of Saul Rossoff, Acting Director, Office of Child Development, HEW) [hereinafter cited as S. 961 Hearings]. The figures provided by HEW do not distinguish adoptions of newborn “unwanted” infants from adoptions of other categories of children. More detailed data are available on adoptions in 1971 and 1972. See Adoption and Foster Care, 1975: Hearings Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare, 94th Cong., 1st Sess. 591-618 (1975) (data collected by HEW) [hereinafter cited as Adoption and Foster Care Hearings].
heavy responsibilities of motherhood, she may find it difficult to embrace the modern alternative. To her, abortion may seem a repugnant and desperate course. Still, in a society oriented toward the simple and expedient, abortion has the advantage of being a very pragmatic solution. To further weight the scales in its favor, abortion is cheap relative to the high cost of pregnancy and childbirth. For the woman with limited financial means, the expensive alternatives may seem hopelessly remote, and abortion looms as the only feasible option. As the field of alternatives narrows, this woman, often without a supportive partner or family, may fear that a struggle against the insistent pressure of circumstances pushing her toward abortion would be foolish or financially disastrous. For the unexpectedly pregnant indigent woman, economic reality is a harsh and insensitive dictator.

Legislative and judicial complications have seriously distorted the economic factors involved in the choice between abortion and the alternatives of motherhood or adoption. The pendulum of the law has swung both ways. The upswing came shortly after Roe v. Wade, when states began to pay the costs of elective abortions for indigent women, usually with federal funding under Medicaid programs.4 Within four years of Roe v. Wade nearly all states paid for nontherapeutic abortions for Medicaid-eligible women.5 In 1976 more than $60,000,000 from Medicaid and other social services programs helped fund over a quarter-million abortions.6 But as the pendulum returned, this generous source of funds was severed. Amendments to the 1977, 1978, and 1979 congressional appropriations to the Department of Health, Education, and Welfare (HEW) have cut off all federal funds administered by HEW that would otherwise go to pay for nontherapeutic abortions.7 In addition, in Maher v. Roe,8 the Supreme Court held

4. The Medicaid statute, title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396a (1976), does not specifically require or prohibit the use of federal program funds for abortions. Rather, it lists general categories of medical services that must be provided by a participating state, permitting the state to limit or expand coverage within these general categories. See note 72 infra; Beal v. Doe, 432 U.S. 438, 444 (1977).

5. See 5 FAM. PLAN./POPULATION RPTR. (AGI) 11 (1976) (only four states did not provide Medicaid assistance for elective abortion as of Feb. 1976); 3 FAM. PLAN./POPULATION RPTR. (AGI) 113 (1974) (1974 study reported only ten states that restricted Medicaid for elective abortion).

6. 6 FAM. PLAN./POPULATION RPTR. (AGI) 59 (1977).

that a state can constitutionally refuse to provide funding for nontherapeutic abortions even though federal funds might be available, and even though the state pays the cost of therapeutic abortion or normal childbirth for eligible women. After the *Maher* decision and Congress' funding cutoff, many states immediately followed the federal example.

It has been strongly argued that the cutoff of public funding of elective abortions will have a serious detrimental effect on indigent women. The initial pressure of economic reality will easily extinguish hopes of attempting motherhood or adoption. Furthermore, in many cases a low-income woman will be unable even to scrape together enough cash for a private abortion. Charitable institutions, if available, may provide help. But without public or charitable support, economic pressure may further violate the freedom of choice of a poor woman by forcing her to submit to the physical and psychological dangers of illegal, but cheap, "back alley" abortion or "black market" abortion when the life of the mother is endangered. The 1978 and 1979 amendments also allow funding in reported cases of rape or incest, or when serious physical health damage to the mother would otherwise result.


HEW issued the required regulations, which were finalized after the Dec. 9, 1977, passage of the 1978 appropriations amendment. 43 Fed. Reg. 4570 (1978) (to be codified in 42 C.F.R. §§ 50.301-.310, 441.200-.208; 45 C.F.R. § 228.92).

9. Id. at 470, 490.
10. See 6 FAM. PLAN./POPULATION RPTR. (AGI) 58 (1977). Within a few months of the *Maher* decision, a majority of states had stopped payments for elective abortion. Id. In addition, several states began legislative consideration of state bans on elective abortion funding. See 7 FAM. PLAN./POPULATION RPTR. (AGI) 10 (1978). Illinois became the first state to enact such a law following *Maher*. Act of Nov. 17, 1977, P.A. 80-1091, § 1, ILL. ANN. STAT. ch. 23, § 5-5. (Smith-Hurd Supp. 1979).
12. Before *Roe v. Wade*, abortions performed by physicians were illegal in most
adoption,13 the only two “alternatives” remaining.

Opponents of the ban on publicly funded abortion thus raise the spectre of widespread back alley abortion to frighten Congress and the states into resurrecting funded elective abortion for poor women.14 Such a return to the previous state of affairs would tend to alleviate part of the problem for indigent women who view

states. In the post-Roe v. Wade era, however, “illegal abortion” refers to the procedure when performed by one other than a licensed physician. An illegally performed abortion presents a much greater degree of danger to the woman because of uncontrolled, often inadequate, medical care. Increased mortality from self-induced abortions, or abortions performed by illegal abortionists, is likely. See Beal v. Doe, 432 U.S. 438, 455 n.1 (1977) (Marshall, J., dissenting); Lincoln, supra note 11, at 213; Right Without Access?, supra note 11, at 493.

Illegal abortions will presumably be less expensive than legal abortions obtainable in the same area, simply as a matter of market competition. See 432 U.S. at 455 n.1 (Marshall, J., dissenting). 13. “Black market” adoption generally involves profiteering on the part of a “broker”—often an attorney or a physician—who contacts a pregnant woman interested in placing her child for adoption. The broker also locates a couple hoping to adopt, usually a couple that has been discouraged and unsuccessful at attempts to adopt through authorized agencies. The couple must be willing to pay cash, often many thousands of dollars, to obtain a child. The broker handles the actual adoption arrangement. Although his “fee” generally covers all medical and living expenses of the mother, plus any court costs, the wolf’s share is retained by him “for services.” See generally Adoption and Foster Care Hearings, supra note 3, at 26-36 (joint statement of Joseph H. Reid, Executive Director, Child Welfare League of America, Inc., and Elizabeth S. Cole, Director, North American Center on Adoption Special Project, Child Welfare League of America, Inc.); Article, Black Market Adoptions, 22 CATH. L. REV. 48 (1976).

Black market “babyselling,” while not always illegal, presents a difficult moral and ethical problem. This is especially true since parents who adopt through the black market have usually failed in earlier attempts to adopt through authorized agencies, often because they lack suitability for the role of adoptive parents. See Adoption and Foster Care Hearings, supra note 3, at 32 (joint statement of Joseph H. Reid, Executive Director, Child Welfare League of America, Inc., and Elizabeth S. Cole, Director, North American Center on Adoption Special Project, Child Welfare League of America, Inc.).

Black market adoption should be distinguished from “independent” adoption placement, often referred to as “gray market” adoption. Independent adoption is placement arranged outside agency channels, either by the mother herself, or perhaps by her clergyman, lawyer, or physician. The element of profiteering is absent. The adoptive parents may have to provide some of the incidental expenses, such as reasonable lawyer’s fees, or in some cases a portion of the mother’s medical expenses, but these costs are small when compared to the cost of a black market adoption. Independent adoption may not provide effective screening for suitability of potential adoptive parents, but being well-intentioned, it does not suffer from the immoral and unethical taint of the black market. See generally Grove, Independent Adoption: The Case for the Gray Market, 13 VILL. L. REV. 116 (1987).


Another possible “spectre” for the pro-funding advocates could be black market babyselling—an obvious, even profitable alternative for a desperately poor pregnant woman.
abortion as an acceptable solution to unwanted pregnancy. But it would do nothing to help those financially limited women who are morally opposed to abortion. For these women, there may be no realistic alternatives. The subtle force of the societal, and perhaps institutional, bias\textsuperscript{15} in favor of the simplicity and expediency represented by abortion tugs insistently. But when swelled by the often severe economic pressure pushing inexorably in the direction of illegal abortion and black market adoption, this force becomes overwhelming.

It is the purpose of this Comment to suggest an acceptable alternative for women caught between the societal and institutional pressure simply to terminate an unwanted pregnancy in abortion, and the sometimes intense economic pressure that may ultimately force them into black market adoption or illegal abortion. The alternative is \textit{publicly funded adoption}. Such a program would cover the expenses of prenatal, natal, and postpartum care for the woman; infant health care; counseling and referral services; and all costs of adoption, including in selected cases subsidies to adoptive parents. For low-income women, the totality of these costs might preclude adoption as a reasonable alternative to abortion. But with public financial assistance, adoption may be the ideal solution for many women.\textsuperscript{16} Administered and supported by federal and state agencies and private organizations, adoption could serve to counterbalance any abortion bias. Furthermore, it would make illegal abortion the costly choice and black market adoption unnecessary and senseless. Funded adoption would thus provide the acceptable alternative to abortion

\textsuperscript{15} Of course, such an institutional bias is extremely elusive and difficult to substantiate. The orientation of a specific agency or organization will naturally tend to reflect the local climate—rural or urban, religious or eclectic, conservative or liberal. However, evidence of this bias at the federal level is suggested in a statement by Connie J. Downey, Director of Women's Action Program, HEW, that the literal alternatives to abortion are suicide, motherhood, and madness. Abortion Alternatives Cited in HEW Memo, Washington Post, Nov. 27, 1977, at A-2, col. 1 (quoting an internal memo from Ms. Downey to HEW Secretary Joseph A. Califano, proposing the disbanding of an HEW task force she headed to research alternatives to abortion).

On the other hand, the recent cutoff of public funding for abortion at both federal and state levels may evidence a trend away from a pro-abortion bias, at least by institutions that are politically responsive. However, the regulations issued by HEW implementing the cutoff of federal funds are quite liberal in defining the "rape or incest" and the "physical health of the mother" exceptions to the funding ban. See 43 Fed. Reg. 4570 (1978). See also 124 Cong. Rec. H5368-70 (daily ed. June 13, 1978) (remarks of Rep. Hyde and Rep. Michel).

\textsuperscript{16} Effective family planning may, of course, be a better solution than either abortion or adoption. However, the focus here is on those situations in which pregnancy is already a reality—situations that for lack of prevention must seek after the cure.
which motherhood, in a woman's personal circumstances, may not.

This Comment will discuss several important considerations bearing on legislative implementation of the funded adoption alternative. Section II details the concepts and components of a complete and effective funded adoption program. Section III outlines the current stance of Congress with regard to the need for abortion alternatives, and in particular discusses enacted and proposed legislation that has involved the funded adoption alternative. Section IV examines existing laws and social services programs that presently provide, or have the capacity to provide, funded adoption services. Finally, Section V briefly discusses some additional issues of significance to a decision to enact a funded adoption program—notably cost, difficulties of implementation, and constitutionality.

II. THE FUNDED ADOPTION ALTERNATIVE

Funded adoption, as advocated by this Comment, would be most workable as a state-administered program, financed in large part through federal matching grants. A new title or subtitle to the Social Security Act\(^\text{17}\) could serve as the legislative vehicle to provide federal financial participation and congressional policy guidelines. The Secretary of HEW would be responsible for implementation and specific regulation in disbursement of federal funds to qualified state programs. Private nonprofit organizations with qualified programs could also be eligible for federal funds. States and private organizations would have discretion to tailor the details of their programs to suit local needs, but the basic federal pattern would need to include four essential components: (1) counseling and referral services, (2) maternal health care, (3) infant health care, and (4) adoption subsidy.

A. Counseling and Referral

The first necessary component of funded adoption is a refined counseling and referral network. Counseling services would be the contact point for a woman seeking assistance under a funded adoption program, perhaps upon referral from another entity, such as her clinic or physician or another social services organization. Once a woman gains access to the counseling network, she would be guided smoothly and comfortably through the

entire program. In this regard it is very important to safeguard against any tendency the program might have to overrule the choices and personal values of the individual. Statutory or regulatory language, therefore, should require counseling staffs to disclose full details of the program, including the fact that receipt of benefits imposes no obligation to participate fully in the program or follow through with the adoption. Misunderstanding on this point could seriously damage the value of the entire program. Counseling must inform the woman of available benefits, yet allow and encourage her to use her own judgment in deciding whether to accept the alternative of funded adoption. In the event she decides against the adoption alternative, the woman should be guided out of the program and referred to other sources of assistance where appropriate.

Counseling, available also to the woman’s partner or family, would be necessary to all stages—from initial contact with the program, through pregnancy, childbirth, and the adoption process. After adoption, the emphasis would shift to the adoptive family. An integrated counseling system would provide both continuity and the comfort of familiarity to program participants, and would thus be vital to the overall effectiveness of the program.

In conjunction with the counseling system, an adoption referral network would also be necessary. Locating suitable adoptive parents, the function of this network, would be greatly facilitated if a nationwide computer referral network were developed. A state, while administering the program within its own boundaries, would be able to draw from a national pool in matching adoptive parents to child—no easy task considering the diversity

18. This type of “disclosure” caveat was included in S. 961, 95th Cong., 1st Sess. § 103(a)(2), 123 Cong. Rec. S17872 (daily ed. Oct. 27, 1977) [hereinafter cited as S. 961], a Senate proposal that in several respects resembles funded adoption as advocated by this Comment. See notes 44-50 and accompanying text infra. Provision of services under the Senate proposal would occur only after the woman has “been informed in writing that the acceptance of such services does not in any way constitute an obligation to proceed with adoption.” S. 961, supra, § 103(a)(2).


of factors, such as familial background, race, and health, that are generally considered in the adoption process.

Together, the counseling and referral systems would function to correlate the various components of the funded adoption programs, provide ready access to its benefits, and ensure comfortable transition through the stages of the program. An efficient counseling and referral network, in order to fulfill these purposes, must be appropriately funded, adequately staffed, and provided with full access to all centrally promulgated guidelines and information.

B. Maternal Health Care

Without public or charitable assistance, a low-income woman may be foreclosed from the adoption alternative simply because she or her family cannot afford the doctor bills. Costs of maternal health care are high,21 and the possibility of complications makes the financial risks much greater. A poor woman's only route to adoption, if she is to escape these costs, may lead through the black market. Thus, an essential element of funded adoption is the provision of all pregnancy-related expenses, including the costs of prenatal, natal, and postpartum care.12

Funded adoption would be most effective if financial assistance for maternal health care were authorized and administered directly through the program. The temptation would be strong to simply cross over to one or more of the various existing medical assistance programs, such as Medicaid,22 as a ready source of funds. For the sake of maintaining the integrated and comprehensive nature of the funded adoption alternative, however, a new framework for maternal health care assistance should be set up, with eligibility requirements and other control aspects based on the specific purposes of the funded adoption program.

21. See The Cost of Having a Baby, 1978, GOOD HOUSEKEEPING, Jan. 1978, at 170. This article gives a regional breakdown of hospital, physician, and other normal pregnancy and delivery medical expenses. Total average costs range from $924 (midwife delivery, New York City) to $2520 (hospital delivery, Boston). The average cost nationwide is about $1300-1500.

22. Although the major pregnancy-related expenses are medical, provision for further incidental expenses, such as nutritional care, maternity wardrobe, and childbirth training would also be appropriate. Additionally, pregnancy may make it difficult or impossible for a woman to continue in a particular employment, especially in later months. In such cases, the provision of "pregnancy disability" benefits might lessen the impact of this income impairment.

23. For a discussion of some of these alternative sources of funding for maternity care, see notes 73-76, 91-94 and accompanying text infra.
C. Infant Health Care

If adoption is planned, but adoptive parents are not readily available, the significant costs of newborn infant care are normally paid by the natural parent or parents until adoption can finally be arranged. These immediate costs can become a financial burden on a low-income woman and her family.

The burden of infant care is compounded drastically in the event of health complications. For example, intensive care for a premature baby could cost much more than an uninsured, average-income family could afford, and would be an impossible expense for low-income parents. Congenital or early-developing health defects could also severely tax natural parents' financial resources.

Funded adoption should provide assistance that meets the expenses of child health care in order to remove a significant economic barrier to the adoption alternative. The same apparatus that disburses maternal health care assistance could operate to provide infant health care. Again, already existing alternative sources of funds may prove tempting, but the same argument mentioned in regard to maternal health care applies. In order to be comprehensive, a funded adoption program must be self-sustaining, depending on no collateral program for any of its essential component services.

D. Adoption Subsidy

Funding of the actual adoption process involves two types of expenses. The first type consists of nonrecurring expenses, notably court costs, attorney fees, and agency fees. Usually these

24. In an attempt to reduce costs and increase availability of specialized care for high-risk pregnancies and premature infants, an experiment in regionalization of perinatal centers and neonatal intensive care units (ICU's) is currently underway in parts of the United States. Helping Hand for the Newborn, Time, Sept. 11, 1978, at 93. Nevertheless, “a newborn’s stay in an intensive care unit can run into tens of thousands of dollars.” Id. A study of 75 premature infants (1000 grams or less) admitted to the Neonatal ICU at Cedars-Sinai Medical Center in Los Angeles showed average total cost for non-surviving infants to be $14,236, while average total cost for surviving infants was $40,287. Pomerance, Ukrainski, Henderson, Nash, & Meredith, Cost of Living for Infants Weighing 1,000 Grams or Less at Birth, 61 Pediatrics 908, 909 (1978).

25. Child health care benefits, in addition to specific medical expenses, should include routine newborn and developing-infant care (for example, immunization and well-baby checkups, diapers and clothing, nutritional care, and day care). In extreme cases, provision could also be made under this heading for basic support costs (food and shelter).

26. For a discussion of some alternative sources of funding for child health care, see notes 74, 91-94 and accompanying text infra.

27. The total amount of these nonrecurring expenses varies, depending on the type
costs are assigned to the adoptive parents, and program funding of these one-time expenses would serve the purposes of funded adoption by removing this economic obstacle when it proved significant for a particular adoptive couple.

The second type of expense includes the child support expenses borne by the adoptive parents. Although these costs, as well as the nonrecurring expenses, are not a direct economic burden to the natural mother or family, the indirect effect—possible difficulty in finding adoptive parents with sufficient financial resources—may serve as a deterrent to the adoption alternative. As discussed in greater detail in Section IV, the purposes of a direct adoption subsidy to the adoptive parents are to create a larger pool of potential adoptive parents and to ensure that all children, despite special needs, handicaps, or other factors tending to discourage prompt placement, will be adopted as soon as possible. Selective adoption subsidy would allow couples with lower incomes, but great desire and parental ability, to adopt. Subsidies would be especially useful in alleviating the extra cost burden on adoptive parents imposed by the special needs, medical or otherwise, of some children. Adoption subsidies cannot substitute for love, but they can meet physical needs that loving adoptive parents might not otherwise be able to provide.

The importance of adoption subsidy becomes clear when it is observed that adoptive placement of minority children may be

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29. Adoption subsidy would be selective in the sense that only some of the funded adoption situations would include this final component. In the majority of cases adoption could be accomplished without program subsidy because the newborn infant would be in demand. Adoption subsidy would only be implemented as needed to ensure adoption in unusual cases, particularly those where the infant has special medical or other needs.

30. More than three-fourths of all nonrelative adoptions (those not by stepparents or other relations) in the United States are arranged by public or private adoption agencies. Adoption and Foster Care Hearings, supra note 3, at 592, 596; J. McNamara, supra note 27, at 45. Agencies have requirements for potential adoptive parents that include such factors as age, marital status, health, religion, and financial status. J. McNamara, supra note 27, at 51-56. Although financial requirements were often prohibitive for low- and middle-income families in the past, the recent trend emphasizes the ability of adoptive parents to manage well what they do have, rather than their specific income or wealth. Id. at 53, 103. In part, this trend toward flexibility in financial requirements for adoption is a result of state adoption subsidies. Id. at 53-54.

31. There is no element of profit in adoption subsidy. The subsidy would cover only those expenses of the child that the adoptive parents could not afford. An example would be extreme medical expenses incurred from operations to correct a birth defect such as a cleft palate.
more difficult than placement of Caucasian children.\textsuperscript{32} Subsidies would facilitate the adoption of minority children by expanding the pool of adoptive parents to include more minority group couples.\textsuperscript{33} Hopefully, the inclusion of adoption subsidy as a component of funded adoption would inhibit any tendency of the program to be of less benefit to minority groups, who may be most in need of the adoption alternative.\textsuperscript{34}

Adoption subsidy is thus essential to an integrated program of funded adoption because it ensures that children with special medical or other needs, or minority children, will be readily adopted. Without this assurance that her child will be adopted by suitable, loving parents regardless of health, race, or other factors, a woman may be unwilling to consider the funded adoption alternative.

E. Possible Additional Components of Funded Adoption

Funded adoption essentially benefits low-income women, those who are most susceptible to economic pressure to submit, against their moral and ethical scruples, to legal or illegal abor-

\textsuperscript{32} Healthy nonwhite infants are not as difficult to place as they once were. See J. McNAMARA, supra note 27, at 35-37. However, nonwhite children with physical handicaps or other special needs are not readily adoptable. See Adoption and Foster Care Hearings, supra note 3, at 438-43 (statements of Evelyn K. Moore, Executive Director, Black Child Development Institute, and Alfred B. Herbert, Jr., Adoption Project Director, Black Child Development Institute). Furthermore, minority awareness groups have recently come to consider transracial adoption inappropriate, largely because it tends to denigrate a child’s racial heritage. See J. McNAMARA, supra note 27, at 37-38. See generally Adoption and Foster Care Hearings, supra note 3, at 438 (statement of Evelyn K. Moore, Executive Director, Black Child Development Institute). Because of the resultant hesitancy on the part of agencies to arrange transracial placements, the bulk of minority child adoptions must occur within minority communities. Recently developed black adoption programs have had some success in placing black children with black families. See id. at 440; Nelson, Tayari: Black Homes for Black Children, 55 CHILD WELFARE 41 (1976) (San Diego Adoption Services program, Tayari, established to provide greater outreach to black community to increase adoption of black children). Nevertheless, there is still a great need for more adoptions within the minority communities. See S. 961 Hearings, supra note 3, at 159-60 (statement of National Urban League/Interagency Adoption Project); Haring, Adoption Trends: 1971-1975, 55 CHILD WELFARE 501, 501-02 (1976); Haring, Adoption Trends, 1971-1974, 54 CHILD WELFARE 524, 524-25 (1975). For a general discussion of the problems encountered in transracial adoption, see J. McNAMARA, supra note 27, at 35-39; Katz, Transracial Adoption: Some Guidelines, 53 CHILD WELFARE 180 (1974).


tion or to black market adoption. Some of the benefits of funded adoption, however, could be extended to a broader group of women. The costs associated with childbirth and adoption in reality may fall more heavily on middle-income women, who may be ineligible for public or charitable aid available to those with lower incomes. Therefore, it might be appropriate to provide some of these women with maternal and child health care benefits. The total cost of the program would increase as more women were included within eligibility limits; but such an expanded program would attract those women who could easily afford the cost of private abortion, yet who as a matter of conscience would prefer an inexpensive alternative.

Counseling and referral services could be made universally available, if for no other reason than to encourage informed choice among abortion and the alternatives, particularly adoption. In addition, nationwide adoption referral would benefit if children from all groups, not just from lower income groups, were included in the pool of adoptable children. Enlarging the total pool of both children and potential adoptive parents increases the likelihood of early matching of parents to child.

Finally, a complete in-state funded adoption program could be financed and administered by a state itself, without federal financial participation or regulation. It would simply require allocation of resources at the state level. The four basic components of the program would be included, possibly with provision for tapping into a wider regional or national pool of children and adoptive parents.35

III. CONGRESSIONAL RESPONSE—LIMITED, BUT LAUDABLE

Resisting any ostrich-like instinct, Congress has not hidden its head in the sand at first sight of looming controversy in the shape of demands for alternatives to abortion. Rather, in magpie fashion, raiding various camps, Congress has gathered a nest-full of programs that it hopes will provide safe haven from inclement political weather. While these efforts provide some makeshift security for those members of Congress concerned with tempest in the constituency, these enacted or proposed programs are less effective as solid support for those women faced with the reality of the need for alternatives to abortion. Nevertheless, legislative

35. The foundation for establishing such a national pool of children and adoptive parents has been established in title II of the Child Abuse Prevention and Treatment and Adoption Reform Act of 1978, 42 U.S.C.A. § 5113, (Supp. 1979).
attempts to ameliorate the problem are encouraging, and continued efforts by Congress are essential to an ultimate solution.

The only actual enactment by Congress in response to the problem is title II of the Child Abuse Prevention and Treatment and Adoption Reform Act of 1978.36 While this Act is more specifically directed at overcoming barriers to adoption of hard-to-place children than at establishing an alternative to abortion,37 its value in making adoption a more attractive and effective alternative should not be underestimated.

The new Act (1) directs the Secretary of HEW to appoint an advisory panel to study model adoption legislation and report specific legislative proposals,38 (2) grants HEW the authority to establish an administrative arrangement to coordinate all federal adoption and foster care services,39 (3) authorizes the establishment of a nationwide, computer-based adoption information exchange system,40 (4) establishes an education and training program for dissemination of adoption assistance information,41 and finally, (5) funds a study, to be reported to Congress, on black market adoption.42

These various provisions of the Act do much to focus both congressional and administrative energies on adoption problems. The Act recognizes the need for coordinated national action to overcome barriers to adoption arising because of differing state laws.43 It encourages counseling programs and nationwide adoption referral, with control of both resources and information centered in a single administrative entity. Most importantly, it anticipates further congressional action after the authorized studies have been completed.

Despite the valuable contributions of the Adoption Reform

37. "It is . . . the purpose of this title to facilitate the elimination of barriers to adoption and to provide permanent and loving home environments for children who would benefit by adoption, particularly children with special needs . . . ." Id. § 5111. See 124 Cong. Rec. S5334-35 (daily ed. Apr. 12, 1978) (remarks of Sen. Cranston).
Act, it is in some ways a disappointment. Certain major provisions of the original legislation, S. 961, were not included in the bill as passed by Congress. These provisions would have given grants to the states (1) to establish comprehensive adoption assistance programs and (2) to provide "pre-natal, natal, and post-partum services to women who are voluntarily planning to place their children for adoption"—women who might otherwise have "no alternative other than [to] resort to abortion or to accept assistance from black market profiteers." This second provision of S. 961, which would have set up "a clear alternative to abortion and black market adoption," was dropped in the Senate amendments to the House bill and ostensibly transferred by its sponsors to other pending adoption reform legislation.

Other, more comprehensive, adoption reform legislation was introduced but not acted upon by the 95th Congress. H.R. 7200, entitled the Public Assistance Amendments of 1977, would have set up an entire system of adoption assistance. The bill would have provided federal matching funds for use by states in adoption subsidy programs and would have increased federal financial participation in other adoption-related child welfare

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46. S. 961, supra note 18, § 103.
47. Id. § 103(a)(2).
49. Id.
51. The 95th Congress adjourned Oct. 15, 1978, allowing certain adoption-related bills to expire. It can only be hoped that similar bills will be reintroduced in the 96th Congress. To date, several bills regarding adoption subsidy have been introduced in the 96th Congress. See, e.g., H.R. 1291, 96th Cong., 1st Sess. (1979) (adoption subsidy); S. 966, 96th Cong., 1st Sess. (1979) (adoption assistance).
services. The overall goal of the adoption reform measures of H.R. 7200 was to redirect federal money and emphasis away from foster care assistance and toward adoption assistance.

Two other bills introduced in the 95th Congress, S. 2614 and H.R. 12400, were specifically aimed at establishing programs to provide alternatives to abortion. S. 2614 proposed to rechannel family planning program funds to provide more emphasis on abortion alternative programs. Although this legislation would not fund adoption expenses directly, it would provide counseling and referral services that emphasized adoption possibilities.

H.R. 12400 proposed a much more comprehensive abortion alternative program. The bill anticipated federal financial participation in programs providing maternity health care benefits for adolescent mothers, health care for their infants, and special adoption services in these cases. It also proposed a full range of adoption assistance, including subsidy, to all groups. Some degree of program funding of maternity-related expenses for all women planning to use the adoption alternative would have been provided. Also, the bill included research grants to promote effective abortion alternative programs, income tax benefits to encourage adoption, and criminal sanctions for black market profiteering.

H.R. 12400 is similar to the funded adoption program advocated by this Comment. The other legislative efforts are more limited in scope than is H.R. 12400 in terms of establishing comprehensive funded adoption, yet the refined contributions of these other proposals may have some advantage over the blunder-

55. H.R. 7200 Hearings, supra note 53, at 57-62 (statement of Joseph A. Califano, Jr., Secretary, HEW).
57. 95th Cong., 2d Sess. (1978) [hereinafter cited as H.R. 12400].
60. Id. § 303. This section of H.R. 12400 is similar to S. 961, supra note 18.
61. H.R. 12400, supra note 57, sec. 303(b), § 1802(a)(2). Cf. S. 961, supra note 18, § 103(a)(2) (provision in S. 961 of maternity-related services to women voluntarily planning to use adoption alternative).
63. Id. § 301.
64. Id. § 302.
buss approach of H.R. 12400. For example, the H.R. 7200 adoption subsidy program is much more complete than the H.R. 12400 proposal. The ideal legislative response would combine the comprehensiveness of H.R. 12400, and its focus on abortion alternatives, with certain strong, finely tuned components patterned after the relevant proposals of S. 961, H.R. 7200, S. 2614, and the Adoption Reform Act.

IV. EXISTING LAW—A MAKESHIFT REMEDY

Existing social services programs at both state and federal levels presently provide, albeit in a disconnected fashion, much of the specific assistance necessary for the funded adoption alternative. Yet there is no clear legislative intent that these diverse programs be considered a direct response to the need for alternatives to abortion. Furthermore, the availability and impact of these separate services vary from state to state. For these reasons, the overall value of existing programs as providers of funded adoption services is diminished.

These various programs can be classified into two general groups. The first includes federally funded, state-administered social services—titles XIX and XX of the Social Security Act, for example. Although these programs differ somewhat from state to state, all generally provide some direct assistance to the eligible woman and child in an adoptive situation. The second group, on the other hand, is more concerned with facilitating the adoption process itself. These assistance programs derive from adoption subsidy laws now in effect in the great majority of states.

65. Compare H.R. 7200, Senate version, supra note 52, sec. 101, §§ 470-476 with H.R. 12400, supra note 57, sec. 303(b), § 1802. The H.R. 7200 adoption assistance program includes express statutory guidelines in such areas as parent income requirements, continued Medicaid eligibility for the adopted child, and disbursement and amount of matching funds. Also, important terms such as “child with special needs” are defined in detail. On the other hand, H.R. 12400 leaves many of the details and much of the guideline-setting to HEW or the individual states.

66. Some of these specific proposals are: maternity health care, see S. 961, supra note 18, § 103(a)(2); adoption subsidy, see H.R. 7200, Senate version, supra note 52, sec. 101, §§ 470-476; counseling on alternatives to abortion, see S. 2614, supra note 56, § 3(a); funding of alternatives-to-abortion projects, see id. § 3(b); and nationwide computerized adoption referral services, see 42 U.S.C.A. § 5113 (Supp. 1979).

67. For examples of programs with legislative intent directed at alternatives to abortion, see S. 2614, supra note 56, § 2; H.R. 12400, supra note 57.

A. Federally Funded Programs

1. Title XIX of the Social Security Act—Medicaid

Title XIX, more commonly known as Medicaid, provides substantial federal financial participation in state medical assistance programs. Medicaid is available in some form in virtually all states. Although federal regulations provide some overall consistency, states are allowed the flexibility necessary to administer their specific medical assistance plans. Detailed regulations and eligibility requirements, therefore, tend to vary, within broad federal guidelines, from state to state. If a woman meets the eligibility requirements in her state, she can receive Medicaid payments to cover the medical expenses of pregnancy and childbirth. In addition, a child born to a Medicaid-eligible mother can receive health care assistance payments. Two of the components of funded adoption—maternity care and infant health care—are

71. Arizona's Medicaid program, scheduled to go into effect in mid-1977, was postponed by failure on the part of the state legislature to appropriate the necessary funds. See Cochise County v. Dandoy, 116 Ariz. 53, 567 P.2d 1182 (1977).
73. Under basic federal guidelines, eligible Medicaid recipients must be either "categorically needy" or "medically needy." See 42 U.S.C. §§ 1396a(a)(10), 1396d(a) (1976); 42 C.F.R. § 435.1 (1978); STAFF OF SUBCOMM. ON HEALTH AND ENVIRONMENT OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 95TH CONG., 1ST SESS., DATA ON THE MEDICAID PROGRAM: ELIGIBILITY SERVICES, EXPENDITURES, FISCAL YEARS 1966-77, at 1-2, 23-25 (Comm. Print 1977) [hereinafter cited as MEDICAID DATA]. "Categorically needy" includes individuals already receiving welfare aid under the federal AFDC (aid to families with dependent children) program, 42 U.S.C. §§ 601-611 (1976), or individuals already receiving welfare aid under the federal SSI (supplemental security income—for the aged, blind, or permanently disabled) program, 42 U.S.C. §§ 1381-1383 (1976). See 42 C.F.R. § 435.4 (1978); MEDICAID DATA, supra, at 1. "Medically needy" includes those who would be eligible for federal welfare (AFDC or SSI) but for failure to meet the low-income and resources requirements, yet who lack sufficient income and resources to pay for medical services. Medicaid coverage of the medically needy is optional with the state. Medicaid coverage of the medically needy is optional with the state. Medicaid coverage of the medically needy is optional with the state. See 42 C.F.R. § 435.4 (1978); MEDICAID DATA, supra, at 1. Thus, generally speaking, Medicaid is only available to the aged, the blind, the permanently disabled, low-income families, or children under age 21. For a more comprehensive discussion of Medicaid eligibility, see Butler, The Medicaid Program: Current Statutory Requirements and Judicial Interpretations, 8 CLEARINGHOUSE REV. 7, 8-12 (1974).
74. A child could be eligible either as a dependent of an AFDC family, or if the mother were not covered under AFDC, then as a child under 21 qualifying on the basis of financial need. See Butler, supra note 73, at 8-9.
thus available, at least to some degree, through Medicaid programs.

Health care assistance as provided by Medicaid programs is a clear benefit to many pregnant women who might otherwise be financially unable to continue on to childbirth and adoptive placement of the child. However, a state's Medicaid eligibility requirements regarding age, income, or familial status may foreclose this benefit to other women who are under economic pressure to find an inexpensive means of resolving the problem of unwanted pregnancy. Many women technically ineligible for Medicaid may still be unable to readily afford the costs of childbirth and infant care, especially given the risk of expensive complications and the chance that the child may for some reason turn out to be difficult to place for adoption. These burdensome financial risks may be so great as to make legal abortion, or the more desperate alternatives of illegal abortion or black market adoption, the only economically safe choices for many middle- and lower middle-income women. An additional disadvantage is that Medicaid is generally unavailable to single women over age twenty-one. In a comprehensive funded adoption program, where eligibility requirements would be tailored to the goal of providing an abortion alternative for all women in financial need, ideally these particular gaps in coverage would not exist.

2. **Title XX of the Social Security Act—social services**

Title XX is a flexible program that provides federal grants to states on a matching funds basis for a wide range of social services. Generally, title XX is intended to finance many services that may not be available through other programs like Medicaid. Thus, if a particular state had no other program source for these expenses, title XX could fund nonmedical maternity

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75. See note 73 *supra*. Presumably, a large percentage of "unwanted pregnancies" occur among single women over age 21—exactly that group excluded from Medicaid coverage.

76. For example, funded adoption eligibility could depend entirely on income and resources of applicants. Income and resources requirements could be set high enough that women who are not considered low-income level, yet who would be unable to assume the costs of childbirth (lower middle- and some middle-income level) would receive program benefits. Marital status and age would be irrelevant.


78. See 42 U.S.C. § 1397 (1976); *Child Welfare League of America, Inc., Using Title XX to Serve Children and Youth 2-4* (1975) [hereinafter cited as *Using Title XX*].

79. 42 U.S.C. § 1397a(a)(7)-(8), (10), (12) (1976). See also 45 C.F.R. §§ 228.40-.43 (1978); *Using Title XX, supra* note 78, at 12-16.
expenses, such as nutritional care and routine child care, as well as certain adoption costs. Particularly, title XX could provide a valuable source of funding for adoption counseling and referral, and possibly even for direct adoption subsidies. Because of its flexible structure, title XX is ideally suited as a possible source for many of the necessary funds not otherwise available to eligible women seeking to place a child for adoption.

3. Title IV-B of the Social Security Act—child welfare

Title IV-B grants matching federal funds to state programs that provide basic child welfare services. Available under this title are funds for some adoption-related services, most notably counseling and referral and foster care services. Also, although this program is not designed to provide direct adoption subsidy, it does cover most one-time adoption expenses, such as legal fees, if eligibility requirements are met.

80. See 42 U.S.C. § 1397a(a)(1) (1976); USING TITLE XX, supra note 78, at 11, 43.
81. See 42 U.S.C. § 1397a(a)(1) (1976); 45 C.F.R. § 228.42 (1978); USING TITLE XX, supra note 78, at 10-11, 42.
83. See 42 U.S.C. § 1397a(a)(1) (1976); USING TITLE XX, supra note 78, at 21-22.
84. See Note, The Implementation of Subsidized Adoption Programs: A Preliminary Study, 15 J. Fam. L. 732, 748 n.46, 750 (1977) [hereinafter cited as Preliminary Study].
85. In general, eligibility for title XX services is based on income level or previous eligibility for other federal welfare programs. 42 U.S.C. § 1397 a(a)(4), (5) (1976). Services may be extended to individuals with higher incomes upon payment of a fee "reasonably related to income." Id. § 1397a(a)(6). See also 45 C.F.R. §§ 228.60-66 (1978); USING TITLE XX, supra note 78, at 6-9. However, information or referral services, family planning services, and services directed at preventing child abuse or neglect are free to all income groups. 42 U.S.C. § 1397a(a)(6) (1976).
87. See 42 U.S.C. §§ 620, 625 (1976); 45 C.F.R. § 220.62(d) (1978); Mott, supra note 82, at 477-78.
88. See 42 U.S.C. § 625 (1976); 45 C.F.R. § 220.62(d) (1978); Mott, supra note 82, at 477-78.
89. S. REP. No. 573, 95th Cong., 1st Sess. 23 (1977); Mott, supra note 82, at 477.
90. Generally, eligibility is based on need for child welfare services, with special consideration given to children and unmarried mothers for whom the state has assumed public welfare responsibility. 45 C.F.R. § 220.62(b) (1978).
4. **Title V of the Social Security Act—maternal and child health care**

Title V,91 the Maternal and Child Health Care Act, gives annual allotments to the states to be used to promote the general improvements of maternal and child health.92 Title V specifically funds maternity counseling services and health and nutrition information centers.93 It is also designed as a source of funding for child health care, especially for handicapped children.94 Although limited in both scope and amount of federal funding, this program may be useful in filling gaps not covered by other state programs.

5. **Title X of the Public Health Service Act—family planning**

Title X95 grants federal funds to both state and private non-profit organizations that provide family planning services.96 Although these programs are generally oriented toward prevention of unwanted pregnancy, they nevertheless could be expanded to provide adoption-oriented counseling that directed women to adoption benefits from collateral state and federal programs.97 Perhaps the major significance of title X in this respect is that its services are generally available without regard to income or other eligibility factors.98

**B. Adoption Subsidy Laws**

1. **Existing state programs—subsidized adoption**

Over forty states have statutes that can be termed "adoption

95. 42 U.S.C. §§ 300 to 300a-8 (1976).
97. This redirection of counseling and referral is legislatively proposed by S. 2614, supra note 56. However, there is apparently nothing in the present statute that would disallow minor administrative readjustments of counseling and referral emphasis to include adoption counseling. Cf. 42 C.F.R. § 59.5(e), (i) (1978) (provision for referral to and coordination with other social and medical services agencies providing family planning services).
98. However, services are free only to low-income individuals. 42 U.S.C. § 300a-4(c) (1976); 42 C.F.R. §§ 59.2(e), .5(a)(4)-(5) (1978).
sibsidy laws." Although the details of the different laws vary greatly, all share a similar purpose—to facilitate placement of all children in need of adoption by increasing the number of suitable adoptive homes.

The adoption subsidy concept is fairly simple. Subsidy payments are made out of public funds to the adoptive parents for the full or partial support of the adopted child. The legal status of the child is not in any way affected by the subsidy. The subsidy is not an award or incentive to adopt. The assistance is meant only to promote placement of the child into a loving, stable home in cases where the financial situation of the adoptive parents would not otherwise permit the adoption. Financial inability to adopt can arise either because the income of the parents is insufficient to support the normal expenses of childrearing or because special needs of the child, such as a physical handicap requiring expensive medical care, demand more than the potential parents’ otherwise adequate income can provide. In either case, the goal is to ensure that all children, regardless of financial factors, will find adoptive homes.

As mentioned, the specific aspects of state adoption subsidy programs vary. Commonly, however, states provide assistance for both normal maintenance and medical costs. Eligibility requirements in many states insist that the child be “hard to place” and already eligible for assistance under other public programs. Assistance is generally administered in the form of direct payments to the adoptive parents, who are contractually obligated to use the subsidies for specific support expenses. Subsidies can also take the form of a continuation of previous

99. Katz, Subsidized Adoption in America, 10 Fam. L.Q. 1, 7 (1976). For a listing and description of most of these state adoption subsidy laws, see S. 961 Hearings, supra note 3, at 341-52 (report of Jean Yavis Jones, Education and Public Welfare Division, Congressional Research Service, Library of Congress). See also id. at 20 (statement of Arabella Martinez, Assistant Secretary for Human Development, HEW).

100. See, e.g., S. 961, supra note 18, ¶ 101 (Findings and Declaration of Purpose); S. REP. NO. 95-167, supra note 19, at 21; Katz, supra note 99, at 7.


103. Id.

104. See S. 961 Hearings, supra note 3, at 339 (Jones research report); Preliminary Study, supra note 84, at 738. For studies comparing the provisions of various state adoption subsidy laws, see S. 961 Hearings, supra note 3, at 353-60.

105. S. 961 Hearings, supra note 3, at 339 (Jones research report); Preliminary Study, supra note 84, at 738.

106. Preliminary Study, supra note 84, at 738.

assistance payments for which the child was eligible, notably Medicaid.108

Adoption subsidy, as presently administered by the states, focuses on placement of children with special needs, children who may have been in foster care or institutional care for some time, even for years.109 The focus generally has not been directed toward cases where mothers are hoping to place newborn children for immediate adoption. However, there is no reason that subsidy payments cannot be provided in this situation as well. Normally, placing a newborn infant is not difficult, and therefore subsidies would not be needed. But in those few cases where the infant is hard-to-place, for whatever reason, adoption subsidy can ensure placement, perhaps by allowing more low-income minority families to become eligible to adopt a minority child, or by making it possible for a concerned and able couple to adopt a child with a costly medical handicap in spite of their modest income.

2. The Model Act—impetus and example

A Model State Subsidized Adoption Act has been drafted.110 This Model Act encourages appropriate adoption by supplementing state adoption programs with a public financial adoption subsidy program.111 The Model Act generally focuses on the financial needs of the child, rather than the financial status of the parents.112 A wide range of “special needs” will qualify a child for assistance.113 However, built into the Act is a requirement that a full attempt to place the child without the subsidy be made before payments will be authorized.114 Additionally, as is the case in most states, the Model Act contemplates a contractual arrangement with the adoptive parents before they can receive the payments.115

Many states now have provisions similar in some respects to those of the Model Act, but it seems likely that unless some leadership at the federal level encourages the states to meet uni-
form guidelines, such as those of the Model Act, the present wide array of differing state adoption subsidy laws will continue. A federally established adoption subsidy plan, patterned after the Model Act and enacted as part of a funded adoption program, could serve to bring about uniformity merely by making funds available to those state plans that conform to federal standards.

C. Federal Benefits and State Subsidies Combined

In many states, a creative social services organization may presently be able to package individual abortion alternative plans. By carefully combining the benefits available under the various existing federal assistance programs with benefits from state adoption subsidy plans, an organization could put together assistance plans that, in individual cases, may provide most of the major advantages of funded adoption. In some cases, limited state assistance can be supplemented with assistance from charitable organizations, which often have established programs that are of great benefit to unwed mothers. Nevertheless, all of these possibilities require an individual approach and may not be adequate for every woman in need of funded adoption services, simply because complete assistance may be impossible to piece together in every case.

A comprehensive funded adoption program need not be administered on an assembly line basis, oblivious to individual situations. However, the uniform nature and availability of all the components of assistance within a single, understandable, federally supported program would discourage inequality of administration. By comparison, the piecing together necessary to provide full assistance under existing programs seems an unwieldy and confusing process, perhaps not worth the effort of a woman totally discouraged by the complexity of social services administration.

V. COST, IMPLEMENTATION, AND CONSTITUTIONALITY

This Comment has urged the legislative enactment of funded adoption from a removed perspective, as if legislators would inevitably be impressed with the proposal to the point that further justification would be unnecessary. Obviously, the situation is more complex. Congress and state legislatures must weigh the

116. See, e.g., Searle, Adoption Program Aids Mother, Child (1973) (pamphlet available from The Church of Jesus Christ of Latter-day Saints, Social Services Dep't, Salt Lake City, Utah).
benefits of providing this essential service against potential disad-
advantages such as excessive cost and implementation difficul-
ties, taking into consideration the competing interests of the var-
ious constituent groups that might favor or oppose funded adop-
tion. Duplication of legislation must be avoided by a review of
existing programs. Overall policy must be examined and debated.
Although all competing viewpoints on the important issues in this
legislative balancing process cannot be discussed adequately
here, certain areas of likely difference of opinion should be men-
tioned. These are the broad issues of cost, implementation, and
constitutionality.

A. Cost

Perhaps the most formidable barrier to any new social legis-
lation is cost. Taxpayers and legislators alike are concerned with
whether the proposed program will prove worthwhile, or merely
wasteful. The worry is whether it will succumb to the chronic and
costly ills of bloated budget and spending waste, or whether the
new program will deliver in a cost-conservative manner services
that are imperatively needed.

A budget report is neither attempted nor feasible in this
Comment, but it should be noted that much of the money neces-
sary for funded adoption is already being spent for similar ser-

dices. All of the various components of the program—counseling
and referral, maternity care, infant care, and adoption sub-
sidy—presently exist, although in separate programs, either at
the federal or state level. If these disjointed efforts were simply
consolidated into a single program, total cost could conceivably
decrease. Indeed, it has been estimated that a redirection of em-
phasis would result either in no extra cost or a budget cut in the
areas of adoption subsidy and counseling and referral.

Nevertheless, total optimism may be inappropriate. It seems
likely that even though a comprehensive funded adoption pro-
gram may be a more efficient use of money already being spent

117. See Section IV-C supra.
118. S. REP. No. 573, 95th Cong., 1st Sess. 115 (1977) (Senate Comm. on Finance
estimates on adoption assistance costs under H.R. 7200); id. at 123-25 (Congressional
Budget Office estimates on adoption assistance costs under H.R. 7200). These estimates
assume that adoption subsidy costs will be offset by funds that would otherwise go to
foster care payments.
119. Emphasizing adoption and other abortion alternatives, instead of abortion,
should not result in increased counseling time or costs. See 124 CONG. REC. S2652 (daily
for similar services, the eventual cost of administering the program so as to actually fulfill its purpose—provision of an abortion alternative—would increase above present budget levels. Simply by becoming an attractive alternative, the program would encourage more women to make use of the available assistance, women who might otherwise not avail themselves of public funds for these special needs. On the other hand, by shunting children who would normally be expected to become part of welfare-eligible families out of the welfare system and into adoptive homes, where some if not all the cost of their support could be borne by the adoptive parents, arguably the public would ultimately save a great deal of social welfare money.\(^{120}\)

Whichever view is taken, funded adoption clearly would demand a large budget.\(^{121}\) Whether this budget can be built up by reallocating present, less efficient funding, or whether new resources will need to be tapped, is a question answerable only after extensive study. In any case, the vital need for this program should prove sufficient to motivate sponsoring members of Congress and state legislatures to devise creative and efficient proposals to meet the expenses of funded adoption.

**B. Implementation**

A complete, integrated funded adoption program should not present insurmountable problems of implementation. A pervasive framework that provides all facets of social welfare services has existed for decades at both state and federal levels. The wealth of experience of federal and state administrative entities in this area will prove useful in building a new system for delivery of the funded adoption benefits. Since the major target group of funded adoption services will be women or families already acquainted with social services administration, there should be no real difficulty in establishing early awareness of the benefits of the new program. However, to ensure the effectiveness resulting from the comprehensive nature of the program, which is its major advantage over the present disjointed system, full implementa-

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121. Depending on eligibility requirements, the overall budget could be expanded or contracted. If all women, regardless of economic need, were eligible for part or all of the funded adoption services, see Section II-E supra, the total cost would be significantly greater than if benefits were limited to needy women.
tion should be a primary goal of administrative personnel. Piece-meal implementation merely postpones this effectiveness.

Duplication of services could be another barrier to smooth implementation. However, a legislative and administrative review of present programs may obviate this problem. Also, a well-organized counseling network, which is the first contact point for those using the program, would be a practical guard against most instances of duplication, and the confusion and budget waste that result.

C. Constitutionality

The constitutionality of funded adoption, as a specifically intended alternative to elective abortion, has of course not been tested in the courts. Nevertheless, a conscientious legislator will be concerned about the constitutional implications of funded adoption legislation, particularly those stemming from the equal protection clause of the fourteenth amendment. The major concern is whether a state, partaking of federal monies, may favor mothers who choose normal childbirth and adoption over those who prefer to terminate pregnancy through abortion by providing economic assistance in a funded adoption program. This question is especially pertinent where a state has refused to fund elective abortion.122

Although this issue has not been litigated in the context of funded adoption, it has been considered by the courts in the related area of funded abortion. The Supreme Court in *Maher v. Roe*123 was faced with the almost identical question of whether the equal protection clause prohibits a state from refusing to pay for nontherapeutic abortions for indigent women, while continuing to provide assistance to eligible mothers carrying their children to term.124 The lower court had overturned a state regulation that restricted Medicaid assistance for abortions to those found to be "medically necessary"125 on the ground that such restrictions were not "equally applicable to Medicaid payments for childbirth."126

122. See note 7-10 and accompanying text supra.
124. 432 U.S. at 468-69.
125. Id. at 466 & n.2.
Justice Powell, writing for the majority, found that the challenged Connecticut regulation did not violate the fourteenth amendment's equal protection clause. In analyzing the equal protection issue, the Court applied the usual two-tiered test. If either a suspect classification or an infringement of a fundamental right is found, then the state must demonstrate a compelling state interest that outweighs the negative effects of the classification scheme in order to overcome the constitutional challenge. If there is no suspect classification or infringement of a fundamental right, then the state's classification scheme must merely be "rationally related" to a legitimate state interest.

The challengers in *Maher* pointed out that the Connecticut regulation classified pregnant women into two groups—those who preferred to give birth normally and those who chose to abort. The classification scheme, they argued, both discriminated against the latter group of women in violation of equal protection of the law and unduly interfered with their right, recognized in

127. The decision was six to three. Justice Brennan, in his dissent, criticized the majority for ignoring the due process considerations. He argued that the denial of elective abortion Medicaid assistance was a direct infringement of an indigent woman's privacy right to obtain an abortion. 432 U.S. at 484-85 (Brennan, J., dissenting). According to *Roe v. Wade*, Justice Brennan pointed out, this right is rooted in the due process clause. See *id.*. However, even assuming the validity of Justice Brennan's criticism of the *Maher* result, it would be inapplicable in the funded adoption situation, where the concern is not whether the state is infringing a poor woman's right to abort by denying needed financial assistance. Rather, the separate concern is whether the state may financially favor alternatives to abortion.


Justice Blackmun drew attention to the human elements involved in the *Maher* result, pointing out that for many poor women the holding of the Court signifies the destruction of the only reasonable solution to unwanted pregnancy. 432 U.S. at 462 (Blackmun, J., dissenting). Funded adoption, as advocated by this Comment, would provide another answer for these women.


Roe v. Wade, to choose an elective abortion. The challengers contended that because of the nature of the right involved, the heavy burden of showing a compelling state interest should fall upon the state—a burden that Connecticut would not be able to carry. The Supreme Court, however, found Connecticut’s classification scheme not “suspect,” and therefore did not require the state to show a compelling state interest. The Court held that even though a fundamental right of privacy was involved, this right was not infringed by the state scheme. The Court emphasized that Roe v. Wade and other right of privacy cases had not established an absolute constitutional right to an abortion, as the challengers had argued. Rather, the cases held that a state may not establish an “unduly burdensome interference” with a woman’s decision to abort. Connecticut’s regulation was an encouragement of childbirth, not an absolute or undue barrier to abortion. Therefore, the deferential rational basis test, rather than the compelling state interest test, was proper.

Alternatively, argued the challengers, the state regulation could not stand even under the rational basis test. Connecticut’s assertion that prohibiting elective abortion payments furthered the state’s interest in conserving public funds was characterized as “wholly chimerical.” The Court, however, emphasized a further legitimate purpose for the regulation—a strong state interest in encouraging childbirth. This purpose, “an interest honored

135. Id. at 471-74.
136. Id. at 474.
137. Id.
138. Id. at 477-78. The test, as articulated by the Court, required that the state’s classification scheme be “rationally related” to a “constitutionally permissible” purpose.” Id. at 478 (quoting Lindsey v. Normet, 405 U.S. 56, 74 (1972)).
140. 432 U.S. at 478-79. In a footnote the Court also suggested that a state’s “legitimate demographic concerns about its rate of population growth” may be a further legitimate state purpose. Id. at 478 n.11. Neither the interests in encouraging childbirth nor the interests in population growth rate were raised by the parties. The interests in state finances and maternal health were the only state purposes mentioned by the lower court. Roe v. Norton, 408 F. Supp. 660, 664 & n.4 (D. Conn. 1975).
Possibly, the state did not urge “encouraging childbirth” as its purpose because this
over the centuries,""¹⁴¹ was legitimate and rationally furthered by making Medicaid funds available for childbirth costs while denying payments for elective abortions.¹⁴² Although the Court did not directly so state, the concept that discouraging abortions also furthers the state policy of encouraging childbirth is inherent in the analysis.¹⁴³ Finally, the Court noted in upholding the Connecticut regulation that states are accorded a "wider latitude in choosing among competing demands for limited public funds"¹⁴⁴ and that sensitive policy decisions involved in this area are most appropriately reserved to the legislative branch.¹⁴⁵

The constitutional issues involved in a state's enactment of funded adoption can be resolved using the analysis of the Maher Court. In the funded adoption situation, the right of a woman to have an elective abortion would be no more infringed than in the Maher situation, and the compelling state interest test would be inappropriate. In the absence of state funding of abortion, the fact that poor women would be encouraged, in an economic sense, to avail themselves of the adoption alternative does not violate any fundamental right. As Justice Powell pointed out in Maher, that the state "may have made childbirth a more attractive alternative, thereby influencing the woman's decision, . . . impose[s] no restriction on access to abortions that was not already there."¹⁴⁶ The economic condition that may foreclose elective abortion is "neither created nor in any way affected"¹⁴⁷ by a funded adoption program.

Funded adoption passes scrutiny under the less demanding

interest seemed so similar to the state interest in the protection of the unborn child, an interest that became sufficiently compelling to overcome the woman's right to decide on abortion only after the stage of viability, Roe v. Wade, 410 U.S. at 163-64. However, the Court in Maher found this state interest in "protecting the potential life of the fetus" to be the source of the interest in encouraging childbirth. 432 U.S. at 478; Beal v. Doe, 432 U.S. 438, 445-56 (1977).

141. 432 U.S. at 478 (footnote omitted).
142. Id. at 478-79.
143. Perhaps the Court shied away from this concept because its rationale for allowing minimal scrutiny depended on a showing of noninterference by the state with the woman's right to terminate her pregnancy. Justice Powell noted that encouragement of childbirth was no obstacle to a woman seeking an abortion. 432 U.S. at 474-75. However, positive discouragement of the exercise of that right seems slightly more suggestive of "direct state interference with a protected activity," id. at 475. See also, Note, State Funding of Nontherapeutic Abortions, Medicaid Plans, Equal Protection, Right to Choose an Abortion, 11 Akron L. Rev. 345, 354 (1977).
144. 432 U.S. at 479 (footnote omitted).
145. Id. at 479-80.
146. Id. at 474.
147. Id.
test of rationality because the same legitimate state interest, encouraging normal childbirth, is at stake. By funding the expenses of pregnancy, delivery, child care, and adoption, the state rationally attempts to further this strong interest. This particular means is at least as effective as simply cutting off abortion assistance. By establishing an economically attractive alternative to abortion, the state not only encourages those who would choose adoption anyway, but also those who might otherwise resort to abortion, to take advantage of the state program, thereby increasing the number of live births in comparison to the number of abortions.

Funded adoption, under the principles stated by the Supreme Court in *Maher v. Roe*, would in no way violate the fourteenth amendment guarantee of equal protection. Even though the arguments of those preferring not to favor childbirth and adoption over elective abortion are entitled to full consideration by a legislature, in the end these arguments fail as constitutional objections; they become instead policy arguments to be weighed in the legislative balancing process against the many policy factors in favor of providing a much needed alternative to elective abortion.

VI. CONCLUSION

Two complex factors have combined to limit the alternatives available to women with unwanted pregnancies. First, economic pressure from high costs of pregnancy and childbirth, most severe in the case of indigent women, pushes forcefully toward the less expensive alternative of abortion. In some cases, especially after the recent cutoff of federal and most state funding of elective abortion, the cost of private abortion itself may increase the pressure, leaving many women with no economically feasible choices other than illegal, “back alley” abortion or black market adoption. Second, public institutions and modern society itself tend to urge the simple and expedient solution—abortion—over the complex and lengthy process of childbirth and adoption. The women most affected by these two factors in combination are those who are morally opposed to elective abortion, yet who are economically disadvantaged to the degree that acceptable alternatives are nonexistent.

Funded adoption is an escape from this cul-de-sac of the conscience. Such a program, enacted at the federal level and administered by states on a matching-funds basis, would provide (1) counseling and referral services; (2) assistance payments for
costs of pregnancy, childbirth, and postpartum care to eligible women; (3) maintenance and medical care for the newborn infant; and (4) adoption expenses, to include direct subsidies to potential adoptive parents, if necessary to facilitate prompt adoption of handicapped, minority, or other hard-to-place infants. By removing the economic obstacles to the adoption alternative and by ensuring prompt and appropriate placement of the child, funded adoption will serve as the much needed alternative for many women.

Congress has not been insensitive to the need for abortion alternatives. The Adoption Reform Act of 1978, as well as several bills introduced in the 95th Congress, have evidenced the concern of many members of Congress. However, a complete program of funded adoption has yet to be approved. Other programs, such as Medicaid and title XX of the Social Security Act, when grafted onto state adoption subsidy programs already in existence in most states, provide makeshift solutions resembling the funded adoption concept. But these efforts must be carried out on an individual case basis, often at added expense, confusion, and frustration to both the government agencies and the women they are trying to assist.

A comprehensive funded adoption program, if enacted, would not be immune from the normal problems of cost and implementation. However, well-planned legislation and high-quality administration of the program could minimize these problems. Also, a conscientious legislator’s concerns about the constitutional implications of a program that tends to favor childbirth over abortion should be assuaged by the recent Supreme Court decision in *Maher v. Roe*, which held that a state can constitutionally refuse to fund elective abortion while continuing to pay for childbirth expenses under Medicaid. The equal protection issue in a funded adoption program is nearly identical. A legislator can be confident that funded adoption does not violate the fourteenth amendment. On the contrary, funded adoption offers its own “equal protection”—a protection that shields those women who are willing to accept the necessary travail in hopes of gaining the luxury of a triumph of conscience over severe economic and social pressure to abort. In an abortion-conscious society, this rare triumph deserves respect.

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