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THE REGULATION OF THE MARKET IN ADOPTIONS†

Richard A. Posner*

I. THE SHORTAGE OF BABIES FOR ADOPTION

Whenever critics of the law-and-economics movement want an example of its excesses they point to what is popularly known as the “baby selling article,” which Dr. Elisabeth Landes and I wrote almost a decade ago.¹ The article is usually, although incorrectly, described as advocating a free market in babies. Worse, an official of a national adoption organization wrote me recently (and more important, the *Wall Street Journal*) that, as he understood the article, I advocate allowing the wealthy parents of a child who needs a liver transplant to buy a child and “harvest” its liver for their own child. In fact, Dr. Landes and I had stated in the article: “Laws forbidding child abuse and neglect would continue to be fully applicable to adoptive parents even if baby sales were permitted.”²

Another profound misconception about the article is that in discussing the

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¹ Landes & Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978). For a briefer treatment of the subject see R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 5.4, at 139-43 (3d ed. 1986). For discussions of the “baby selling” article by the popular press see, e.g., Barrett, *Influential Ideas: A Movement Called ‘Law and Economics’ Sways Legal Circles*, Wall St. J., Aug. 4, 1986, at 1, col. 1, 16, col. 2; McDaniel, *Free-Market Jurist*, NEWSWEEK, June 10, 1985, at 93-94; Caplan, *Meet Richard Posner, the Judge Who Would Sell Homeless Babies*, Washington Post Nat’l Weekly Ed. (Commentary), Oct. 29, 1984, at 23, col. 1. For temperate scholarly criticism of the Landes-Posner article see Prichard, *A Market for Babies?*, 34 U. TORONTO L.J. 341, 347-57 (1984); for intemperate see Kelman, *Consumption Theory, Production Theory and the Ideology of the Coase Theorem*, 52 S. CAL. L. REV. 669, 688 n.51 (1979) (commenting on my discussion of baby selling in *ECONOMIC ANALYSIS OF LAW*, and calling it, without elaboration, “irrational and immoral,” a “parody of Jonathan Swift’s ‘Modest Proposal’ ”).

² Landes & Posner, *supra* note 1, at 344. The letter, by William L. Pierce, President of the National Committee for Adoption, was published in the *Wall Street Journal* of Aug. 22, 1986, at 16, col. 1. In further correspondence with me, Pierce stated that he had never read my article with Dr. Landes and that his understanding of my position came from accounts in the popular press, such as Barrett’s article cited in note 1, *supra*. Letter from William L. Pierce to Richard A. Posner (August 4, 1986).

pros and cons of using the market to equilibrate the demand for and supply of babies for adoption, Dr. Landes and I were proposing a radical break with existing ethical norms. Actually, wholly apart from the black market in babies for adoption, the market *is* used, though in a stunted form, to allocate babies for adoption. Adoption agencies charge fees, often stiff ones, to adoptive parents, and part of the agencies' fee income goes to pay the medical expenses and other maintenance expenses of the natural mother; thus the adoptive parents pay the natural mother, albeit indirectly and at a regulated price, to give up her child.³ In "independent" adoptions, which are arranged through a lawyer or obstetrician, the element of sale is even more transparent, and indeed the system of independent adoption is often referred to as the "gray market." Dr. Landes and I were simply trying to consider how changes in the law might make the existing market in babies for adoption operate more efficiently—and more equitably.

Writing a second article on "baby selling" is not likely to dispel misconceptions harbored by people who feel free to criticize the first article without having read it and are therefore unlikely to read the second either. My purpose is different. The social problem that impelled Dr. Landes and me to write our article remains serious, and this article is addressed to those willing to think about possible solutions in a rational manner.

Some critics of our article apparently believe we wrote it as an exercise in mechanical extrapolation from the economic analysis of conventional markets. According to one of the least controversial concepts in normative economics—Pareto superiority—a transaction that makes at least one person better off and no one worse off increases social welfare, and is therefore efficient. A voluntary exchange is such a transaction, since the parties would not make it if they did not think it would make both of them better off. Therefore (it might seem) the exchange of money for a baby is efficient. But this last step does not follow from the first two.⁴ A baby is a member of society too. If the transaction diminishes its welfare, the transaction is not Pareto-superior. If it diminishes the baby's welfare by more than it increases the transactors' welfare, the transaction is not efficient even under a less demanding definition of efficiency. These points are fundamental to an economic analysis of family law,⁵ but they do not establish the irrelevance of

³ To simplify the analysis, I shall abstract from the issue of the natural father's rights. To the extent that the father is thought to have a legal right in the child, the transaction costs of baby selling are, obviously, increased.

The fees charged by the agencies are of course regulated. *See In re Baby Girl D.*, 517 A.2d 925 (Pa. 1986). If they were not, and if the agencies acted as profit maximizers, the baby shortage would disappear.

⁴ We noted this in our earlier article, *see Landes & Posner, supra* note 1, at 342, but I shall now drop this refrain to spare the reader.

⁵ *See generally* R. POSNER, *supra* note 1, ch. 5. What if, in Mr. Pierce's "harvest" example, *supra* note 2, the transplant would increase the net utility of the rich baby and its parents by more than it would decrease the net utility of the poor baby and its

economics to adoption. Economics is not just about the exchange of objects. Labor economics, and more recently family or household economics, are important fields of economic inquiry even though they deal with the exchange of, and not merely between, human beings. The purpose of our article was not to make an extrapolation at once mechanical and unsound from the market in goods to the market in babies but to use the analytical tools of economics to explore a pressing social problem—the imbalance between the demand for and supply of babies for adoption.

On the demand side, many married couples are unable to have children and want to adopt them. Recent advances in the treatment of fertility problems appear to have been offset by the growing tendency of women to marry later and postpone childbearing to their thirties, when they are likelier to have fertility problems and will have less time to do something about them (whether the something is medical treatment or joining the queue for adoption). Childless couples who try to adopt through an adoption agency find that they must join a long queue and that even then they may be ineligible to adopt—not because they would be unfit parents but because the agencies, having a very limited supply of babies, set demanding (and sometimes arbitrary) criteria of age, income, race, and religion to limit demand to supply. Few healthy white infants are placed through adoption agencies today; I postpone discussion of the special problems involved in placing other children for adoption.

A couple may try to go the independent adoption route, but this route is haphazard and disorganized, and information about babies available for adoption through it is hard to come by. Some states, moreover, have outlawed independent adoptions.⁶ It goes without saying that both adoption

parents? Would the sale then be efficient? These questions pose dilemmas at the heart of ethical debate over utilitarianism and cognate normative concepts such as wealth maximization. See, e.g., Laycock, *The Ultimate Unity of Rights and Utilities*, 64 TEX. L. REV. 407 (1985); Posner, *Wealth Maximization Revisited*, 2 NOTRE DAME J. L., ETHICS & PUB. POL'Y 85, 100-05 (1985); Thomson, *The Trolley Problem*, 94 YALE L.J. 1395 (1985). These are, however, academic questions, because child abuse laws protect children from being killed or injured by their parents, whether natural or adoptive, and whether to reduce or increase welfare in its broadest utilitarian sense. Just as economists who study labor markets normally do not urge the repeal of the thirteenth amendment, which prohibits involuntary servitude, even though under some conditions such servitude might be efficient, Dr. Landes and I did not and do not advocate any relaxation of child abuse laws.

⁶ On the varying pattern of state regulation of independent adoption see Note, *Independent Adoption: The Inadequacies of State Law*, 63 WASH. U.L.Q. 753, 755-56 (1985); Note, *Independent Adoption: Regulating the Middleman*, 24 WASHBURN L.J. 327, 345-56 (1985). On the practice of independent adoption agencies see Galen, *Baby Brokers: How Far Can a Lawyer Go?*, 9 NAT'L L.J. no. 22, at 1 (Feb. 9, 1987).

As stunted as the independent adoption system is, it offers a dramatic example of the superiority of market to administrative methods of allocating resources. One commentator, after noting the arbitrary restrictions that adoption agencies impose, points out another serious problem with adoption agencies:

through an agency and independent adoption favor the wealthy and well connected. The final alternative is the black market, a form of independent adoption. The black market is by definition illegal,⁷ and illegality forces price up and quality down and makes prospective buyers uneasy. Long queues, shortages, uncertain quality, a black market—these are the classic symptoms of excess demand, whether in the baby market or the Soviet food market.

The difficulty of satisfying the potential demand for babies for adoption would be easier to accept if the supply of babies were inherently quite limited in relation to the demand, as it would be if premarital sex were rare—for the usual source of babies for adoption is illegitimate births. But sex outside marriage is rampant in our society. Although the widespread use of contraceptives reduces the fraction of sexual encounters that result in unwanted conception, the reduction is not so great as one might imagine. Because the probability of conception is reduced, the “costs” of sex (one cost being unwanted conception) are also reduced. The reduction in cost can be expected to increase, and undoubtedly has increased, the amount of premarital sexual activity. For although there are effective methods of contraception, people are often careless about using them; and some people have greater moral inhibitions about contraception than about premarital sex. So even though the fraction of pregnancies is reduced, when it is multiplied by the larger number of sexual encounters the number of undesired pregnancies may not be reduced greatly or even at all.⁸ Furthermore,

The harsh interrogation method employed by most agencies also alienates expectant mothers. Approximately four out of five women who consult agencies decide against adoption and raise their own children. Yet, most women who consult independent placement attorneys ultimately place their children for adoption. The difference lies in the fact that agency workers often appear unsympathetic and offer these prospective mothers only economical medical care, while the intermediaries are usually more considerate and provide the best of hospital accommodations.

Consequently, in states that allow independent placements to flourish, the ratio of adoptions to total population is substantially higher than in states that discourage or prohibit independent placements. In Connecticut, the number of state-wide adoptions dropped almost ninety percent in the thirteen-year span following the state's prohibition of all forms of direct and intermediary placement. Understandably, the adoption agencies have frequently sponsored national legislation to eliminate independent placements in an effort to gain control over all non-relative arrangements.

Krones, *Stimulation of Independent Adoptions—A Sensible Approach to Eradicating the Baby Black Market*, 6 ORANGE COUNTY B. J. 192, 200-01 (1979) (footnotes omitted). See also Leavitt, *The Model Adoption Act: Return to a Balanced View of Adoption*, 19 FAM. L.Q. 141 (1985).

⁷ Although only about half the states have laws specifically aimed at the black market in babies for adoption, see Katz, *Surrogate Motherhood and the Baby-selling Laws*, 20 COLUM. J.L. & SOC. PROBS. 1, 8 n.34 (1986), a free market in babies would run afoul of restrictions on adoptions in every state.

⁸ Dr. Landes and I presented figures showing that the number of illegitimate births

because the stigma of illegitimacy, for both parents and children, has also lessened, a smaller fraction of babies born out of wedlock is put up for adoption. The decline in that stigma is also partly responsible for the increase in premarital sex and the casual attitude of many engaged in it about contraception. And more than a change in moral attitudes is involved. The welfare system enables indigent single women and girls, who might otherwise be forced to give up their children for adoption, to keep them.

The supply of babies for adoption has been dramatically affected by the increase in abortions since the Supreme Court's decision in *Roe v. Wade*.⁹ The number of reported legal abortions rose from nearly 600,000 in 1972 (before *Roe*) to almost 1,300,000 in 1983, the last year for which reliable figures are available.¹⁰ Of course, even if abortion were illegal, there would still be many abortions, and of the additional babies born many would be retained by the mother. Nevertheless the supply of babies for adoption would be greater. Because of *Roe v. Wade*, the state cannot compel a woman determined to have an abortion to have the baby and give it up for adoption, but it does not follow that the woman should not be given incentives to do so. For many women, abortion is a last resort; indeed, most supporters of a right to abortion insist that this is generally the case. Thus, for little more than the maintenance and medical expenses of pregnancy plus any lost earnings, and often for less, many women might be induced to forgo an abortion and give up the baby for adoption. Dr. Landes and I proposed authorizing some adoption agencies, on an experimental basis, to use a part of their adoption fees to pay women contemplating abortion to forgo the abortion, have the baby, and put it up for adoption through the agency.¹¹ I

in the United States had risen from 183,000 in 1957 to 407,000 in 1973. Landes & Posner, *supra* note 1, at 325 n.6. By 1984 this figure had risen to 770,355. See NAT'L CENTER FOR HEALTH STATISTICS, MONTHLY VITAL STATISTICS REPORT, vol. 35 no. 4 Supp., ADVANCE REPORT OF FINAL NATALITY STATISTICS, 1984, 31 tab. 18 (July 18, 1986).

⁹ 410 U.S. 113 (1973).

¹⁰ See CENTERS FOR DISEASE CONTROL, U.S. PUB. HEALTH SERV., ABORTION SURVEILLANCE 1983, tab. 1 (not yet published).

¹¹ See Landes & Posner, *supra* note 1, at 347-48. An alternative to the scheme Dr. Landes and I suggest would be to subsidize adoption; this is proposed in Comment, *Funded Adoption: A "Viable" Alternative to Adoption*, 1979 B.Y.U. L. REV. 363 (1979). It is an odd proposal, however. The imbalance in the baby market comes not from insufficient, but from excess, demand; subsidizing adoption would make the demand even greater. What is needed is a mechanism for getting more money into the hands of women facing a choice between having an abortion, on the one hand, and carrying the baby to term and then putting it up for adoption, on the other. The Comment does recommend that the program of funded adoption include payment for maternal health care, but it would be a lot simpler (and require no public funding) to let the adoptive parents make a transfer payment to the natural mother via the adoption agency. Although the general case for subsidized adoption is weak, there is

continue to believe that this would be a good experiment. Dr. Landes and I did not in 1978 and I do not today advocate the wholesale and immediate abolition of laws forbidding the sale of babies for adoption.

One problem we did not consider was the age of consent for giving up a child for adoption in exchange for money. If a young girl, say a fourteen-year-old, becomes pregnant, should she be considered competent to decide among abortion, sale, and perhaps other alternatives? I would elide this difficult issue by confining the experiment to pregnant women eighteen or older.¹²

Because no one to my knowledge proposes the "deregulation" of the adoption market beyond the limited experimental step just mentioned, debate about a free market in babies is academic. But that should not be an objection to an article published in an academic journal. In the remainder of this article I shall describe briefly how such a market might operate, under what regulatory constraints, and with what likely consequences, and in doing so will try to respond to the most frequently expressed objections to allowing the market to function in this area.

II. CHARACTERISTICS OF AND DESIRABLE CONSTRAINTS ON THE BABY MARKET

A. *The Question of Price*

For heuristic purposes (only!) it is useful to analogize the sale of babies to the sale of an ordinary good, such as an automobile or a television set. We observe, for example, that although the supply of automobiles and of television sets is rationed by price, not all the automobiles and television sets are owned by wealthy people. On the contrary, the free market in these goods has lowered prices, through competition and innovation, to the point where the goods are available to a lot more people than in highly controlled economies such as that of the Soviet Union. There is even less reason for thinking that if babies could be sold to adoptive parents the wealthy would come to monopolize babies. Wealthy people (other than those few who owe their wealth to savings or inheritance rather than to a high income) have high costs of time. It therefore costs them more to raise a child—child rearing still being a time-intensive activity—than it costs the nonwealthy. As a result, wealthy couples tend to have few rather than many children.¹³ This pattern would not change if babies could be bought. Moreover, since most people

a stronger case for subsidizing the adoption of children for whom the market demand is weak—children who are nonwhite, or handicapped, or no longer infants. I come back to this issue in Part IIA.

¹² This is probably three-fourths of all women who have abortions, for only 27.1% are 19 or under. See CENTERS FOR DISEASE CONTROL, *supra* note 10, tab. 1.

¹³ See G. BECKER, A TREATISE ON THE FAMILY 98, 102 (1981).

have a strong preference for natural, as distinct from adopted, children, wealthy couples able to have natural children are unlikely (to say the least) to substitute adopted ones.

It is also unlikely that allowing people to bid for babies with dollars would drive up the price of babies, thereby allocating the supply to wealthy demanders. Today we observe a high black-market price conjoined with an artificially low price for babies obtained from adoption agencies and through lawful independent adoptions. The "blended" or average price is hard to calculate; but probably it is very high. The low price in the lawful market is deceptive. It ignores the considerable queuing costs—most people would pay a considerable premium to get their adopted baby now, not five or ten years from now. And for people unable to maneuver successfully in the complex market created by the laws against baby selling, the price is infinite. Quality-adjusted prices in free markets normally are lower than black market prices, and there is no reason to doubt that this would be true in a free market for adoptions. Thus, while it is possible that "[i]nherent in the baby black market is the unfairness that results from the fact that only the affluent can afford to pay the enormous fees necessary to procure a baby,"¹⁴ the words "black market" ought to be italicized. It is not the free market, but unwarranted restrictions on the operation of that market, that has raised the black market price of babies beyond the reach of ordinary people.

Thus far I have implicitly been speaking only of the market for healthy white infants. There is no shortage of nonwhite and of handicapped infants, and of any children who are no longer infants, available for adoption. Such children are substitutes for healthy white infants, and the higher the price of the latter, the greater will be the demand for the former. The network of regulations that has driven up the full price (including such nonmonetary components of price as delay) of adopting a healthy, white infant may have increased the willingness of childless couples to consider adopting a child of a type not in short supply, though how much (if at all) no one knows. The present system is, in any event, a grossly inefficient, as well as covert, method of encouraging the adoption of the hard-to-place child. If society wants to subsidize these unfortunate children, the burden of the subsidies should be borne, if not by the natural parents of these children, then by the taxpaying population at large—rather than by just the nation's childless white couples, who under the present unsystematic system bear the lion's share of the burden by being denied the benefits of an efficient method of allocating healthy white infants for adoption in the hope that this will induce them to adopt nonwhite, handicapped, or older children.

B. *The Question of Quality*

As soon as one mentions quality, people's hackles rise and they remind you that one is talking about a traffic in human beings, not in inanimate

¹⁴ Katz, *supra* note 7, at 15 (footnote omitted).

objects. The observation is pertinent, and at least five limitations might have to be placed on the operation of the market in babies for adoption. The first, already mentioned and already in place, is that the buyers can have no right to abuse the thing bought, as they would if the thing were a piece of steel or electronics. This really should go without saying. The laws against child abuse have never distinguished among different methods of acquiring custody of the child. Natural parents are not permitted to abuse a child because they are natural rather than adoptive parents; and people who acquire their children illegally through the black market are no more exempt from the child-abuse laws than people with illegal income are exempt from paying income tax on it. If I were arrested for torturing my cat and charged with violation of the laws forbidding cruelty to animals, it would be no defense that I had bought the cat for forty dollars.

If the laws against child abuse were perfectly efficacious, nothing more would have to be said on the subject. But they are not. The abuse occurs in secret, and the victim may be too young and too dependent to bring it to the attention of the authorities—or indeed to know what is going on. In addition, many child abusers may be so mentally or psychologically abnormal that they cannot be deterred even by very harsh penalties. In such a setting, preventive as well as punitive measures may be justified. Today, all adoptive parents are, in theory anyway, screened for fitness. Adoption agencies are charged with this responsibility, and if we moved toward a freer market in babies the agencies could be given the additional function of investigating and certifying prospective purchasers, who would pay the price of the service.

But let us not make too much of screening. The idea that a significant number of people are lurking about who if given the chance would buy babies for criminal purposes is a bogeyman. Most child abuse occurs as a result either of stresses arising from the experience of parenthood or from the sexual maturing of the child; it is not planned in advance when a baby is conceived or when steps are initiated to adopt a baby.¹⁵ As I will note in a moment, a market in babies for adoption should only be allowed to operate with regard to infants; a couple should not be allowed to sell its thirteen-year-old daughter for immoral (or any other) purposes.

Moreover, since we do not screen natural parents, and any proposal to do so would be met with justifiable protests against governmental intrusion into private matters, the case for screening adoptive parents can hardly be considered self-evident. Maybe, since people like their own children more than strangers' children, the child molester is less likely to molest his own children than other people's children. But people who adopt children do so not out of a mild affection toward children in general, which might easily be

¹⁵ On the character and causes of child abuse see, e.g., A. COHN, *AN APPROACH TO PREVENTING CHILD ABUSE* 3-7, 15-17 (National Committee for Prevention of Child Abuse, 1981), and studies cited therein.

overborne by a tendency to abuse children, but in the hope of creating the same close bonds of affection with the adopted child as natural parents have with their children. Allowing price to play a bigger role in adoptions is not likely to change this. But whether screening adoptive parents is a good or a bad idea is not the issue in this article. Whatever screening is deemed necessary for persons who adopt through an agency or by independent adoption would also be necessary for persons who adopted children in a free(r) market. Freeing the adoption market from price regulation would leave the case for or against screening largely, perhaps entirely, unaffected.

The third limitation on a baby market concerns remedies for breach of contract. In an ordinary market a buyer can both reject defective goods and, if the seller refuses to deliver and damages would be an inadequate remedy for the refusal, get specific performance of the contract. Natural parents are not permitted to reject their baby, either when it is born or afterward, because it turns out to be handicapped or otherwise not in conformity with their expectations; no more should adoptive parents who buy their babies.¹⁶ Nor should the adoptive parents be able to force the natural mother to surrender the baby to them if she changes her mind, unless some competent authority determines that the baby would be better off adopted. For the welfare of the baby must be considered along with that of the contracting parties. Refusing to grant specific performance in circumstances in which it appears that forcing the sale to go through would harm the baby is consistent with the basic equity principle that the third-party effects of equitable remedies must be considered in deciding whether to grant such a remedy or confine the plaintiff to damage remedies. The child is an interested third party whose welfare would be disserved by a mechanical application of the remedies available to buyers in the market for inanimate goods.

For the same reason (the child's welfare) neither natural nor adopting parents should be allowed to sell their children after infancy, that is, after the child has established a bond with its parents. Nor should the natural mother be allowed to take back the baby after adoption, any more than a seller of a conventional good or service can (except in extraordinary circumstances) rescind the sale after delivery and payment in accordance with his contract with the buyer, unless, once again, a competent authority decides that the baby's welfare would be increased. I shall not try to resolve the question whether, in any of these remedial settings, the welfare of the child should be paramount or should be balanced with that of the adult parties.¹⁷

¹⁶ Cf. *Burr v. Board of County Comm'rs*, 23 Ohio St. 3d 69, 491 N.E.2d 1101 (1986), where the adopting parents were awarded damages because the adoption agency had intended to induce reliance on its material misrepresentations of fact about the child, and the parents did reasonably rely, to their detriment, on the misrepresentations. For a discussion of the remedial problem see Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936 (1986), which discusses the constitutionality of specific performance in breach of contract suits against surrogate mothers.

¹⁷ See *supra* note 5.

The last limitation on the baby market that I shall discuss relates to eugenic breeding.¹⁸ Although prospects still seem remote, one can imagine an entrepreneur in the baby market trying to breed a race of *Übermenschen* who would command premium prices. The external effects of such an endeavor could be very harmful, and would provide an appropriate basis for governmental regulation.

I am not so sanguine about the operation of a baby market, even with the limitations I have discussed, that I am prepared to advocate the complete and immediate repeal of the laws forbidding the sale of babies for adoption. That such a market might give somewhat greater scope for child abusers and might encourage weird and potentially quite harmful experiments in eugenic breeding should be enough to give anyone pause. But to concentrate entirely on the downside would be a mistake. One million abortions a year is a serious social problem regardless of where one stands on the underlying ethical issues; so is a flourishing black market in babies combined with a severe shortage in the lawful market.

The severity of the shortage is, admittedly, a matter of fair debate. In our 1978 article Dr. Landes and I estimated that about 130,000 married couples who at present are childless might adopt a child under free-market conditions.¹⁹ More recent research suggests this estimate is reasonable. A study conducted by the National Center for Health Statistics found that 46% of the estimated 274,000 currently married women who are between 30 and 44 years of age and sterile have adopted a child.²⁰ If all those who have not adopted would like to, and would be willing to pay a free-market price, then the 148,000 married couples in the relevant population who have not yet adopted a child are unsatisfied demanders. But some unknown fraction of this number either do not want to have children at all or do not want to have adopted children. Dr. Landes and I noted that 96% of couples marrying in 1975 in which the wife was between 18 and 24 years old expected to have a child.²¹ Since most people who marry young do not know whether they have a fertility problem, it seems a fair guess that almost all of the 274,000 married couples who are sterile planned when they got married to have children, and hence that most of the 148,000 who have not yet adopted a child would like, or at some time in the past would have liked, to adopt a child. Of course,

¹⁸ See generally Smith, *Genetics, Eugenics, and Public Policy*, 1985 S. ILL. L.J. 435, 447-53 (describing artificial insemination, *in vitro* fertilization and embryo implants, cloning, and parthenogenesis, and discussing the constitutionality of eugenics legislation).

¹⁹ Landes & Posner, *supra* note 1, at 336.

²⁰ See Bachrach, *Adoption as a Means of Family Formation: Data from the National Survey of Family Growth*, 45 J. MARRIAGE & FAM. 859, 862 & tab. 2 (1983).

²¹ Landes & Posner, *supra* note 1, at 336. The figure was the same in 1983. See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S.: 1986, 64 tab. 98 (106th ed. 1985).

wanting something and being willing to pay for it are two different things, and it might seem that many childless couples would be unwilling or unable to pay for a baby if they had to pay free market prices. But this seems unlikely. The purchase price on the free market would probably be lower than under the present system (for reasons discussed earlier), and in any event only a small fraction of the total cost (even discounted to present value) of raising a child. Bear in mind, too, that adoptive parents save the medical and opportunity costs of pregnancy. Marrying couples who expected to have a child, notwithstanding the cost, are unlikely to be deterred by the small, probably zero or even negative, incremental cost of adopting a child in a free market.

True, some couples decide after marriage that they don't want to have a child. This is particularly likely if the couple anticipates a high probability of divorce. About half of American marriages end in divorce, and some of these divorces are anticipated before children enter the picture. Another consideration is that some couples do not consider an adopted child a good substitute for the natural child they cannot have, and they may therefore decide to remain childless even if the price of an adopted child is low and the quality high.²² Although these factors suggest a downward adjustment in my estimates, there are three offsetting factors to consider. First, some unknown fraction of adoptions is of babies bought in the black market, and the part of the demand for a good that is satisfied in a black market reflects the shortage in the lawful market. Second, the 148,000 figure excludes married couples who become sterile after having one or more children and who would like to adopt. In fact, 20% of married couples who become sterile after having one child go on to adopt a child, and 42% of married couples with one child say that they would adopt a second child if they became sterile.²³ Finally, and bearing particularly on the experiment that Dr. Landes and I proposed, ten times as many premarital pregnancies end in "pregnancy loss" (miscarriage, stillbirth, and no doubt the biggest category, abortion) as in putting the baby up for adoption.²⁴

²² The potential importance of this point is brought out by a 1977 study that found that, of then-married women who had no children and wanted to have one or more, only 62% said they would adopt a child. See Bonham, *Who Adopts: The Relationship of Adoption and Social-Demographic Characteristics of Women*, 39 J. MARRIAGE & FAM. 295, 300 tab. 3 (1977). If 46% of sterile couples have adopted a child, Bachrach, *supra* note 20, and 62% would like to, it might seem that the fraction of unsatisfied demanders (to be multiplied by 274,000 to yield an estimate of their number) would be 16% rather than 54%. But apart from other factors mentioned in the text, a statement of nonintention to adopt a child may simply reflect awareness of the obstacles to adoption under the present system. As we shall see, the nonintending 38% (100% - 62%) is almost twice the percentage of couples who become sterile after having one child and then adopt—suggesting a very large unsatisfied demand among this group.

²³ See *id.*; Bachrach, *supra* note 20.

²⁴ See Bachrach, *Adoption Plans, Adopted Children, and Adoptive Mothers*, 48 J. MARRIAGE & FAM. 243, 251 tab. 6 (1986).

One reason people fear the operation of a free market in babies for adoption is that they extrapolate from experience with the illegal market. Critics who suggest that baby selling offers the promise of huge profits to middlemen—the dreaded “baby brokers”—fail to distinguish between an illegal market, in which sellers demand a heavy premium (an apparent, though not real, profit) in order to defray the expected costs of punishment, and a legal market, in which the premium is eliminated. Seemingly exorbitant profits, low quality, poor information, involvement of criminal elements—these widely asserted characteristics of the black market in babies²⁵ are no more indicative of the behavior of a lawful market than the tactics of the bootleggers and rum-runners during Prohibition were indicative of the behavior of the liquor industry after Prohibition was repealed.

III. THE OBJECTION FROM SYMBOLISM AND THE ISSUE OF SEMANTICS

Even if partial deregulation of the baby market might make practical utilitarian sense along the lines just suggested, some will resist on symbolic grounds. If we acknowledge that babies can be sold, the argument goes, we open the door to all sorts of monstrous institutions—including slavery. We regularly resist this type of argument in analogous contexts, and I have difficulty understanding why it stubbornly persists in this one. Some people argue that military conscription is wrong because it legitimates government coercion of the civilian labor force, or because it is a form of slavery; others that the sale of blood should be forbidden because it treats human life as a commodity; others that medicine should be socialized so that the wealthy can't use their wealth to increase their chances of a long and healthy life, relative to the poor; others that parents should not be allowed to spank their children because that is treating the children like slaves; others that capital punishment should be outlawed because it implicates the state in murder. The common thread in these arguments is the reprobating of social practices not because of any demonstrable or even probable bad effects, but because the practices have a symbolic affinity with practices that do have horrible effects. Allowing parents to sell their children into slavery would be a monstrous idea. Allowing the prospective mother of an illegitimate child to receive money in exchange for giving up the child for adoption, when described in shorthand as “baby selling,” seems to many people uncomfortably close to the type of real baby selling that is found in slave societies—that was found in the slave societies of the South before the Civil War. No doubt it requires more thought than most people are willing to give to the problem to hold these quite different concepts separate in their minds. But if

²⁵ See, e.g., Grove, *Independent Adoption: The Case for the Gray Market*, 13 VILL. L. REV. 116, 118-21 (1967). There are few data on the operation of the black market, and none later than the mid-1970s. See references in R. POSNER, *supra* note 1, at 139 n.3, and in *Black-Market Adoptions*, 22 CATH. LAW. 48 (1976).

they are not held separate we may find ourselves condemned to perpetuate the painful spectacle of mass abortion and illegitimacy in a society in which, to a significant extent, children are not available for adoption by persons unwilling to violate the law.

One should always be suspicious of arguments against the market when they are made by people who have no desire to participate in it themselves, people who want to restrict the availability of goods to other people. Most people who invoke vague symbols in opposition to "baby selling" have no interest in or expectation of either adopting a child or conceiving one out of wedlock. They have little empathy with the needs of people who find themselves involuntarily childless or involuntarily pregnant.

The opponents of "baby selling" are unwilling to acknowledge that what we have today, even apart from the black market, is closer to a free market in babies than a free market in babies would be to slavery or torture (always bearing in mind that a free market in an economic sense is one in which due consideration is given the welfare of affected third parties, here the babies themselves). As I said at the outset, adoption agencies do lawfully "sell" babies, and many charge thousands of dollars. Moreover, in independent adoptions, the mother herself may "sell" her baby, for it is not considered unlawful to use a part of the fee paid by the adoptive parents to defray the medical and other maintenance costs of the mother during pregnancy. It seems that to obtain lawfully a healthy, white infant (rarely available through adoption agencies), a couple must be prepared to lay out at least \$5,000.²⁶ Black-market prices of \$25,000, even \$50,000, have been rumored, but the equilibrium baby price in a free market (by which I do not mean an entirely unregulated market, for I suggested in Part II of this paper that the market should be regulated in various ways) might not exceed \$5,000. As a matter of fact, though baby selling is everywhere unlawful, almost half the states have no specific restrictions on fees payable for adoption, and in many other states the restrictions are porous.²⁷ No doubt many lawful and semi-lawful "baby sales" are taking place today at approximately free-market prices.

Two other important examples of legal baby selling should be mentioned.²⁸ One is the "family compact" doctrine, which allows a woman to enter into an enforceable contract to give up her baby for adoption by a close

²⁶ See Pesmen, *Bizarre Sector of the Economy Awaits Adoptive Couples Here*, Crain's Chi. Bus., Sept. 1, 1986, at 27, col. 1.

²⁷ See W. MEEZAN, S. KATZ & E. RUSSO, *ADOPTIONS WITHOUT AGENCIES: A STUDY OF INDEPENDENT ADOPTION* 182-85 (1978).

²⁸ See generally Note, *Developing a Concept of the Modern "Family": A Proposed Uniform Surrogate Parenthood Act*, 73 GEO. L.J. 1283, 1289-92 (1985) (discussing whether and in what circumstances surrogate mother arrangements violate laws against baby selling); Cohen, *Surrogate Mothers: Whose Baby Is It?*, 10 AM. J. L. & MED. 243 (1984) (discussing the legality and judicial enforcement of surrogate mother contracts).

relative. The other is surrogate motherhood, by which (at least in some states) a married couple in which the wife is infertile can make an enforceable contract with another woman whereby the latter agrees to be artificially inseminated with the husband's sperm and to carry the baby to term and give it up to the couple. In the first case the close family relative "buys" the baby, in the second the father (and his wife) "buys out" the natural mother's "share" in their joint product.

So we have legal baby selling today; the question of public policy is not whether baby selling should be forbidden or allowed but how extensively it should be regulated. I simply think it should be regulated less stringently than is done today.