

THE FREE-MARKET APPROACH TO ADOPTION: THE VALUE OF A BABY

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Abstract: Adoption processes in the United States, once based on the altruistic child welfare model, have morphed to reflect the desires of would-be parents. The author argues that the current adoption model in the United States resembles an unregulated marketplace in children. Whether lawmakers and citizens wish to recognize this marketplace, its existence is demonstrated by frequent financial transactions among adoptive parents, birth mothers, and adoption agencies that resemble payments. The author explores this marketplace and the way in which race, genetic traits, and class are implicated in adoption processes, resulting in higher fees associated with the adoption of children with desirable traits. The author proposes two mechanisms by which the government could regulate the adoption market—price caps and taxation. Ultimately, however, the author advocates greater transparency and information in the adoption process to protect the welfare of children who might otherwise be exploited in an unregulated adoption market.

INTRODUCTION

The notion that children might be placed with families according to an auction paradigm too closely resembles the repulsive practices

* L.L.M., University of Wisconsin; J.D. Boston College Law School. Wicklander Professor, Director of the Health Law Institute and the Center for the Study of Race and Bioethics at DePaul College of Law. I am grateful to Professor Ruth Arlene Howe who inspired this conference on the Welfare of Black Children. She is a dynamo in the field of family law, and yet has inspired scholarship that is far reaching, including my own. It is an honor to contribute to a fine collection of scholarship generated by the living legacy of Ruth Arlene Howe and her seminal research in the field of adoption. Over the past thirty years, Professor Howe's scholarship and field research have been influential in eliminating the stigma associated with adoption as well as chronicling the ways in which child protection and home transference occur in the United States. Professor Howe has also been a controversial trailblazer, unafraid to walk the uneven terrain of a field where much is yet to be resolved, particularly with regard to race and socio-economic status. It is in the spirit of her probing style of inquiry that this article is offered to this special edition. I am also thankful to Professor Anthony Farley who helped to organize a well-deserved tribute to Professor Howe. I would like to acknowledge the research support provided by Dean Weissenberger and Erin Crow, my outstanding research assistant.

of slavery.¹ In an imagined version of auction competition, with a white billet in hand, one can push up the price of a child like a piece of furniture. In this suppositious scenario, spirited competition between bidders is encouraged by the auctioneer. An ebullient atmosphere heightens the intensity and legitimacy of the process; surely nothing so gleeful could possibly be malapropos? Finally, after the bidding competition concludes, with an unhesitating strike of the gavel, a birth certificate and baby are transferred. We may know very little about the winners (their character, composition, personality, integrity, and values) or the losers for that matter, except how high they were willing to bid on a child at that particular time. This is a scene most would abhor—even those willing to consider more transparent, incentive based adoption approaches.

The concept of a free market in children is rejected based on what it symbolizes, including its argued resemblance to slavery or the auction block.² Yet, directly and indirectly, market forces or economic considerations influence adoptions in the United States to a greater extent than traditionally acknowledged.³ Conventional wisdom and early legislation held the best interest of children at the center of all adoptions,⁴ which functioned as a child welfare model for aban-

¹ The auction paradigm was the slave model, where children were forced to bear their teeth, toes, and even genitals to determine if they were “fit.” See MARIE JENKINS SCHWARTZ, *BORN IN BONDAGE: GROWING UP ENSLAVED IN THE ANTEBELLUM SOUTH* 160 (2000) (describing how “[p]urchasers relied on such external measurements to gauge whether the child had the strength, dexterity, physical stamina, and good health necessary for completing plantation chores.”); see also *Touching It off Softly*, PROVINCIAL FREEMAN (Toronto), Apr. 29, 1854, at 1, 2 (relating a short historical account of slave auction practices).

² David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 VAL. U. L. REV. 281, 287 (2004) (arguing that adoption practices resemble the purchase of human beings, which is analogous to slavery practices).

³ The high cost of adopting children (especially those in higher demand) is evidenced through schemes to subsidize the costs for adoptive parents. See Laura Bailey, *Execs Expand Their Families Through Adoptions*, CRAIN’S DETROIT BUS., Nov. 1, 2004, at 22 (describing a system of tax credits for adoptive parents of both foreign and American children to ease the often hefty financial burden of adoption); Joe Manning, *More Firms Helping Staff with Costs of Adoption*, MILWAUKEE J. SENTINEL, Aug. 23, 2004, at D1 (detailing that employers are providing benefits to aid employees with fees associated with adoption, which have been described as “staggering”); Tess Nacelewicz, *More Love Than Money*, PORTLAND PRESS HERALD, Sept. 27, 2004, at A1 (describing a family who wished to adopt two additional Haitian children, and the community organized fundraisers to help the family raise money for the adoption fees.); Sylvia Slaughter, *Penny for Your Thoughts of Samuel*, THE TENNESSEAN (Nashville), Oct. 23, 2004, at 1 (describing a charity project in which residents collect change to help defray the costs of adoption for a local family).

⁴ See Ruth Arlene Howe, *Adoption Laws and Practices in 2000: Serving Whose Interests?*, 33 FAM. L.Q. 677, 677 (2000).

doned, abused, neglected and orphaned youth.⁵ Contemporary adoption services, however, resemble free markets where aesthetic profiles of race, hair texture, eye color and other market variables determine the welfare of children or, at least, their likelihood of placement.⁶ Between two ends of a spectrum, one representing child welfare and the other “adult needs,” the latter influences U.S. adoptions far more than imagined.⁷

This article scrutinizes financial considerations involved in adoption, including “baby valuing” and suggests that those transactions illustrate the market nature of adoptions in the United States. This article illuminates market consciousness in the adoption process, arguing that economic interests influence adoption more than we might like to acknowledge.⁸ It demonstrates that the adoption process is more like a market than less so. Part I frames the adoption market debate, arguing that current adoption indeed resembles a free market. It describes current adoption processes in the United States, which are governed by factors of availability, race, class, and aesthetic preferences. Part II scrutinizes the moral and ethical obstacles to recognition of a market in adoption: the degradation of personhood, the charitable roots of child placement, and the social costs associated with adoption. Part III examines alternative adoption models, including price caps and taxation alternatives, and suggests that each model tramples on established values. The article argues for greater transparency and information in the adoption process and proposes a different model to effectuate adoptions in the United States.

⁵ See Jehnna Irene Hanan, *The Best Interest of the Child: Eliminating Discrimination in the Screening of Adoptive Parents*, 27 GOLDEN GATE U. L. REV. 167, 174–75 (1997). In 1851, Massachusetts passed the first adoption law in the United States. *Id.* at 174. That law served as a model for other states, with each state’s law “emphasizing the best interests of the child.” *Id.* at 174–75.

⁶ Smolin, *supra* note 2, at 282 (stating that, “the adoption system has become so intertwined with market behavior as to, in theory and practice, frequently permit child selling as a form of adoption”). See also Patricia J. Williams, *Spare Parts, Family Values, Old Children, Cheap*, 28 NEW ENG. L. REV. 913, 918 (1994) (“And with that magical stroke of the pen, the door to a whole world of plentiful, newborn, brown-skinned little boys . . . opened up to me from behind the curtain marked, ‘Doesn’t Care.’”).

⁷ See Howe, *supra* note 4, at 677–78.

⁸ Smolin, *supra* note 2, at 306 (“[T]he effect is to create a market in babies, with high-demand characteristics of the infant (race, youth, and health) . . . being allocated to the highest bidder. This contradicts the legal conception that adoption is guided principally by the best interests of the child . . .”).

I. THE POSNER PARADIGM

A. *The Market Debate*

Nearly thirty years ago, Elisabeth Landes and Richard Posner attracted strident criticism from scholars concerned that their 1978 publication on adoption, colloquially known as the “baby selling article,” endorsed a market in babies.⁹ In this article, Landes and Posner proposed evaluating the efficiency of adoption through a market analysis.¹⁰ They applied a law and economics framework to study the pros and cons of incentives in adoption as well as mechanisms that could increase the matching of babies to couples.¹¹ Ironically, their article drew criticism about incentive models that preexisted the article’s publication.¹² Opponents decried the language of efficiency in evaluating adoptions, suggesting that it reduced children to objects in a mechanical economic analysis.¹³

Posner and Landes’ critics characterized their article, *The Economics of the Baby Shortage*, as promoting the introduction of financial incentives in the adoption allocation process, thereby suggesting that Landes and Posner were tainting an unflawed and otherwise purely altruistic process.¹⁴ Transaction fees received by adoption agencies were believed to be so minimal or infrequently present at the time as to pose insignificant ethical problems. Some critics thereby dismissed the resemblance between transactional fees, indirect incentives, and payments. They refused to entertain the proposition that an adoption “market” already existed.

Refusal then and now to acknowledge financial incentives in adoption does not negate the free market’s existence and influence in adoption services. In other words, a community preference that adop-

⁹ See, e.g., Ronald A. Cass, *Coping with Life, Law, and Markets: A Comment on Posner and the Law-and-Economics Debate*, 67 B.U. L. REV. 73, 73 (1987); Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 339–46 (1978).

¹⁰ Landes & Posner, *supra* note 9, at 324.

¹¹ *Id.* at 324–39.

¹² See Robert S. Prichard, *A Market for Babies?*, 34 U. TORONTO L.J. 341, 350, 354 (1984).

¹³ See Cass, *supra* note 9, at 76–77.

¹⁴ For an overview of common objections to Landes & Posner, see Prichard, *supra* note 12, at 350, 354 (finding that a market in children would lead to an unequal distribution of “good babies [T]he objection seems to assume that this does not happen already, thus ignoring the reality that one’s income and wealth are generally thought . . . to be important” Objectors also claim that the market analysis focuses solely on the social end of pleasing adoptive parents rather than the welfare of the child.).

tions are free from financial transactions does not mean that it is so.¹⁵ Financial transactions and interests govern the adoption process both directly and indirectly. Financial exchanges, including exorbitant fees paid to adoption agencies, medical payments to birth mothers (or surrogates in the case of in vitro babies), transportation costs and living expenses,¹⁶ while characterized under the umbrella of “transactional costs,” resemble “payments” in most other spheres.¹⁷ Some commentators, including Posner, have described these payments as part of the adoption “black market.”¹⁸ To be clear, there seems to be very little that is *illegal* about these transactions.¹⁹ Rather, exorbitant transaction fees, and direct payments to parents and their attorneys are evidence of a *de facto*, largely unregulated, adoption free market.²⁰

B. The Free Market: Indirect & Direct

1. Lack of Regulation

Several factors indicate the free market in adoptions. First, adoption services are a largely under-regulated and disorganized enterprise.²¹ Lack of regulation is a key factor in free-market econom-

¹⁵ See Francesco Parisi & Ben W.F. Depoorter, *Continuing Tributes to the Honorable Richard A. Posner—Private Choices and Public Law: Richard A. Posner’s Contributions to Family Law and Policy*, 17 J. CONTEMP. HEALTH L. & POL’Y 403, 411 (2001) (arguing that the “selling” of babies already legally takes place).

¹⁶ See NAT’L ADOPTION INFO. CLEARINGHOUSE, U.S. DEP’T OF HEALTH & HUMAN SERVS., STATE REGULATION OF ADOPTION EXPENSES: SUMMARY OF STATE LAWS 1 (2005), available at <http://naic.acf.hhs.gov/general/legal/statutes/expensesall.pdf>.

¹⁷ Smolin, *supra* note 2, at 304 (likening payment of birth-related expenses to birth mothers to financial consideration for a right of first refusal if the birth mother ultimately decides to place the child in an adoptive home).

¹⁸ See Landes & Posner, *supra* note 9, at 339–40.

¹⁹ See, e.g., Donald J. Boudreaux, *A Modest Proposal to Deregulate Infant Adoptions*, 15 CATO JOURNAL 117, 119 (1995) (describing that state laws govern monetary compensation given to birth mothers, which is allowed for out-of-pocket expenses related to the birth and prenatal care).

²⁰ See Danielle Saba Donner, *The Emerging Adoption Market: Child Welfare Agencies, Private Middlemen, and “Consumer” Remedies*, 35 U. LOUISVILLE J. FAM. L. 473, 490 (1996) (arguing that the shift to a fee structure in the adoption process is a response to market forces).

²¹ Data on adoption is often inconsistent and unreliable because there is not a specialized agency responsible for adoption data collection. See, e.g., NAT’L ADOPTION INFO. CLEARINGHOUSE, U.S. DEP’T OF HEALTH & HUMAN SERVS., HOW MANY CHILDREN WERE ADOPTED IN 2000 AND 2001? 14 (2004), available at http://naic.acf.hhs.gov/pubs/s_adopted/index.pdf.

ics.²² Babies can be adopted indirectly through the free market by way of an agency process, wherein fees are bundled and an adoptive couple pays one fee that supports salaries for staff, medical expenses for the birth mother, and transportation costs.²³ Babies can also be adopted directly through the free market via independent agents who facilitate the process, which includes lawyers, pastors, and doctors acting as intermediaries.²⁴ Unlike agencies, independent agents may be interested in only one, specific adoption. These processes are not monitored by any federal agency. Rather, state laws govern part of the adoption processes, but are generally inadequate in addressing the interstate and transnational aspect of adoptions. Thus, under the guise of promoting child welfare, contemporary adoption practices have exposed children to free-market dynamics. In the free-market realm, supply, demand and aesthetic preference factor significantly in the cost of a baby.²⁵

2. Race-based Baby Valuing

Second, baby valuing indicates that racial and genetic preferences are associated with the cost of adoption. Consider the following: couples may spend upwards of \$50,000 to adopt a healthy, white in-

²² See, e.g., Robert B. Horowitz, *Understanding Deregulation*, 15 THEORY & SOCIETY 139, 160–64, 168–69 (1986) (explaining that deregulation of a given market (*i.e.*, telecommunications) must occur in order to obtain a truly free and competitive marketplace).

²³ NAT'L ADOPTION INFO. CLEARINGHOUSE, U.S. DEP'T OF HEALTH & HUMAN SERVS., ADOPTION OPTIONS: A FACT SHEET FOR FAMILIES 1, 2 (2003), available at http://naic.acf.hhs.gov/pubs/f_adoptionoption.cfm [hereinafter ADOPTION OPTIONS: A FACT SHEET FOR FAMILIES].

²⁴ *Id.* at 3–4.

²⁵ See Marianne Bitler & Madeline Zavodny, *Did Abortion Legalization Reduce the Number of Unwanted Children? Evidence from Adoptions*, 34 PERSPS. ON SEXUAL AND REPROD. HEALTH 25, 26, 27 (2002); Mark F. Testa, *When Children Cannot Return Home: Adoption and Guardianship*, 14 FUTURE OF CHILD. 115, 118 (2004). Distinctive adoption practices can be seen prior to and after 1973, the year of the landmark *Roe v. Wade* decision. Bilder & Zadvoyny, *supra* at 25–26. Prior to 1973, abortions were illegal, and single-motherhood and unwed pregnancies were taboo. Almost twenty percent of unwed white women placed their children for adoption prior to 1973. EVAN B. DONALDSON ADOPTION INST., PRIVATE DOMESTIC ADOPTION FACTS (2002), <http://www.adoptioninstitute.org/FactOverview/domestic.html>. Since 1973, researchers estimate that as few as 1.7 % of white unwed mothers have placed their babies up for adoption. *Id.* Some commentators attribute the low surrender rates to the legalization of abortions (*i.e.* women are choosing to abort rather than have babies). Bilder & Zadvoyny, *supra* at 31. On the other hand, single-parenthood is less stigmatized now among certain classes of Americans than prior to 1973. See Bilder & Zadvoyny, *supra* at 26, 27; Testa, *supra* at 118.

fant.²⁶ Black infants, however, are adopted for as little as \$4,000.²⁷ Adoption agencies attempt to clarify this discrepancy by explaining that black children are more difficult to place than white children, and, therefore, the costs associated with adopting Caucasian children are higher.²⁸ This logic appears flawed, even though it is true that black children wait longer for permanent placements.²⁹ Why would it cost more to do less, if transaction costs were based *purely* on the labor and transactions involved?³⁰ If placing white children is easier than placing black children, it would seem that *less work* would result in *less pay* and lower fees. Instead, fee structures based on race give evidence that adoption is subject to the free-market forces of supply, demand, and preference.³¹ In this market, racial preference matters; bi-racial children also attract higher fees than black children.³²

²⁶ See Bonnie Miller Rubin, *Adoption Bill Targets Legal Loopholes*, CHI. TRIB., Mar. 27, 2005, at Metro 1, 4 (describing how the price of a [presumably white] American infant can "hit the \$50,000 mark").

²⁷ See Dusty Rhodes, *Baby Trade*, ILL. TIMES, Feb. 17, 2005, available at <http://www.illinoistimes.com/gyrobase/Content?oid=oid%3A3990>.

²⁸ See Judith K. McKenzie, *Adoption of Children with Special Needs*, 3 FUTURE OF CHILD., 62, 62 (1993) (characterizing children of color as having "special needs" resulting in more difficult placement into an adoptive home).

²⁹ See Carla M. Curtis & Ramona W. Denby, *Impact of the Adoption and Safe Families Act (1997) on Families of Color: Workers Share Their Thoughts*, 85 FAMILIES IN SOC'Y: J. CONTEMP. SOC. SERVS. 71, 71 (2004) (stating generally that children of color wait longer in foster care to be adopted than do their white counterparts).

³⁰ Historically, to the extent that discrimination was legally enforced and social values with regard to reproduction were delineated according to race and socio-economic status, adoption services were affected as was any other social institution. Thus, the best interest of young black children was, at best, limited to a model that restricted those adoptions to black families—a model that the National Black Social Workers Organization would later endorse. See Hanan, *supra* note 5, at 176–77 (describing the National Association of Black Social Workers' objection to interracial adoption as negatively affecting the formation of the child's racial identity); Larry Elder, *Exporting Black/White Adoptions*, LONG BEACH PRESS-TELEGRAM (California), Feb. 28, 2005, at A15 ("According to the National Adoption Center, government still allows agencies to use variables to calculate the 'best interest of the child.'"). As a contemporary model, the disproportionately low adoption rate for black children in foster care gives some indication of the continued illusory nature of adoption as a specialized child-focused welfare service model. See Richard P. Barth, *Effects of Age and Race on the Odds of Adoption versus Remaining in Long-Term Out-of-Home Care*, 76 CHILD WELFARE 285, 288 (1997) (noting that white children in the Michigan foster care system are three times more likely to be adopted than black children).

³¹ See Martha M. Ertman, *What's Wrong with a Parenthood Market?: A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 10 (2003) ("Children who are racial minorities, such as African-American children, are sometimes cheaper to adopt than white children, a differential that seems to turn more on supply and demand than on agencies expending more money to place white children.").

³² See Rhodes, *supra* note 27 (describing how some adoption agencies charge more for biracial children than African-American children).

Even though an “estimated 2 million American families” are looking to adopt, the majority will pass over black children for children from abroad.³³ A recent study reveals the ways that race matters in adoption.³⁴ While 86.4% of black women would accept a white child, only 72.5% of white women would accept a black child, and only 1.8% of white women expressed a preference for a black child.³⁵ Most notably, more women expressed a preference for adopting a child with severe physical or mental disabilities than a preference for adopting a black child.³⁶

In reality, adoption agencies and independent adoption agents establish fees with adoptive parents based on the characteristics of the children in the adoption supply pool, such as, race, gender, and supposed genetic strengths, including the parents’ intellectual aptitude.³⁷ In U.S. adoptions, white children are more highly valued than black children by both adoption agencies and by those who seek to adopt them.³⁸ Further, adoptive parents are acutely aware that competition

³³ See 60 Minutes: *Born In USA; Adopted in Canada* (CBS television broadcast Mar. 10, 2005).

³⁴ Anjani Chandra et al., *Adoption, Adoption Seeking, and Relinquishment for Adoption in the United States*, ADVANCE DATA, May 11, 1999, at 9, available at <http://www.cdc.gov/nchs/data/ad/ad306.pdf>.

³⁵ *Id.* at 8 (see Table 4).

³⁶ *Id.*

³⁷ See David Ray Papke, *Pondering Past Purposes: A Critical History of American Adoption Law*, 102 W. VA. L. REV. 459, 469 (1999) (framing modern adoption in the era of consumption: “[i]n addition to purchasing their share of conventional consumer goods, many also seek to obtain the child held out by advertising and general cultural imagery as central to a good, successful life”). Furthermore, several cases bear out the assumption that adoption has become a market governed by the laws of economics and that the adoptive parents’ wishes to obtain a healthy, genetically desirable child are paramount in the adoption process. The adoptive parents are considered “consumers” who have a right to be informed. See Donner, *supra* note 20, at 518–24. For example, in the case of Michael J., the court awarded judgment to the adoptive parents of a child with a genetic disorder. Michael J. v. L.A. County Dep’t of Adoptions, 247 Cal. Rptr. 504, 513 (Cal. Ct. App. 1988). The child possessed symptoms of the disease at the time of his adoption (manifested in a visible port wine stain birthmark) but the adoption agency took no further action to investigate the underlying cause of the child’s condition. *Id.* at 505. The court “implicitly applied an economic analysis of the adoption process” and implied that the “allocation of risk on adoptive parents [was] unconscionable.” See Donner, *supra* note 20, at 519–20. The case of M.H. also illustrates how the adoptive parents’ interests are being served by the courts in deciding adoption cases. M.H. v. Caritas Family Servs., 488 N.W.2d 282, 287 (Minn. 1992). The court permitted a negligent misrepresentation action by the adoptive parents of a child when the adoption agency failed to disclose that the child was a product of incest. *Id.* at 288.

³⁸ See Mary Mitchell, *Adoption Swamp Grows Murkier with Drug Charges*, CHI. SUN TIMES, Mar. 22, 2005, at 14 (“[T]he fees at a lot of adoption agencies [are based on] the color of

is involved in free-market adoptions.³⁹ Thus, those serious about adopting a white baby, and with the resources to do so, realize balking at the high costs associated with those adoptions would prove futile.

But for the racialized nature of adoption, the market in babies and children might be less detectable. If U.S. adoptions were primarily focused on child welfare, rather than adult need, the price of white children would not exceed that of black children. Why spend more to adopt a white child, if in fact the social service motivation is the same—to serve the best interest of a child? Thus, pursuit of the best interests of children in adoptions is an easily consumable fiction. Even if the rate of adoption for white children exceeded that of their black counterparts, black children would be second in line to foreign adoption if the fulfillment of the best interests for U.S. children were the reality. But sadly, it is not. According to the Department of Health and Human Services, many couples wait more than eighteen months, and spend as much as \$30,000 to adopt children from abroad,⁴⁰ bypassing the less expensive and less desired black children.⁴¹ In fact, according to a recent report, adoption of black children can be facilitated in less than three weeks.⁴²

the baby's skin. Babies who have two white parents cost the most and those who have two black [parents] cost the least.”).

³⁹ See Gay Jerve, *Priceless*, MONEY, Apr. 1, 2003, at 119 (a couple describes the life-style changes they underwent when they decided to adopt: “[My husband] took a ‘real job’ To adopt, we had to appear to be solid, and we also needed the money Unless you’re independently wealthy, you have to fit the norm.”).

⁴⁰ NAT’L ADOPTION INFO. CLEARINGHOUSE, U.S. DEP’T OF HEALTH & HUMAN SERVS., INTERCOUNTRY ADOPTION 1, 3 (2001) available at http://naic.acf.hhs.gov/pubs/f_inter/f_inter.pdf [hereinafter INTERCOUNTRY ADOPTION].

⁴¹ In researching for this article, the highest fee associated with black adoptions was \$19,000. The lowest fees included nearly free permanent placements involving children from foster care. See, e.g., Gabrielle Glaser, *The Price(s) to Adopt*, OREGONIAN, July 4, 2004, at L01 (a couple adopting an African-American child can expect to wait between one to nine months and pay \$12,000–\$19,000); ADOPTION OPTIONS: A FACT SHEET FOR FAMILIES, *supra* note 23, at 3 (children can be adopted from foster care without the adoptive parents incurring any, or very few, costs).

⁴² *60 Minutes: Born In USA; Adopted in Canada*, *supra* note 33.

3. Social Valuing

*If the mother wanted to show a commitment to her daughter, then she should learn English to the extent that her daughter had . . .*⁴³

The third factor that provides evidence of a free market in U.S. adoptions is the use of social status of adoptive parents in the child allocation process. Adoptive parents' social status, including household income, family type, and immigration status figures significantly in adoption decision-making.⁴⁴ Angela Kupenda, Zanita Fenton, and other child-welfare law scholars provide a race-based critique of the challenges faced by families of color seeking to adopt.⁴⁵ According to these scholars, black families face greater obstacles in qualifying for child placements.⁴⁶ They suggest that the prevalence of single parent households and lower income status weighs against black families.⁴⁷

⁴³ Shaila Dewan, *Two Families, Two Cultures and the Girl Between Them*, N.Y. TIMES, May 12, 2005, at A16 (quoting Amanda Crowel, the lawyer for the couple petitioning to adopt Linda Berrera Cano).

⁴⁴ See RANDALL B. HICKS, *ADOPTING IN AMERICA: HOW TO ADOPT WITHIN ONE YEAR* 12 (4th ed. 2004) (describing the importance of adoptive parents' ability to demonstrate financial security to adoption agencies, including those agencies that place an emphasis on a permanent stay-at-home parent).

⁴⁵ These scholars also suggest that black families tend to adopt within their families, which avoids the costly transaction fees imposed by agencies. See Zanita E. Fenton, *In a World Not Their Own: The Adoption of Black Children*, 10 HARV. BLACK LETTER L.J. 39, 42–43 (1993) (describing the slavery origins of informal adoption by extended family members, which is still common within African-American communities); Angela Mae Kupenda, *Law, Life and Literature: Using Literature and Life to Expose Transracial Adoption Laws as Adoption on a One-Way Street*, 17 BUFF. PUB. INT. L.J. 43, 49–50 (1998–1999); see also ROSE M. KREIDER, U.S. CENSUS BUREAU, *ADOPTED CHILDREN AND STEP CHILDREN: 2000*, at 2–3 (Oct. 2003), available at <http://www.census.gov/prod/2003pubs/censr-6.pdf> (illustrating that informal adoption of children is more common in certain cultural groups, including the Inupiaq in Alaska, Blacks, and Hispanics). Because of the structure of the adoption identification category, the data from the 2000 Census cannot differentiate among different types of adoption, including informal and formal adoptions.

⁴⁶ See Kupenda, *supra* note 45, at 49–50 (citing problems such as the frequency that black families are rated as “unqualified” to adopt, the scarcity of black professionals employed by adoption agencies, the presence of hefty adoption fees, and the lack of adoption subsidies).

⁴⁷ See Juan J. Battle, *What Beats Having Two Parents?: Education Outcomes for African American Students in Single- versus Dual-Parent Families*, 28 J. BLACK STUD. 783, 783 (1998) (noting that in 1991, 57.5% of African-American children lived with only one parent); see also U.S. CENSUS BUREAU, *PEOPLE: INCOME AND EMPLOYMENT*, available at <http://factfinder.census.gov> (follow “People” hyperlink; then follow “Read about Income and Employment” hyperlink) (“Black households had the lowest median income. Their 2003 median money income was about \$30,000, which was 62 percent of the median non-Hispanic White households.”).

Thus, potential black adoptive parents are comparatively less competitive players in the free market for children; they will lose more often than white parents, even if their goals are to adopt black children.⁴⁸

More recently, immigration status might affect whether parental rights are protected or possibly terminated.⁴⁹ A prime example occurred when a Tennessee court recently removed an eleven-year-old girl, Linda Berrera Cano, from the custody of her mother, a Mexican migrant worker, and placed her with a family that “lives in a brick ranch house with a basketball hoop in the driveway, a swimming pool in the backyard.”⁵⁰ Ironically, Linda Berrera Cano was never surrendered by her mother to the state, nor was she in foster care when she was placed with the Patterson family.⁵¹ Instead, Linda was simply a poor, migrant worker’s child who missed some days of school to care for her siblings. One of Linda’s teachers took a special interest in her and petitioned for her adoption.⁵² The case attracted considerable attention as Judge Barry Tatum demanded that the mother, Felipa Berrera, *learn to speak English* before visitations would be permitted with her daughter, whose first language is Spanish.⁵³

Tennessee law provides for direct petition to courts in cases of child abuse and neglect. Most would view this law as progress and in the best interest of children, after all, it avoids delays in removal from dangerous situations. Deciding, however, whether this case and its aftermath have been focused on the welfare of the child or the desires of the adults is more complicated. The facts of the Berrera case seem unique, but it does provide limited precedent for wealthier individu-

⁴⁸ See Ruth G. McRoy et al., *Achieving Same-Race Adoptive Placements for African-American Children: Culturally Sensitive Practice Approaches*, 76 CHILD WELFARE 85, 89 (1997) (describing “a National Urban League study of 800 African-American families who applied to adopt,” and a mere two of the 800 were approved for adoption); see also Erika Lynn Kleiman, *Caring for Our Own: Why American Adoption Law and Policy Must Change*, 30 COLUM. J.L. & SOC. PROBS. 327, 359 (1997) (noting that “traditional standards governing parent eligibility are biased against minority parents, and this may be one of the reasons why there is a dearth of minority parents available to adopt minority children”).

⁴⁹ See U.S. CENSUS BUREAU, *THE FOREIGN-BORN POPULATION: CENSUS 2000 BRIEF 3* (Dec. 2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-34.pdf> (noting that there are 31.1 million foreign-born individuals in the United States, comprising 11.1 % of the total population, and that naturalized citizens constitute 40.3 % of the foreign-born population).

⁵⁰ Dewan, *supra* note 43, at A16.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* It is more than likely that Linda suffered from the conditions that poverty typically produces. But, is it reasonable to address the underlying conditions of poverty through the arbitrary displacements of children from their parents?

als to directly petition the courts to adopt handpicked children. Poverty, immigrant status, limited political clout, and limited English proficiency may factor significantly in one's ability to effectively compete for a child, despite a biological connection.⁵⁴

4. Unrestrained International Market

Finally, private, transnational adoptions provide evidence of market competition. Foreign adoptions figure significantly in U.S. adoption services, with growth on two fronts.⁵⁵ First, overwhelmingly, white couples who are unable to locate white children for adoption in the United States are increasingly looking and adopting children from abroad, including China, Guatemala, Russia, and the eastern European countries.⁵⁶ Couples who decide to adopt from abroad pay far more than the costs associated with adopting black children in the United States. These costs include international transportation fees, transactional costs with foreign governments, and local and foreign fees.⁵⁷ In this way, they exercise another key component of free markets: choice.⁵⁸

Second, a notable trend is affecting the lives of African-American children. Canadians, Germans, Swedes, and other predominantly white ethnic groups are adopting black children from the United States.⁵⁹ With open adoptions, there are no restrictions on the adoption of American children to foreign couples, as long as they can meet the requirements and fees established by adoption agencies and birth parents.⁶⁰ Of the many ironies, one which has not escaped the scrutiny of commentators, is the dramatic difference in costs associated with these

⁵⁴ *Id.*

⁵⁵ See KREIDER, *supra* note 45, at 12 ("In 2000, 13 percent of adopted children of householders of all ages were foreign born.").

⁵⁶ See Dawn Davenport, *Born in America, Adopted Abroad*, CHRISTIAN SCI. MONITOR, Oct. 27, 2004, at 11.

⁵⁷ ADOPTION OPTIONS: A FACT SHEET FOR FAMILIES, *supra* note 23, at 2.

⁵⁸ See Kleiman, *supra* note 48, at 363 (noting the irony in the adoption of foreign children: since many international adoptions are also transracial, the adoptive parents encounter many of the same cultural problems as they would have if they had adopted a ['less expensive'] minority child in the United States).

⁵⁹ See Davenport, *supra* note 56; Anne-Marie O'Neill, Joanne Fowler & Ron Arias, *Why Are American Babies Being Adopted Abroad?*, PEOPLE, June 6, 2005, at 64 (describing that some American birth mothers simply choose foreign adoptive parents based on the perception that other countries might be less race-conscious than the United States).

⁶⁰ See O'Neill, *supra* note 59 (noting that "looser federal regulations allow even newborns to leave [American] borders.").

adoptions. The adoption of African-American babies and children usually costs less than half the cost of adopting a white baby.⁶¹

II. MARKET PITFALLS & CONVENTIONAL WISDOM

According to conventional wisdom, the needs and best interest of children would always prevail over the special interest of the adults seeking to adopt them.⁶² Conventional wisdom, therefore, rightfully rejected the proposition of a child being placed into an abusive family or one that sought to exploit the child's labor, sex, or talent. In reality, however, adoption has never been a flawless system.⁶³ Indeed, adoption is no longer a domestic welfare service that attends primarily to the needs of children born in the United States.⁶⁴ Rather, adoption is a multi-million dollar transnational service where aesthetics and genetic traits are significantly scrutinized.⁶⁵ There are pitfalls in the free-

⁶¹ See INTERCOUNTRY ADOPTION, *supra* note 40 (adopting a child internationally can cost up to \$30,000); Rhodes *supra* note 27 (noting the cost for an African-American child is a mere \$4,000); Rubin, *supra* note 26 (noting the cost for a [white] American infant can "hit the \$50,000 mark").

⁶² After the enactment of the first modern state adoption statute in 1851, adoption in the United States evolved as both a state judicial process and a specialized child welfare service to promote the best interest of children in need of permanent homes. See Hanan, *supra* note 5, at 174 (noting that modern adoption laws, beginning in 1851, were designed to serve the best interests of the child, no longer to merely provide adoptive parents with heirs, as did early American adoption laws based on the Roman model).

⁶³ The conventional wisdom worked optimally when adoption was viewed through a contextual lens. For example, over five hundred thousand children live in foster care arrangements, and sixty-one percent of all those in the public foster-care system are children of color. See ADMIN. FOR CHILDREN AND FAMILIES, ADMIN. ON CHILDREN, YOUTH & FAMILIES, CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT: PRELIMINARY ESTIMATES FOR FY 2002, at 1, 2 (2004), available at <http://www.acf.hhs.gov/programs/cb/publications/afcars/report9.pdf>. Children of color will wait considerably longer for adoption than their white counterparts. (For statistics regarding placement and length of stay of children in foster care see *id.*) White children in the Michigan foster care system are three times more likely to be adopted than black children. See Barth, *supra* note 30, at 288. Yet, the adoption of white children may have less to do with early child welfare considerations of the 1850s and social altruism. Rather adult desires factor significantly in this process, meaning children are not necessarily being adopted to simply provide a charitable service; if that were so, fewer African-American children would be bypassed for foreign adoptions. Because race matters in adoptions, child welfare may be secondary to the market constraints imposed by the costs of racism in the United States.

⁶⁴ See Kleiman, *supra* note 48, at 366 ("American adoption law- and policy-makers claim to focus on the protection of children's best interests. If this were their true concern, however, adoption laws would facilitate the placement of children with families that want them. Instead, current laws and policies create a strong incentive for American parents to adopt foreign children.").

⁶⁵ As mentioned above, since the adoption process in the United States is not administered by any single entity, exact data relating to the worth of the adoption industry is not

market model, however, where finances prevail over child welfare and the best interests of children are subordinate to adult preference.

Critics of the free market in adoption have rightfully illuminated the tensions involved with financial considerations of “sensitive subjects”⁶⁶ or what Professor Margaret Radin refers to as the “market inalienable.”⁶⁷ For example, Professor Radin argues that our very “personhood” is threatened by the rapid expanse of commodification in our daily reality.⁶⁸ Yet, what even the most insightful critics fail to grasp or overlook, however, is the diminution of value according to race and social hierarchies that are born out of the free-market model. The free-market model is not like slavery, but it does reproduce the class and social distinctions found in the legacy of American slavery.⁶⁹ Free-market opponents have advanced two main ideological criticisms. The first criticism was that a market analysis was always inappropriate to the study of human subjects.⁷⁰ Second, critics suggested that although costs are involved in the adoption process, it is unfair and inaccurate to characterize those fees in market terms.⁷¹ In other words, to imply that the adoption process is subject to market forces of supply, demand, and preferences would tarnish the reputation of the industry.⁷²

known. See generally U.S. CENSUS BUREAU, INDUSTRY SERIES: SUMMARY STATISTICS FOR THE UNITED STATES: 2002 ECONOMIC CENSUS 3 (see table 2) (July 2004), available at <http://www.census.gov/prod/ec02/ec0262.04.pdf> (Data from the 2002 Economic Census estimates that the “child and youth services” industry, which includes adoption, has an annual payroll of 3.3 billion dollars. The data also indicate revenue of the industry is nearly 9.5 billion dollars.). See also Glaser, *supra* note 41, at L01 (“In 2001, Marketdata Enterprises . . . reported that adoption services were a \$1.4 billion industry in the United States . . .”).

⁶⁶ See Rahel Jaeggi, *The Market's Price*, 8 CONSTELLATIONS 400, 408 (2001); Mario Morelli, *Commerce in Organs: A Kantian Critique*, 30 J. SOC. PHIL. 315, 318 (1999); Michael Rushton, *The Law and Economics of Artists' Inalienable Rights*, 25 J. CULTURAL ECON. 243, 248 (2001).

⁶⁷ Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1850 (1987).

⁶⁸ See MARGARET JANE RADIN, *CONTESTED COMMODITIES* 154–63 (1996).

⁶⁹ See Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 55 (1993–1994) (noting that some blacks question “whether the system of white control over the fate of Black children” that dates back to slavery has changed. “To some Blacks, [the placement of Black children in white homes by white-dominated social service agencies] suggest[s] that the disempowerment of enslaved Blacks has continued in modern-day America.”).

⁷⁰ See, e.g., Williams, *supra* note 6, at 918 (implying that applying a cold, scientific analysis to something as unscientific as adoption is not appropriate: “I am trying, quite intentionally, to problematize the clean, scientific way in which the subject is often discussed.”).

⁷¹ See Ertman, *supra* note 31, at 52 (criticizing Landes & Posner’s approach—“scholars do not see parenthood and cash as completely commensurable”).

⁷² See *id.*

Unfortunately, financial incentives in adoptions cannot be easily dismissed, nor can policy-makers, scholars, and child welfare advocates pretend that by ignoring class and the considerable costs involved in domestic and international adoptions, that a market has not developed. To ignore the less attractive nuances of adoptions is to presume that adoption services in the United States operate entirely for the best interest of children, and adult interests are *always* subordinated to those of children. Were the best interest of all adoptable children served by unacknowledged market considerations, there would be very little need for further scholarship scrutinizing the mechanics of adoption. After all, adoption is a very sensitive process that involves vulnerable children and adults, as both groups have an interest in being part of a loving family.⁷³

III. VALUES & SOCIAL IMPACT

This article has argued that a free market in adoptions already exists and that altruism as a primary goal in adoption has been overshadowed by supplication to parental desires. Financial incentives, payments to mothers, exorbitant fees provided to adoption agencies and the robust enterprise of independent, direct adoptions provide evidence of free-market forces in adoption. Determining, then, whether the state has a future role in shaping the adoption market or allowing it to freely exist without state interference is a relevant and timely question. Because parental autonomy has been so strongly guarded within the common law and constitutional law tradition, scholars may tend to overlook the government's arguable affirmative duty to be involved in this "sensitive" legal issue involving children.

Unconsciously, individuals can make choices that have significant implications for social policy. The method that individuals use to make decisions with regard to acquiring children can have both positive and negative social consequences. To the extent that those individual decisions can negatively impact society – economically, morally, or burden social services, the state arguably has a role in regulation. In the context of adoption, individuals make choices that can have

⁷³ Both would-be parents and children alike have deep psychological desires and needs to be part of a family. See Joan Heifetz Hollinger, *From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction*, 18 U. MICH. J.L. REFORM 865, 875 (1985) ("Women especially have been socialized with the view that their self-esteem, their deepest sense of personhood, depends on their ability to bear a child.").

significant implications for a broader society, about which society should be concerned.

If the byproducts of free adoptions are two-tiered racial systems or racial hierarchies, it is an issue worth greater social scrutiny. Beyond race, society might also be concerned about middle class whites (and other groups) being priced out for white babies, which has a double negative effect. First, if the market responds only to the highest bidder with regard to white babies, it is possible that white babies will only be placed with wealthier families. The problem created by the free market is the legitimatization of a troubling normative view that adoption should only be among the wealthy and ignoring the class diversity in the United States, which could have a deterrent effect on "class diverse" adoptions.

Second, well-meaning, altruistic white parents who are able to share their home and love with another child, although not among the wealthiest of society, could be shut out of the adoption free market. Finally, there is the consideration of social involvement in shaping the lives of adoptees. Should we as a society be concerned that a special class of adoptees is created through free-market adoptions? After all, wealth based adoptions could lead to children being funneled into an "elite" class. How society addresses the free market in adoption or the individual decision-making in adoption will have a significant social impact. There are several options society must weigh, and each is burdened by what might be considered undesirable consequences by market proponents. To the extent that agents are needed to service the adoption process, financial transactions will always be involved. Our challenge is to determine a proper balance between the needs of children, government responsibility, and individual autonomy.

A. *Price Caps*

One option is to regulate the price of adoption. In this option, prices could be capped by the State. In this scenario, all adoptions would cost the same, regardless of the child's race, gender, religion or other factors, including eye color, hair texture, and complexion. To the extent that even with price caps, the adoption of some children would be unaffordable, there could be adjustments. Critics would likely eschew this option as it interferes with individual autonomy and the free market. Others might oppose such an option because it unveils what we would otherwise want unrevealed, free market in adoptions.

B. *Taxation*

A second option to monitor and control the social impact of individual decision-making is taxation.⁷⁴ In a taxation model, all adoptions with transaction fees would be assessed a progressive tax, meaning that the government imposed fee would not be capped, but would be proportionate to the adoption fee. Under this proposal, all adoptions could have a ten percent fee attached. Alternatively, adoption fees over a “reasonable” dollar amount could be taxed at a higher rate, similar to property taxes within various municipalities.

Taxation helps to generate state and federal funds that can be used to promote the social welfare of children in foster care and adoption centers, thereby facilitating a positive social impact. For example, taxation on free-market adoptions could be used to provide better care for children who are more difficult to place, including children with disabilities, older children, and black children. Funds generated through taxation could also help to fund private foster care or permanent placements. Critics might equally be troubled by this model and suggest that it detracts from adoption of “desirable” babies by taxing well-meaning couples out of the adoption arena. Moreover, they could argue that individual autonomy is compromised through government taxation on adoption. Such criticisms, while true, are not so compelling as to limit governmental interference or interests in promoting the health and safety of all children. Nor, it seems, are adoption agents’ interests so severely burdened by this type of governmental involvement that a protected interest is violated.

C. *Information*

A final option to address the negative social impact of the free market is information. Government sponsored information campaigns have been used to promote organ donation, in anti-smoking campaigns, entreaties for mothers not to drink alcohol during pregnancy, and even more invasive efforts with regard to abortion. In the context of abortion, some states mandate a waiting period and that information be provided to the woman or girl seeking an abortion. Could this model be used with free-market adoptions? Currently, adoption agencies provide information to prospective parents, but perhaps there is an additional role for government to the extent that

⁷⁴ Such options are used by the government to address other markets, such as alcohol and tobacco.

adoptions are not conducted in isolation, but impact the entire society. This third option of greater governmental involvement through increased information as to the social impact of race-based decision-making in adoption is, perhaps, the least invasive of the three options.

In order for Americans to truly understand the socio-economic implications of adoptions they must be provided information. Currently, the federal government does not take a role in providing information to adopting parents about the racial and socio-economic impact resulting from an adoption process driven by aesthetic preferences and perpetuated by a free market. Specifically, that thousands of children are permanently shut out of placement because of racial preferences is a disturbing message, and one that adopting parents should be made aware. Receiving information will not obligate potential parents to adopt black children. However, it might assist individuals and couples in making better informed decisions about adoptions and the best interests of children. Indeed, there is a legitimate governmental function served by providing this data to the extent that the government has an interest in the health and safety of children left in its care and in semi-private foster care situations.

Critics of information driven remedies might rightfully identify certain shortcomings of such a policy-based proposal, including that it provides no guarantees of placement for black babies and children, and that it places an added burden on the government to address the racial impact of private arrangements. Yet, it seems that there is, as stated earlier, a valid governmental interest here, and, indeed, an obligation to proactively act on behalf of its child citizens in adoption limbo. The burden on the government is not so weighty nor is such a proposal overly intrusive into the lives of prospective adopting parents to outright dismiss the proposal. The means of accomplishing or at least addressing this significant governmental interest is not so burdensome to the public as to trample any constitutional rights. To the contrary this government action further empowers citizens to make informed choices. Finally, this proposal does not itself end race-based decision-making in adoption. However, we have learned with other information based campaigns from the labeling of cigarettes about the harmful effects to pregnant women, and public-service announcements about the dangers of drunk driving, that social movements can be inspired by information. Further, individuals can and will respond in the better interest of society and themselves when clear information explaining the social impact of consumer decision-making is disseminated.

CONCLUSION

If market forces exist in adoptions, should there be state-based regulation? Even Posner agrees that the vulnerable status of children requires some level of state participation and oversight in the adoption process to prevent the exploitation and denigration of children. How should the fine line of state responsibility and prospective parental autonomy be balanced? Greater state involvement in adoptions could create bureaucracies that have a deterrent effect or slow the adoption processes. Children who otherwise would be adopted may have longer waits. Indeed, there are pitfalls to governmental involvement, but with attention to those problems, they can be overcome.

The attacks on market place inquiry in the realm of adoption generated by the Posner “baby selling” article unintentionally served to obscure less altruistic adoption practices and ignored relevant questions in the supply and demand of children. The backlash to some extent stifled dialogue about the realities of adoption in the United States. Scholars have not rigorously scrutinized the market nature of adoptions and child supply. Greater dialogue is needed on this question that constructively examines the roles of government, judges, adoption agencies, and independent agents. This article is an attempt to generate dialogue on market nuances of contemporary adoption.

