A Modest Proposal to Deregulate Infant Adoptions

Donald J. Boudreaux

In his famous satire, Jonathan Swift "modestly" proposed slaughtering babies and feeding them to hungry Irish folk. Thanks to Swift's masterful lampoon, any proposal for modestly changing public policy affecting children risks being branded a satire. So I proclaim up front my sincerity in proposing that pregnant women, and women who have just given birth, be allowed to contract freely with adoptive parents at mutually agreeable prices for the sale of parental rights in their infants.

The proposal is not original. Richard Posner has long championed the cause of a liberalized adoption market.[1] But most replies to his proposal have been critical, too often failing to rise above invective.[2] Such negative reaction belies both the modesty and the worthiness of Posner's proposal. The proposal is modest because it merely extends to birth mothers a liberty now enjoyed by many adoption agencies: the liberty to sell parental rights to adoptive parents at mutually agreeable prices. The proposal is worthwhile because it promises gains to all relevant parties to adoptions—birth mothers, couples wishing to adopt infants, and children.

Opposition to birth mothers' voluntary sales of parental rights is founded on faulty reasoning. I use basic economics to highlight the benefits of liberalized adoption and to address some of the most common objections raised by those who insist that children or society would be harmed by the free exchange of parental rights in infants.

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The author is Associate Professor of Law and Economics at Clemson University. For their incisive comments, he thanks Clint Bolick, Karol Ceplo, Conna Craig, Mike DeBow, Bill Field, D'Anne Hancock, Randall Kennedy, Dwight Lee, Roger Meiners, Erin O'Hara, Richard Posner, Adam Pritchard, Marie Reilly, Jennifer Roback, Henry Sanborn, George Selgin, Donna Tingle, and Bruce Yandle.

[1]See Landes and Posner (1978) and Posner (1987).

[2]See, e.g., Cohen (1987).

Some preliminaries are in order. First, I refer throughout to the "sale of parental rights" rather than to "baby selling." When a birth mother gives a child up for adoption, she legally transfers her parental rights to the adoptive parents; the adoptive parents gain all those rights, but only those rights, that the birth mother possessed before the adoption. Such rights are those that all non-derelict parents have in their children. The rights do not include license to abuse the child or to use him or her as a slave. Parents who purchase their parental rights from birth mothers would have precisely the same rights, and *only* those rights, that they would have if their children were their biological offspring (Landes and Posner 1978: 344). Branding the sale of parental rights "baby selling" (Baker 1978; Fox 1993) provokes people reflexively but wrongly to assume that some horror akin to slavery is being advocated.

Second, I deal here only with the sale of parental rights in infants (say, children nine months old or younger). The proposal may or may not be suitable for older children; I leave investigation of that issue for another time.

Third, I assume that only adult birth mothers have initial parental rights in children. The case I have in mind is the all-too-common one in which an unmarried woman has, or is having, an unwanted child and the father either is unknown or has ignored his parental responsibilities. Cases in which the birth mother is married or the father knows and cares about his child, or in which the birth mother herself is still a child, are more complex. Perhaps the law should give those fathers, or the parents of minor birth mothers, some say in adoption decisions. I do not, however, explore in this paper the desirable specifics of those fatherhood rights or of the rights of parents of minor birth mothers.

Fourth, I assume that the law prohibits resales of parental rights by adoptive parents. Once a final decree of adoption is issued for a particular child, that child's adoptive parents may not resell their parental rights in this child.

The Baby Shortage

All agree that adoptable healthy white infants are in short supply today. The National Committee for Adoption (1989) estimates that in the United States 20 couples are willing to adopt for every available infant. Various reasons are offered for the shortage. Low-cost methods of birth control and legalized abortion arguably reduce the absolute

number of children born to women who do not wish to raise them.[3] The availability of increased welfare payments makes unwed mothers more likely to keep their children. In addition, the fact that women increasingly pursue professional careers before starting a family raises the demand for adoptable infants. A woman's ability to conceive and successfully carry a child to term decreases as she ages. Consequently, as more women delay having children, the number of couples suffering infertility problems rises, causing more to seek adoption.

Although medical, legal, and demographic changes affect both the supply of, and demand for, parental rights, such changes alone are insufficient to cause a baby shortage. Supplies and demands for all sorts of goods change frequently without creating lasting shortages. For a shortage to persist, prices paid to suppliers must somehow be held below market-clearing levels. And so it is with the current baby shortage. No market-clearing price for parental rights emerges because birth mothers cannot contract freely with adoptive parents.

Adoption in the United States is governed principally by state laws. Currently, birth mothers in all states and the District of Columbia are barred from selling their parental rights (Medoff 1993: 60). Birth mothers can give the rights away, but they cannot receive monetary payments in return. Monetary compensation is allowed only for out-of-pocket medical expenses for the prenatal care and birth of children. (In some cases, these expenses include psychological counseling for birth mothers). But the amounts are limited to ensure that birth mothers do not profit by offering their children for adoption.

State regulations also obstruct efforts by birth mothers and prospective adoptive parents to learn about, and to contact, each other. The most restrictive states simply ban "independent" adoptions: adoptions in which adoption agencies are not intermediaries. Other restrictions include criminal prohibitions against advertising by prospective adoptive parents, prohibitions on out-of-state couples applying for adoption within a state, and requirements that independent (though not agency)

[3]Pierce and Vitillo (1991) list the commonly cited demographic and legal facts that allegedly cause the baby shortage, without ever mentioning that the price of parental rights is capped at an artificially low level by prohibitions on birth-mother contracting. It is interesting to note that the absolute number of adoptions began to fall in the United States two years *before* the Supreme Court declared unconstitutional all legislative restrictions on first-trimester abortions in *Roe v. Wade* (1973). See Pierce and Vitillo (1991: 133). Also note that greater availability of birth control and abortion will not necessarily decrease the absolute number of unwanted pregnancies. Posner explains (1992: 415) that, although easy access to birth control and abortion will reduce the frequency of unwanted pregnancies relative to the frequency of sexual intercourse, the amount of sexual intercourse might increase to such a large extent (in response to the lower risk of pregnancy) that the absolute number of unwanted pregnancies actually rises.

adoptions be "open"—that is, that adoptive parents give their full names and addresses to birth mothers.[4]

Proponents of such restrictions argue that the baby shortage can be reduced by increased adoption awareness and, perhaps, by government subsidies for adoption. But even if such policies fail to alleviate the shortage, these proponents insist that birth mothers never be allowed to sell parental rights for a profit.

Let Birth Mothers Keep the Profits from the Transfer of Parental Rights

Birth mothers should be allowed to contract freely with adoptive parents for the sale of parental rights in infants at whatever prices they find mutually agreeable. Allowing such contracting does not necessitate abandonment of other regulations on adoption. Courts will still have to sign off on each adoption, allowing judges to ensure the suitability of adoptive parents. Indeed, all prospective adoptive parents could be required (as they are now) to pass home studies before being eligible to contract with birth mothers. Finally, all contracts between birth mothers and adoptive parents will be subject to the same checks on fraud, duress, and other abuses that traditionally limit contractual commitments.

The most obvious consequence of greater freedom of contract for birth mothers is that the baby shortage will end. The supply of adoptable infants will increase as birth mothers seek to sell their parental rights for a profit. The price birth mothers receive for parental rights will rise until the supply of those rights expands sufficiently to meet demand. Importantly, greater numbers of adoptable infants means that fewer couples must remain childless. That benefit is immense for those suffering the agony of unwanted childlessness.

A second effect will be greater wealth for birth mothers.

Third, there will be fewer abortions. Allowing women to sell parental rights in their infants at market prices transforms previously unwanted fetuses into valuable capital assets. If parental rights in infants can be sold profitably by birth mothers, women will be far more reluctant to abort their fetuses. Just as a car owner sells rather than destroys an automobile when he decides that he no longer wants the car, a pregnant woman with transferable parental rights is much more likely to carry her pregnancy to term and then offer the baby for adoption

[4]Roughly 70 percent of all U.S. adoptions are administered by licensed adoption agencies. The remaining 30 percent of adoptions are independent. (See National Committee for Adoption 1989.)

rather than abort the fetus. Allowing women with unwanted pregnancies to sell their parental rights for a profit will increase the cost of abortion to those women and, hence, reduce its incidence.[5]

Fourth, the average health of infants will improve. Because parental rights in healthy infants will command higher prices than will parental rights in unhealthy ones, pregnant women will have stronger incentives to seek prenatal care of their fetuses and to avoid harmful habits such as alcohol and drug abuse.

Fifth, the incidence of child abuse will decline. Because the current welfare system rewards women for keeping their children (Medoff 1993: 66), many children who are only marginally wanted by their birth mothers are kept by the women. Such children are surely more subject to neglect and abuse than they would be if they were adopted by loving parents. Ability to receive payment for parental rights will cause many such children to be put up for adoption.

Sixth, and relatedly, fewer children will be placed in foster care, itself a dysfunctional institution (Pelton 1991). Birth mothers who now choose not to keep their children are more likely to place those children in foster care rather than make them available for adoption (Landes and Posner 1978: 338). According to Conna Craig, president of the Institute for Children, 4 percent of the 35,000 children now in foster care who are eligible for adoption are infants.[6] Birth-mother ability to keep the profits from the transfer of parental rights raises the likelihood that birth mothers will both learn about, and take advantage of, the adoption option.

Seventh, the price of infertility treatments might fall. Infertility treatments and adoption are substitute methods of securing parental rights. Thus, an increase in the supply of adoptable infants will reduce the demand for infertility treatments. The price of infertility treatments will likely fall as a consequence.[7]

Current adoption law thus creates avoidable heartache and expense for all parties interested in infant adoptions. Liberalizing birth-mother contracting will improve adoptive-parents' chances of adopting the

[5]In his useful study of the economic determinants of adoption under current law, Medoff (1993: 66) finds that Aid to Families with Dependent Children payments make "poor women regard adoption as a less desirable alternative than keeping the child or having an abortion." Medoff's data also show that single women, as well as working women, with unwanted pregnancies are "more likely to choose an abortion relative to adoption." That pattern will likely change with a freer adoption market.

[6]Information from personal correspondence.

[7]If substantial economies of scale characterize the operation of infertility clinics and infertility research, it is possible that a reduction in the demand for infertility treatments will result in higher, rather than lower, prices of such treatments. Thus the use in the text of the qualifier "likely."

child (or children) of their dreams, while allowing birth mothers to acquire greater wealth. The policy change might also allow couples suffering infertility problems to pay lower costs for infertility treatments. Most important, many children who would otherwise not be born, or who would be born with birth defects, will be blessed with healthy lives. No party to the adoption process loses—save for abortion clinics as well as adoption agencies and state bureaucracies that will lose some of their business to private arrangements.[8]

If all parties to the voluntary agreements benefit, those who morally object to such agreements are obliged to explain why their objections should trump a proposal yielding widespread benefits with little or no evident costs. Michael Trebilcock (1993: 29), in his discussion of legal restrictions on market transactions, correctly insists that when "we are contemplating prohibitions or constraints on exchange relationships that parties thereto would in the absence of such prohibitions or constraints, apparently wish to enter into, ultimately some justification is required for this form of paternalism."

Justifications are offered, but none is persuasive. Here are the most commonly encountered reasons for denying freedom of contract to birth mothers.

"Economic Motives Are Inappropriate for Familial Matters such as Adoption"

Among the most oft-repeated objection to greater contractual freedom for birth mothers is the claim that human life is not an appropriate object of economic calculation; economic motives should not intrude into such personal decisions as whether or not to adopt a child or to give a child up for adoption. According to Martha Field (1990: 30), "There are some types of things that our society does not want measured in terms of money. Society may want to do what it can to help people keep these in a personal sphere that is distinct from the commercial."[9]

This claim is laden with both emotion and vagueness. Depending on what is meant by terms such as "commercial" and expressions such as "economic motives" or "measurement in terms of money," such claims are either trivially true or factually incorrect. On one

[8]Adoption agencies oppose not only freedom of contract for birth mothers, but even independent adoption (Pierce and Vitillo 1991: 141). Of course, birth mothers who choose the independent route are currently not permitted to sell their parental rights at market-clearing prices.

[9]Perhaps the most strident opponent of the "objectification" that allegedly attends commercial transactions is Margaret Jane Radin. See Radin (1987, 1991).

hand, if what the speaker or listener has in mind is that slavery should not be reinstated (slaves, after all, were humans whose lives were measured "in terms of money"), then no sane person disagrees. As explained above, allowing birth mothers to sell their parental rights voluntarily to adoptive parents in no way connotes a return to slavery. On the other hand, if the speaker or listener really believes that economic considerations should play no role in familial matters, then he or she has not thought through the full implications of this belief. In fact, family matters, including child-rearing and adoption, are routinely objects of economic calculation.[10] Economic considerations are inescapable in the teeth of scarcity (although many people remain incognizant of the pervasiveness of such influences).

For example, many people—and responsible persons especially—make explicit economic decisions about whether or not to have children and, if so, when. Children are costly in monetary as well as nonmonetary ways. Raising them requires sacrifice. The things sacrificed—be they European vacations, nicer automobiles, additional education, more quiet time, or whatever—are what parents pay for children. These costs are not always out-of-pocket cash expenses, but form should not blind us to substance: they are genuine economic costs, and they are regularly considered when people make family decisions. Young newlyweds with no savings might delay starting a family to establish firmer financial grounds for raising children. Other couples might choose (say, for career reasons) never to have children. The costs and benefits of having children are inevitably weighed against each other, and decisions made accordingly. Surely such decisions are not immoral, unethical, or impersonal because they are made with economic concerns in mind. Indeed, we properly denounce people who have children *without* adequately considering the economic consequences of doing so.

In addition to the economic considerations mentioned above, medical treatments for fertility problems are undertaken in light of financial constraints. Those treatments are expensive, costing patients hundreds—and often several thousands—of dollars monthly. Decisions on whether or not to pursue such treatments and, if so, choosing which particular treatments to pursue and for how long, are inevitably made in the face of resource constraints. Similarly, birth mothers who

[10]The classic text on the economics of the family is Becker (1991). Indeed, even the behavior of young children can usefully be analyzed with the rational-action assumptions of modern economics. See Anderson and Tollison (1991). Margaret Brinig (1994a, 1994b), and in Brinig and Alexeev (1995), creatively uses economics to explore family questions, although she admits that economics presents "only a partial picture" (1994a: 1573).

put their children up for adoption under current law usually do so for economic reasons: they cannot afford to raise their children.

Those who argue that economic considerations ought not influence decisions regarding children and child bearing must, for consistency's sake, argue that unwanted babies should not be given away, and that couples and single women should not hesitate because of "mere" financial reasons to have children. Consistency also demands that opponents of a deregulated market in parental rights support bans on money payments for infertility treatments. Yet there is no widespread opposition to unregulated prices for fertility treatments, or to people making decisions to bear or to keep children in light of explicit economic concerns. These facts dispel claims that society generally disapproves of rational economic calculations in the realm of child bearing and child rearing.

"Babies Should Not Be Traded Commercially"

Some opposition to a freer market in parental rights stems not so much from the belief that it is unethical to ground family decisions on cost-benefit analysis as from the conviction that babies ought not be objects of commercial exchange.[11]

This argument also proves too much; it suggests that doctors, nurses, and clinics specializing in medical treatment for people suffering fertility problems should not be allowed to sell their services for a profit. On the supply side, medical infertility specialists employ their knowledge to improve infertile couples' chances of conceiving and successfully carrying children to term. These physicians and technicians profit by selling their child-creation services. On the demand side, infertility patients spend money to purchase parental rights in infants. A couple spending $5,000 monthly for artificial insemination, *in vitro* fertilization, or other treatments for infertility, uses money to pursue a child no less so than does a couple who spends money to purchase parental rights in adoptive infants.

It may be countered that physicians working to improve couples' chances of having babies do not really sell parental rights in children: physicians sell skilled *services* that improve couples' chances of having their own biological children. Might we not, though, recast what birth

[11]"Judge Posner's model also makes babies fungible, smoothing over the intangible qualities that make each child unique. If a baby's value can be expressed in dollars, then a baby can be compared to a car, a dress, a year's tuition, or a trip to Bermuda. There are already too many parents to whom a child's use value is less than satisfying without encouraging such dissatisfaction by supplying a competing exchange value" (Frankel and Miller 1987: 102). See also Radin (1987: 1850).

mothers sell as their child-creation services? Even though the law gives birth mothers initial ownership of parental rights in whatever children they birth, why deny women the liberty to profit from their abilities to produce babies that other couples earnestly want and are willing to pay for? And why deny infertile couples the right to contract voluntarily with birth mothers? Adoption may well be less costly than infertility treatments for many couples. Not only will prices charged by birth mothers likely be lower than the costs of adopting through adoption agencies (see below), but adoption avoids the risks of medical complications that attend the use of drugs and intrusive surgery often entailed by infertility treatments. These risks include harm to infertility patients as well as to the children born as a result of these treatments (Prichard 1984: 343).

More significant, however, is the law's failure to truly prohibit commerce in parental rights. The law prevents only unlicensed, private individuals—most notably, birth mothers—from profiting from such commerce. Adoption agencies today (some of whom are for-profit firms) legally sell parental rights in infants at profitable prices. Not all states regulate the prices that adoption agencies charge for their services.[12] Fees charged by for-profit agencies run as high as $30,000 per adoption, while fees charged by nonprofit agencies reach $25,000 (Sullivan and Schultz 1990: 39–41). And often, agency fees depend on adoptive parents' income: lower-income adoptive parents pay less than higher-income parents (Gilman 1992: 33). In economic terms, adoption agencies price discriminate, a practice that increases their revenues.

Of course, agencies do not list "infant" or "parental rights" on itemized bills. But, again, form should not camouflage substance: adoption agencies sell parental rights at prices kept artificially high by laws prohibiting birth mothers from contracting directly with adoptive parents. Figure 1 depicts the economic consequences of denying freedom of contract to birth mothers.

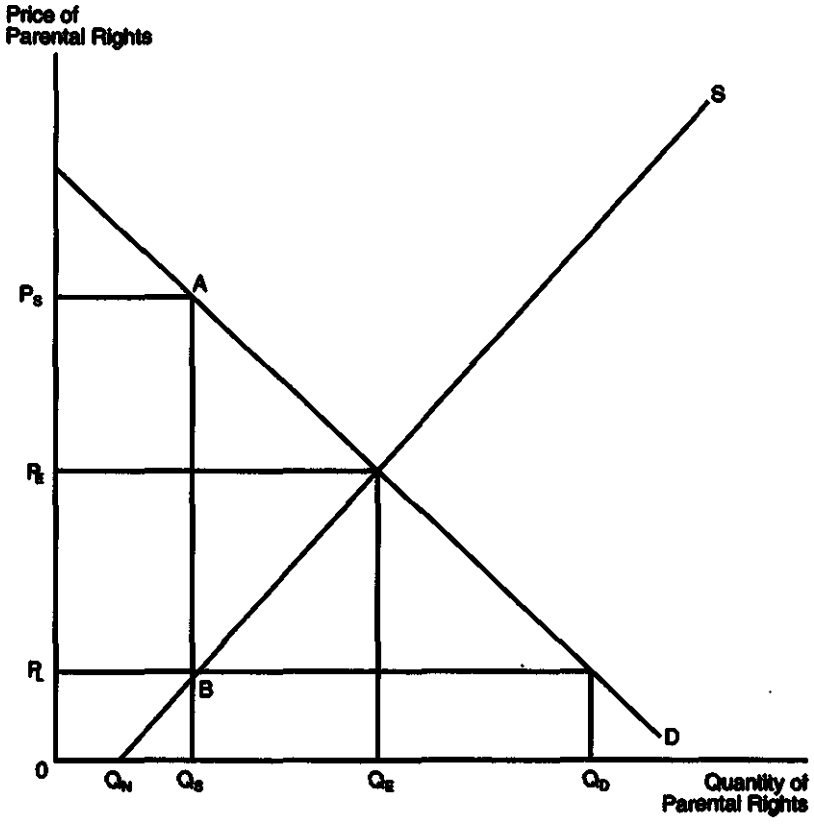
S represents the supply of parental rights in infants. Quantity supplied increases as the price received by birth mothers rises.[13] D represents the demand for parental rights to adoptive children. As the price of parental rights rises, fewer are demanded. With no restrictions on the abilities of birth mothers to contract with adoptive parents, the equilibrium quantity of children adopted per period of time would

[12]"While some states set ceilings on the fees that agencies can charge, others do not" (Gilman 1992: 33–34).

[13]Because some women will wish to put their babies up for adoption even at a zero price, the supply curve intersects the quantity axis at a positive quantity (Q_N).

FIGURE 1

THE MARKET FOR PARENTAL RIGHTS



be Q_E; the equilibrium price would be P_E. Babies would not be in short supply.

But existing prohibitions on free contracting keep artificially low the prices that birth mothers may legally receive for their parental rights. In Figure 1, birth mothers can legally receive no price higher than P_L. The law allows small payments to birth mothers as compensation for out-of-pocket medical expenses connected with prenatal care and birthing. But P_L is substantially below P_E; thus, a "baby shortage" (Q_D—Q_S) is created by restricting the prices that birth mothers receive for their parental rights.

Importantly, though, the full price paid by adoptive parents for parental rights is *not* limited to P_L. When quantity supplied is limited to Q_S, the marginal value of parental rights in adoptive children is P_S. That is, laws that have the effect of limiting the supply of parental

rights in adoptive children to less than Q_E ensure that each "unit" of those rights is valued by adoptive parents at some price higher not only than the parents are allowed to pay to birth mothers, but higher also than P_E. Artificial excess value ("rent") is created, and birth mothers cannot legally receive that excess value. But legal prohibitions on birth mothers' abilities to collect those rents do not make the rents disappear. Because adoptive parents will pay up to P_S for each of the available Q_S 'units' of parental rights, competition among adoptive parents raises the full prices paid for parental rights. The amounts that adoptive parents pay to adoption agencies as fees and expenses are bid up to reflect the artificial scarcity of parental rights. Adoption agencies rather than birth mothers reap the financial fruits of competition among prospective adoptive parents for the parental rights that are in short supply. Agencies' practice of labeling their charges "service fees" or "home study fees" does not alter the fact that the fees are determined by the forces of demand and supply, and that they reflect the artificially created scarcity of parental rights in adoptable infants.

To be sure, the average pecuniary price paid by adoptive parents to adoption agencies is not bid all the way up to P_S. If it were, there would be no queues—i.e., long waiting lists—of would-be parents wishing to adopt healthy white infants (Landes and Posner 1978: 326). Why adoption agencies do not raise their average fee to P_S is not clear. One reason may be that, if adoptive couples paid in dollars an average of P_S to agencies, too many birth mothers would be attracted into the black market. As birth mothers shift away from agencies and to the black market, agencies' supply of adoptable infants falls. Thus, given the high costs of eliminating black markets, adoption-agency profits are maximized at some price less than P_S.

Queuing, of course, is a real cost borne by prospective adoptive parents. The monetary value of the time spent waiting as well as the anxiety caused by queuing, combined with the pecuniary fees charged by agencies, will be equal at the margin to P_S (Barzel 1989: 16–19). But because adoption agencies do not receive the full P_S per child, birth mothers are not as tempted to sell their parental rights in a black market as they would be if they witnessed adoption agencies taking on average P_S per child.

The problem with this explanation is that it leaves unexplained why the queuing itself is not more fully exploited by black-market entrepreneurs. Entrepreneurs willing to risk criminal and civil penalties should be able to transform some of the queuing costs into monetary payments by adoptive parents.[14]

[14]A defender of the explanation might respond, following Hayek's discussion of prices as guides to market opportunities (1945), that queuing sends out only terribly distorted and

An alternative explanation for why adoption agencies fail to convert the entire area P_SABP_L into pecuniary payments by adoptive parents is suggested by Sam Peltzman's (1976) theory of regulation. Peltzman pointed out that interest groups often compete in the legislative arena against opposing interest groups, as well as against the public interest. If Peltzman is correct, adoption agencies may fear that charging pecuniary fees equal to P_S would result in regulation more adverse to agencies' interests.

Nevertheless, regardless of the form in which adoptive parents pay P_S, those who succeed in securing a child pay more than P_B, which is the amount they would pay if birth mothers could sell parental rights outright. If the ban on birth-mother contracting were lifted, the full cost to adoptive parents of adopting a child would fall although payments received by birth mothers would rise.[15]

"Only the Rich Will Benefit, while the Poor Will Be Exploited"

While studying law at the University of Virginia, I regularly proposed a free market in parental rights to fellow law students. A large majority objected by asserting that only the rich will benefit.

A valid response to this objection is "So what?" Suppose that it were in fact true that only the rich will benefit if birth mothers are allowed to sell their parental rights. This fact would not justify current restrictions on the abilities of birth mothers to contract. As long as no one is harmed by such sales, it is malice borne of envy (or, in the case of many of my fellow students, of misdirected guilt) to deny the rich opportunities to use their assets in ways that result in loving

weak signals to potential black-market rivals of adoption agencies. Thus, because much of the price paid by adoptive parents in a queue is hidden from potential black-market rivals, the rivals do not exert much effort to lure birth mothers away from legal adoption agencies.

[15]The nonprofit status of most adoption agencies does not mean that the managers and staff of the agencies do not benefit from charging higher prices. In the United States, a nonprofit firm is a firm not liable for taxes on income derived from the stated charitable purposes of the firm. Such firms have no owners in the conventional sense. That is, they have no residual claimants who can transfer to themselves, in the form of cash, any excess of revenues over costs. Nevertheless, the staff of nonprofit organizations gain to the extent that their agencies' revenues exceed costs. Wages and salaries, expense accounts, and working conditions and other perquisites all improve with higher revenues. A substantial body of work by economists shows that the motive to maximize personal gain is very much alive among people working in the nonprofit sector (Weisbrod 1988).

Regarding adoption agencies whose fees are regulated, such regulation often is based on agency average costs (Carlson 1994: 274), thus allowing agency managers to disguise monopoly rents as costs. In addition, a recent writer noted "states' relative indifference toward agency salaries" (Carlson 1994: 274).

families for children. The fact that only the rich purchase Mercedes-Benz automobiles, cases of Chateau Haut Brion, and summer homes on Newport Beach is no reason to outlaw the sale of such items. (Incidentally, only the relatively wealthy can now afford infertility treatments. Should such treatments be outlawed because poor people cannot take advantage of them?)

But it is not true that only the rich will benefit. In every voluntary exchange, *both* parties are made better off. Moreover, the nonwealthy will be *better* able to adopt children when birth mothers are allowed to freely sell parental rights. First, adoption agencies under the current legal regime favor well-to-do adoptive parents: the poor tend to be discriminated against even if they are willing to spend as much as their wealthier rivals to acquire parental rights.[16] Second, because political connections and ability to grease palms thins regulatory thickets, poor people are disadvantaged by the current system. Third, as explained above, the full price of adopting a healthy infant is today actually quite high. Not only is the wait long and agonizing, but adoption-agency fees and other out-of-pocket expenses are higher than necessary because the market is controlled. As argued earlier, allowing birth mothers to sell directly to adoptive parents will increase the quantity of adoptable infants supplied for adoption while reducing the role of adoption agencies as middlemen. Market prices paid by adoptive parents for parental rights will fall as a consequence, even as prices received by birth mothers rise. As the price of acquiring parental rights in infants falls, people of modest means are better able to adopt.

Nor will poor women be exploited by being forced into "a new oppressed and undignified occupation" (Shalev 1989: 159). No woman will be coerced into supplying parental rights. And birth mothers—most of whom, presumably, will be nonwealthy—can profit from their sales of parental rights. Given this ability to profit and the voluntary nature of the transactions, to say that greater contractual freedom for birth mothers would lead to the exploitation or "demeaning" of birth mothers is curious.[17] In a freer market, birth mothers would continue to enjoy all the options they have now, *plus* the additional option of selling their parental rights.

[16]The "best interest of the child" standard that is central to modern U.S. adoption law allows agencies, when deciding which would-be parents will be granted rights to adopt children, to weigh heavily and positively the wealth of prospective adoptive parents.

[17]Pierce and Vitillo (1991: 142) are representative of a large class of commentators who assert that allowing women to choose voluntarily to sell their parental rights "demeans biological mothers."

Opponents of liberalized adoptions might respond that it is unseemly for the poor to be the sole supplier of adoptable infants to the nonpoor. Even granting that the suppliers of parental rights will overwhelmingly be low-income women, this is no argument to prohibit these women from contracting voluntarily with adoptive parents. Prohibiting poor women from bargaining with wealthier adoptive parents for prices that those women find profitable is a peculiar way to safeguard them from exploitation—and a selfish and harmful way to shield the sensibilities of the ethically hyperenlightened from "unseemly," if beneficial, market transactions.

Another argument supporting the exploitation claim is that poor women are generally unable to make sound decisions regarding the disposition of their parental rights. Their immediate need for money causes them to pursue short-term pecuniary gain at the expense of long-term woe. In the words of one commentator, "financial benefits urged upon an often indigent natural mother by a baby-broker become a source of coercion to her to force her to give up her baby" (Katz 1986: 13). Quite simply, a poor birth mother who sells her parental rights today might regret that decision a month or a year or 10 years from now.

Of course, a woman might err in her assessment of the costs and benefits of selling her parental rights, and may later regret her decision. But so, too, might a woman who under current law chooses to give her parental rights away free of charge, as might a woman who chooses abortion or who chooses never to become pregnant. Indeed, any party to any contract may later regret his or her contractual commitment. Such is the nature of uncoerced choice.

Women who, under existing law, give their children up for adoption typically do so because of their immediate financial predicaments; their need for current liquidity makes it prudent for them not to undertake—or to delay undertaking—the role of mother. It is true that the additional financial incentives under a freer adoption market to give children up for adoption will cause some women who would otherwise choose to keep their children, or to abort, to decide instead to sell their parental rights. But allowing birth mothers to bargain for profitable prices with adoptive parents does not create financial incentives for adoption where none existed before. Such incentives exist under current law.

A more fundamental question, however, is why society puts so little trust in birth mothers to make rational decisions regarding adoption of their children under a regime of voluntary contract. That paternalistic lack of trust is bizarre given that the same women are trusted to make abortion decisions, adoption decisions involving no cash pay-

ments, and decisions to keep and to rear children. If government does not assume the right to second-guess those decisions, the burden of proof is on those who advocate a policy of second-guessing women's decisions to sell their parental rights.

"Free-Market Adoption Will Spawn a Baby Industry"

Another argument against greater freedom of birth mothers to contract with adoptive parents is that the lure of profits will induce women to become pregnant for the sole purpose of selling their parental rights to adoptive couples. While many women will still become pregnant accidentally, others will do so intentionally in search of profits. Such actions create life for all the wrong motives.

Intentional births by profit-seeking birth mothers are a possibility, but it is difficult to see why this outcome is undesirable. The market price of parental rights will reflect adoptive parents' demand for such rights. Willingness to supply parental rights (and hence willingness to become pregnant solely to sell parental rights) will vary with the market price. If demand for parental rights falls, so too will the price of these rights, leading fewer women to offer their parental rights for sale. Likewise, an increased supply of babies lowers the price of parental rights, thereby increasing the willingness of people to adopt. At market-clearing prices for parental rights, birth mothers' supply of these rights will equal adoptive parents' demand for these rights. Any excess supplies of, or demands for, parental rights will be corrected by decreases or increases in market prices. Only women who find market prices attractive will become pregnant for the purpose of profiting from the sale of their parental rights. There is no reason to suppose that the pricing mechanism will fail to keep markets cleared.

To be sure, the market will not work flawlessly, instantaneously matching demand with supply. What happens when a woman becomes pregnant believing that she can sell her baby profitably only to discover, nine months later, that the market price for parental rights has fallen? If the woman has no interest in raising the child herself, she will sell her parental rights at the lower price. Her profits will be lower than she expected when she became pregnant, but that is a risk she assumed when she chose to become pregnant. Women contemplating becoming pregnant to profit from selling their parental rights will account for the risk that the market price nine months hence might fall.[18]

[18]Surrogate-mother contracts can shift the risk of price declines from birth mothers to adoptive parents. By contracting before conception at a known price, a surrogate mother no longer risks having to sell her parental rights at a price she regards as too low.

In contrast, women who decide that the current market price is too low will not sell their rights. These women keep their children. Of course, women who decide only after becoming pregnant to keep their children retain all parental rights and responsibilities, just as do today's mothers who choose to keep unplanned children. There is no reason to believe that one kind of unplanned child will be treated less well than the other.

"Liberalized Birth-Mother Contracting Will Engender Exploitation by Middlemen"

Lifting the ban on birth-mother contracting rouses fears of ruthless exploitation of birth mothers and of adoptive parents by middlemen—specialists in bringing birth mothers and adoptive parents together. (See, e.g., Katz 1986: 7–18.)

Such fears are unfounded. Although horror stories are told of how corrupt middlemen prey on vulnerable birth mothers and adoptive parents,[19] the problems highlighted by the stories are an artifact of the law's refusal to legalize birth-mother contracting. Just as the gangsterish conduct of bootleggers during the 1920s was not indicative of the conduct of Anheuser-Busch, Seagram's, and other legitimate participants in today's legal market for alcohol, current unscrupulous actions of "baby brokers" in no way portend that legitimate participants in a legalized market for parental rights will behave unethically.

There are at least two reasons participants in a liberalized market for parental rights will perform honorably and in the best interest of all parties involved. First, legalized birth-mother contracting would give all market participants easy recourse to the courts for redress of untoward treatment. Liars, swindlers, and scoundrels under the current legal regime have little fear of being hauled into civil court by their victims. Second, legalized birth-mother contracting will subject to open competition all market participants. Middlemen who fleece and defraud their clients will, in addition to the threat of legal action, lose business to honest middlemen. Competition can be open only if it is legal, and—as in most markets—open competition is the best guarantee that all parties to the adoption process will behave, and be treated, properly.

In contrast, the current legal regime actually promotes exploitation by middlemen of birth mothers and adoptive parents. Adoption agencies are middlemen who profit from artificially high fees on the sale of parental rights—fees that birth mothers today are banned legally

[19]For example, see Baker (1978).

from earning. Giving birth mothers and adoptive parents the legal right to contract with each other for the sale of parental rights will end exploitation not only by illegal "baby brokers" but by adoption agencies as well.

Of course, it is not clear that liberalized birth-mother contracting will create a demand for middlemen. Legally protecting birth-mothers' options of dealing directly with adoptive parents ensures that middlemen will survive only if they perform useful services. As long as the market for the services of middlemen is competitive, their existence and their actions are to be applauded rather than feared.[20]

Conclusion: Liberalize the Rules against Birth-Mother Contracting

Giving birth mothers the legal right to contract voluntarily with adoptive parents for the sale of parental rights in infants will not solve all the problems that today afflict child care and families. The surplus of older children, disabled children, and nonwhite children will not be alleviated by a freer market in adoptions. Nor will the dysfunctional U.S. foster care system be repaired. Many infertile couples will still not wish to adopt, and many pregnant women will still choose to abort. Nevertheless, a freer market in parental rights does promise great gains to adoptive parents, birth mothers, and children. These gains ought not be forsaken merely because the market cannot cure every evil or because we are uncomfortable with use of the language of economics and of commerce to explain how a liberalized market in parental rights will function.

Implementing such a market would not entail a great legal change. All that is required is that birth mothers and adoptive parents be allowed to contract with each other for the sale of parental rights in infants at mutually agreeable prices. Laws prohibiting birth mothers from dealing directly with adoptive parents and from selling their parental rights at mutually agreeable prices would be repealed, as would restrictions on birth-mother and adoptive-parent advertising. Current government-mandated screening of adoptive parents can be retained. Courts—which still will be required to issue a final decree of adoption in each case—can ensure that no one adopts without

[20]In reviewing an earlier version of the paper, Henry Sanborn correctly noted that a free market for parental rights will cause prospective adoptive parents to become much more selective about the characteristics of adopted children. The role of middlemen might expand to facilitate this selectivity. Intermediaries might also specialize in monitoring the prenatal care and habits of prospective birth mothers—many of whom might maximize their returns through association with intermediaries of good repute.

having first passed a home study of the kind currently given to adoptive parents. Moreover, courts will keep whatever abilities they now possess to invalidate adoptions when adoptive parents turn out to be derelict or abusive. Cooling-off periods are also consistent with a freer market in parental rights: a birth mother can be given the right to reclaim her parental rights within, say, one week after initially turning her child over to the adoptive parents.

Indeed, nearly all regulations that today govern infant adoptions in the United States can be retained if birth mothers are granted freedom of contract. Reasonable people will disagree (as they do now) about which regulations are worthwhile and which are harmful. All that I propose is that birth mothers be allowed to contract freely with adoptive parents, with no restrictions on the prices paid for parental rights in infants, but subject to whatever other controls legislatures or judges deem appropriate. This modest change will yield enormous net benefits.

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