

May 2010

## Market Forces in Domestic Adoptions: Advocating a Quantitative Limit on Private Agency Adoption Fees

Jack Darcher

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/sjsj>

---

### Recommended Citation

Darcher, Jack (2010) "Market Forces in Domestic Adoptions: Advocating a Quantitative Limit on Private Agency Adoption Fees," *Seattle Journal for Social Justice*: Vol. 8: Iss. 2, Article 11.  
Available at: <https://digitalcommons.law.seattleu.edu/sjsj/vol8/iss2/11>

This Article is brought to you for free and open access by the Student Publications and Programs at Seattle University School of Law Digital Commons. It has been accepted for inclusion in Seattle Journal for Social Justice by an authorized editor of Seattle University School of Law Digital Commons.

## **Market Forces in Domestic Adoptions: Advocating a Quantitative Limit on Private Agency Adoption Fees**

---

Jack Darcher

### INTRODUCTION

Since at least the early 1970s, there has been a widening gap in the United States between the number of prospective adoptive parents and the relatively diminishing supply of children eligible for adoption. As detailed later in this article, adoption (as a form of family formation) continues to expand in terms of popularity and availability. This increased availability comes from both the creation of new forms of adoption, such as open adoption, and from the qualification of new categories of adoptive parents, such as single adults and gay couples. Due to these factors and the expected permanence of reproductive rights, this gap is likely to persist and expand into the twenty-first century.

Regardless of the various avenues of placement that adoptive parents pursue, market forces exist within the adoption process. While observers might rightfully feel uncomfortable speaking about adoption in financial terms, the influence of adoptive parents' desires and preferences on the adoption market requires that market forces be recognized and discussed. Only within the last quarter century has legislation been enacted that has effectively influenced this market behavior. However, with the exception of statutes targeting black-market adoption, these measures have never intentionally confronted the economics of the adoption market. Meanwhile, social and legal commentators have taken a great interest in the market forces of adoption. Key amongst these commentators is Judge Richard Posner, who has advocated a system of free-market adoption. While the idea of a legal free market for adoption has existed for some time, its

benefits have rarely been seriously contemplated. And although the human costs of such a deregulated market prevent its realization, its benefits warrant a discussion on the role of legislation in influencing adoption market behavior.

This article begins by exploring the social and cultural forces that have contributed to the adoption crunch. Then, after surveying the various available avenues for adoption, this article will give background information about the market forces in adoption and the competing philosophical views on these forces. Next, the article will cover past and present measures that have influenced both market forces and market behavior. Finally, the article will make proposals for additional steps, while acknowledging their flaws.

Ultimately, this article seeks to establish that adoption regulation must be crafted to modify adoption market behavior for maximum societal wealth, while taking every effort to protect the personhood interests of the adoptee. This article appraises two possible avenues toward this goal, each of them embracing the economic aspects of adoptions while striving to divert adoption away from “grey-market” independent adoption and into more regulated and humane adoption formats. The first possibility, the federalization of adoption, is fraught with constitutional obstacles. While this approach might become more feasible as international adoption becomes more prevalent, and thus requires a more uniform national approach to adoption, it also suffers from the morally and politically distasteful necessity of justifying the federalization of adoption under the purview of the Constitution’s Commerce Clause.<sup>1</sup> As discussed later, the mere conception of adoption in such market terms could arguably have such a dehumanizing effect on the adoption process that it actually threatens the public acceptance of the institution of adoption. Given these immense obstacles, this approach, in this author’s opinion, is not viable.

The second proposal is a cap on private agency adoption fees. By lowering the overall costs of adoption for those who choose agency

adoption, this measure would make agency adoption more attractive than independent adoption, having the effect of decreasing the commodification of adoption and protecting the personhood of the child. Although burdened with several drawbacks, this measure could be instituted at either the federal or state level and could be either voluntary or mandatory. In any of these forms, a quantitative limit on private agency adoption fees will counteract or reverse the destructive effects of market forces in domestic adoption while preserving the advantages of agency adoption. Thus, a limit would provide many of the benefits of free-market adoption while avoiding its critical detriments.

## I. BACKGROUND

### *A. Twentieth Century Adoption Trends*

Some history of adoption's progression in the twentieth century is necessary in order to appreciate the influence and importance of the adoption measures that this article will evaluate and promote. Moreover, it is important to understand the economic forces currently at play in adoption. Of particular importance for this article is the creation of the wide gap between the supply and demand for healthy infants that adoption has been experiencing for approximately forty years.

Adoption reached its peak numbers in the United States during the 1960s, with over 140,000 adoptions taking place in 1965.<sup>2</sup> In remarkable contrast, a mere 16,000 adoptions took place in 1938.<sup>3</sup> Various explanations have been given for this noteworthy increase, the most persuasive being the erosion of adoption's stigma as an illicit and morally questionable institution.<sup>4</sup> Changes in child welfare policies and state adoption laws helped create a perception of adoption as a generous and selfless measure, whereas it had earlier been perceived as an abnormal practice.<sup>5</sup>

A shift in cultural views of genetics also played an important role.<sup>6</sup> In the first third of the twentieth century, the theory of eugenics had gained

significant popularity, creating the idea that orphaned children possessed inferior mental and physical traits and, therefore, were not entitled to the benefits of a nuclear family.<sup>7</sup> However, studies in the 1920s, the creation of child welfare advocacy groups, and an overall resistance to the theory of eugenics reversed this view of adoptive children, and by the mid-1950s prospective parents started outnumbering eligible adoptees.<sup>8</sup>

For at least a decade after this point, the number of available adoptees continued to grow with the expanding demand; out-of-wedlock births soared from 88,000 in 1938 to 201,000 in 1958.<sup>9</sup> And due to the increased tolerance for illegitimacy, agencies began dealing directly with pregnant women and offering services to help them bring their children to term in a compassionate atmosphere.<sup>10</sup> Also, agencies became less concerned with placing adoptees according to their religious, cultural, and racial heritage. The adoption of older and handicapped children became more commonplace as well.<sup>11</sup>

However, the rate of adoptions plummeted after 1970, as agencies began experiencing a rapid decrease in the number of available adoptees. Several explanations have been given for this result. One commonly identified cause is the increased access to contraceptives and abortion following seminal Supreme Court decisions.<sup>12</sup> While these decisions represented a breakthrough for the sexual revolution, their impact on adoption was seemingly immediate; from 1970 to 1975, adoptions fell from 89,000 to 50,000.<sup>13</sup>

Additionally, those unwed mothers who did choose to bear children more often decided to keep them. In 1973, 20 percent of unwed mothers placed their child in adoption; by 1982, this rate dropped to 12 percent.<sup>14</sup> The availability of contraceptives and abortion now made motherhood a conscious choice.<sup>15</sup> Also, the social stigma for single mothers was eroding.<sup>16</sup> Judge Richard Posner, whose views of adoption will be focused on later, cites this increased retention of unwed children as the leading cause for the decline in available adoptees. He suggests that the number of illegitimate

births remained steady, but fewer children were being given up for adoption.<sup>17</sup>

While the supply of adoptive children has been dwindling, the supply of potential adoptive parents has been increasing. The ability to adopt, which had previously been limited to married heterosexuals, has become accessible to unmarried couples, same-sex couples, and single persons regardless of sexuality in most states.<sup>18</sup> Additionally, despite advances in assisted reproduction, the national number of infertile couples increased substantially in the latter part of the twentieth century, most likely due to a trend to delay childbearing in the baby boomer generation.<sup>19</sup> However, the increased use of assisted reproduction might actually contribute to a lessened demand for adoptees since fewer infertile couples are seeking to adopt.<sup>20</sup>

Perhaps the strongest indicator of the gap between adoption's supply and its demand is the growth of intercountry adoption in the United States. It seems logical to assume that increased availability and access for intercountry adoption would decrease the demand for domestic adoptees, thereby theoretically reducing domestic adoption fees. Any success in reducing adoption fees domestically might also help promote domestic adoption over intercountry adoption. However, this possibility confronts two obstacles. First, people who seek intercountry adoption often do so because of nonmonetary barriers that present themselves in domestic adoption, such as barriers some countries have pertaining to age and family structure (single or unmarried adoptive parents). Second, there is a question as to whether a decrease in adoption costs could persuade a potential adoptive parent to change their preferences when it comes to their potential child. However, while intercountry adoption feasibly helps relieve domestic demand for adoptive children, it is an immense topic that is beyond the scope of this article.

### *B. Adoption Avenues*

While adoption has evolved according to various social forces, it has also been impacted by economic forces. The imbalance between the supply and demand for healthy infants has manifested itself in all aspects of adoption—from foster care adoption to private independent adoption. Before examining the various theories evaluating these economic forces in adoption, the three major forms of adoption must be described: public adoption (either via foster care or a public adoption agency), private agency adoption (including both closed adoption and open adoption, as distinguished below), and independent adoption.

#### **1. Public Adoption**

Public adoption—adoption undertaken solely through state avenues—can take one of two forms: foster adoption or public adoption agency. In foster adoption, the parental rights of the birth parents have not yet been fully terminated; the child is in the custody of the state, but the possibility still exists that he or she will be reunited with his or her parents under various circumstances. In public agency adoption, the child is still under state custody, but parental rights have been fully and unalterably terminated, as discussed below.

The key distinction between public agency adoption and private agency adoption is that the latter typically represents adoptions initiated by the child's biological parents, while public adoption represents the adoption of children whose parental rights have been acquired by the state or a state-licensed agency. In public adoption, the child's availability for adoption usually requires that the parental rights of the birth parents have been severed prior to any adoption proceeding—a difficult and painful process and the source of much delay. Public adoption usually pertains to children under state care and is the typical method of adoption for older or special-needs children.<sup>21</sup> These “wards of the state” include both abandoned children and children removed from their parents by the state. The former

group—abandoned children—may have come into state care by outright abandonment, such as children found without identification, or may have been handed to the state without legal consequence as the result of safe-haven laws, which are now present in forty-seven states.<sup>22</sup> The growing popularity of such laws has increased the number of children flooding into foster care.<sup>23</sup>

Unlike every other form of adoption, public adoption centers do not lack a supply of children. In 2002, roughly 534,000 children were living in foster care nationwide, of which roughly 126,000 were eligible for adoption.<sup>24</sup> Currently, as a result of measures which are detailed later in this article, public adoption is relatively cost free for adoptive parents. As opposed to private agency and independent adoption, public agencies are nonprofit organizations and do not charge a fee for placement. The only costs to adoptive parents in public adoption usually come from legal fees, which are minimal and are often reimbursed by the state.

The costs of public adoption to states, however, can be immense. These costs include the housing and care for foster children under direct state supervision and the payment of monthly stipends to foster parents providing foster children a temporary living situation. Additionally, states must employ hundreds of social workers dedicated to either repairing and reuniting broken families or placing those children who cannot return into foster homes. Finally, it is important to recognize the variety of other administrative and legal costs associated with removing children from negligent or abusive situations as well as the costs associated with providing them with stable living situations.<sup>25</sup>

## **2. Private Agency Adoption**

Private agency adoption, along with independent adoption, represents the placement of children voluntarily given up for adoption by their birth parents. Often, this involves the placement of infants and newborns.<sup>26</sup> Private agencies originated as sources of adoptees for specific religious



groups or other demographics. Today, agencies may possess a variety of philosophical purposes, ranging from a general interest in promoting adoption to providing an alternative to the abortion of unplanned pregnancies.<sup>27</sup> Some private agencies operate as alternatives to state-run foster homes. Whatever the purpose, the agency must still adhere to state regulations.<sup>28</sup>

By and large, these agencies are nonprofit organizations because most states expressly prohibit profitable adoption. While children placed in private adoption are often quickly matched with potential parents, the opposite is true for the parents, who must often wait several years before being matched with a child. The application process is likely to include complex selection procedures specific to the agency, as well as substantial fees for the agency's services, regardless of whether placement is ultimately successful.<sup>29</sup> In particular, private agencies are more likely to apply traditional conceptions of family when ranking potential parents for placement: young, married, and heterosexual applicants are usually given preference over older, single, or homosexual counterparts.<sup>30</sup> Even if such bias is prohibited by the state, private agencies are often capable of excluding undesired applicants on pretextual grounds.<sup>31</sup> Private agencies may also apply stringent race-matching criteria in their adoption placements, thereby severely delaying the adoption of children whose race does not match that of the agency's roster of prospective parents (and vice versa).<sup>32</sup>

While the use of agency fees is now industry-wide, prior to the 1950s, such mandatory payment was considered inappropriate.<sup>33</sup> At that time, agencies subsisted on voluntary donations made by adoptive parents out of gratitude to the agencies.<sup>34</sup> The introduction of agency fees, and the commercialization of adoption in general, raised a multitude of ethical and professional concerns.<sup>35</sup> Of particular concern was the seeming duality that such fees created between the perceived pricelessness of the child and a legal arrangement that assigned a monetary value to children.<sup>36</sup> Agencies

justified the fees by limiting them to compensate the agency's actual cost for the adoption—a claim that is still adhered to today.<sup>37</sup>

However, despite this claimed adherence to operational costs, agency fees have steadily risen. Estimates in the late 1980s put the average agency fee between \$7,000 and \$10,000.<sup>38</sup> By the end of the twentieth century, the upper end of the fee range was estimated at \$30,000.<sup>39</sup> Less than five years later, agencies were charging as much as \$52,000 for adoption placement, and price premiums were available for Caucasian children and expedited service.<sup>40</sup>

Given this exponential rise in agency fees, much institutional effort has been invested into validating this seemingly limitless expense without claiming profit-seeking as a justification.<sup>41</sup> While agencies advocate for these fees as a symbolic expression of parental devotion,<sup>42</sup> one possible justification could be the need to provide birth mothers with the same compensation available through the arena of independent adoption. However, this author was unable to find any written evidence of agencies using such a market-savvy justification, possibly because of the wariness to acknowledge such economic forces within the adoption process.

### **3. Independent Adoption**

Independent adoption is coordinated solely by the adoptive parents and the birth parent, or a representative of these parties, and is completely autonomous from any agency involvement. Representatives might be attorneys, social workers, clergy, or even medical personnel. Most often, birth mothers participating in the process of independent adoption are seeking to form an adoption plan for an unborn child.<sup>43</sup> Alternatively, prospective birth parents might be using nonagency means to search for children, most notably through adoption advertisements or a party who is likely to know of mothers contemplating placing a child in adoption.

Due to the lack of agency-imposed safeguards against fraud, and the lack of intensive screening processes and parent counseling, independent

adoption is prohibited in several states.<sup>44</sup> Safeguards still exist in those states that allow independent adoption, most notably the requirement of a home study during which a social worker determines the prospective parents' suitability to adopt. However, this process is not as rigorous as the screening process that would be conducted by an agency.

Another possible policy justification for disallowing independent adoption is its supposed proximity to black-market adoption, leading many observers to refer to independent adoption as "the grey market."<sup>45</sup> In black-market adoptions, "baby brokers" connect adoptive parents with birth mothers for direct profit. In a black-market adoption, birth mothers can potentially profit by receiving money in excess of the compensation permitted by state law. Also, adoptive parents do not have to endure years-long waiting periods, nor are they subjected to an agency screening process. The only difference, hypothetically, between an independent adoption and a black-market adoption is the exchange of money that is expressly prohibited by state law. However, black-market adoptions might also utilize forged or fabricated versions of the necessary documents, such as home study reports. While this type of adoption is rare in the United States, it still persists due to its level of discreetness and the obvious financial benefits it affords to unscrupulous birth parents and baby brokers.

Still, the differences between independent adoption and black-market adoption are not necessarily as vague as dissenters might portray. Ideally, an independent adoption only differs from an agency adoption in that the screening process is conducted by a state social worker rather than the state-sponsored agency representative. All other matters are conducted with the same transparency and rigor as an agency adoption. As discussed later, this transparency is enforced by laws in several states in the form of mandatory disclosure of all adoption related expenses, along with close state supervision of the parties' financial transactions.

#### **4. Open Adoption**

Open adoption is a relatively new variation of agency adoption that is gaining in popularity and it is worth mentioning for its potential to increase the supply of adoptees. In open adoption, prospective parents submit their information to an agency. Birth parents who contact the agency are given access to the various profiles of prospective parents. The birth parents select several of the profiles, and the agency arranges meetings. The birth parent(s) ultimately select the parent(s) with whom the child will be placed. Additionally, the birth parents can negotiate a mutually agreeable level of involvement in the child's life after his or her birth, not unlike the visitation arrangements of a divorce.

In theory, open adoption affords all parties advantages over traditional "closed" adoption. The birth mother is spared some of the burden of abandoning a child by being able to approve of the child's new parents and guarantee some involvement in and knowledge about the child's future life. The child benefits by growing up with knowledge of her origins and by having a relationship with her biological parents while still having a permanent and stable parental relationship with her adoptive parents. The adoptive parents might benefit as well by relieving themselves of the possible future stress of a resentful or restless adoptive child, one who feels alienated from his or her genealogical identity. Ultimately, open adoption could function as a means to increase the attractiveness of adoption for single mothers or other disadvantaged parents who might otherwise keep their children due to the trauma and uncertainty of giving a child up for adoption, or who might abort the pregnancy out of these same fears.

Having discussed the three major forms of adoption, this article can now address the economic and social theorists' positions on the adoption market. Because adoption involves moral questions on the value of human life in the context of a human exchange, theorists have taken different positions on how to deal with the market forces at play in the adoption industry. This next section will address two of the most prominent views posed by such

observers and commentators, namely the free market of personhood models of adoption. The section will then conclude by discussing the emergence of a third view, the poststructuralist view, and its potential to bridge the free market and personhood models.

## II. SCHOLARLY VIEWPOINTS OF MARKET FORCES IN ADOPTION

Several legal theorists have addressed the market forces in adoption and their effects on children, families, society, and the adoption process itself. These theorists tend to occupy one of two views. One view advocates “free market” adoption, which typically involves the removal of barriers on adoption payments to birth mothers or other regulation of monetary exchanges in adoption procedures. This viewpoint is best described by Judge Richard Posner, one of the founders of the law-and-economics movement of the last half-century.

In opposition to this viewpoint are theorists who have challenged the “commodification” of adoptees. The commodification of human products, such as sperm, eggs, and organs, has attracted much attention from observers who question the fungibility of these items and who warn that these markets are immoral, if not outright dangerous to those individuals involved in these markets. Therefore, the law should be hypercritical of these markets, and necessary measures should be made to protect the personhood of individuals. The market forces at play in adoption are of special interest to these personhood advocates because adoptees are simultaneously both individuals and the biological product of their birth parents. Professor Margaret Radin best represents this “personhood” ideal and has delivered much of its rhetoric on the topic of adoption. This section will outline these two competing and responsive theories of adoption market forces, relying on Posner and Radin for the key tenets.

*A. Free-Market Adoption*

In 1978, while a Professor of Law at the University of Chicago, Judge Posner—a key proponent of “Law-and-Economics” theory—proposed a reanalysis of the law’s view of the adoption market.<sup>46</sup> Posner developed a model of supply and demand in the adoption process, one built around a system of regulation and social forces that does not differ drastically from those presently at play. By that point in time, as is true today, adoption agencies—both public and private—had grown to dominate over independent adoption.<sup>47</sup> The restrictions on payments to birth parents were nationwide by this point, meaning that most states limited a child’s “price” to the direct medical expenses and, at most, some maintenance expenses for the end of the pregnancy.<sup>48</sup>

Posner cited several similarities between adoption regulations and those seen in “explicit markets,” including the monopolization by government-sponsored institutions and the hindrance on full pricing.<sup>49</sup> However, adoption did have several distinct characteristics: the collusion seen between agencies, the agencies’ inability to refuse the children offered to them, and the availability of a close, unregulated substitute to the agencies—namely, independent adoption.<sup>50</sup> Estimating the potential demand for adoption by comparing the percentage of childless couples with the percentage of young women who had indicated their expectation to remain childless,<sup>51</sup> Posner noted a surprising lack of utilization of independent adoption.<sup>52</sup> This he attributed to the restriction on fees, which artificially decreased the financial value of children.<sup>53</sup> Hence, not only were fewer children being put into adoption, the market was providing children at an underappreciated cost, and the limited supply was therefore disappearing at a much quicker rate.<sup>54</sup>

Posner’s main issue with restricted independent adoption fees was that the fees did not represent the birth mother’s true expenses for the pregnancy and the subsequent adoption. While most systems did allow for compensation for medical and legal services and for some living expenses,

other costs were beyond compensation. Posner listed three chief costs that were undercompensated: (1) the opportunity costs of the birth mother during her pregnancy, over and above her living expenses; (2) both the physical and emotional suffering experienced as a result of the pregnancy and adoption; and (3) the costs of locating the middlemen who would connect the birth mother and the adoptive parents.<sup>55</sup> While this last category of cost is minor, it still represents a crucial obstacle to market-efficient adoption. Although permissible costs can be slightly inflated due to the lack of scrutiny, the unavailability of fully legitimate payments to middlemen results in the duty of connecting birth mothers with adoptive parents to fall on those people who are already committed to the adoption process, either financially or not: attorneys, obstetricians, or the birth mothers themselves.<sup>56</sup> With full legal compensation, middlemen could more effectively connect birth parents with adoptive parents—an attractive idea in a market where these persons might be socially and geographically removed from one another and who likely lack experience in the adoption process.<sup>57</sup>

Along with more efficient and professional placement of children, the expansion of payments in independent adoption would affect other desirable results. In the adoption process, both now and in 1978, birth mothers have had little financial incentive to give a child up for adoption rather than abort their pregnancies.<sup>58</sup> Also, public assistance might often be available to cover the medical expenses that adoption would otherwise cover, so birth mothers might feasibly be less inclined to opt for adoption if they are already incurring the same opportunity costs by raising the child.<sup>59</sup> A free independent market would more fully compensate women for the physical, emotional, and economic consequences of their pregnancy. Therefore, this system would also reduce any incentive to seek compensation in the black market.<sup>60</sup> Lastly, the constraints on independent adoption payments may be responsible for the number of children in foster care, because birth mothers

who already intend to relinquish their parental rights have no financial incentive to place a child in adoption.<sup>61</sup>

This last argument, while contentious, certainly seems intuitive. It also could contain more implications for the adoption supply than Posner intended. With an increased incentive comes a more frequent termination of birth parental rights. Some birth parents, whose parental rights might not have otherwise been terminated, might voluntarily terminate their parental rights in order to receive compensation. In addition, some birth parents whose rights would still have been terminated might expedite the process, therefore accelerating the child's placement. While some birth parents might actually withhold termination until adoptive parents willing to compensate were located, the essential argument persists that with more incentive to adopt comes more effort to make adoption happen.

In response to anticipated arguments against free-market adoption, Posner recognized that the assignment of children by price was not designed to promote the best interests of children.<sup>62</sup> However, Posner argued, agency adoption did not act exclusively in the children's best interests, because (1) parents were not categorized by parental fitness once the state determined their qualifications to adopt, and (2) the particular best interests of the children were rarely discernible at their young age.<sup>63</sup> Therefore, as long as states still screened independent adoption parents by the same standards as agencies, the same level of safeguards against abuse would exist.<sup>64</sup>

Posner challenged several other anticipated criticisms, but one possible rebuttal was not addressed. With pregnancy being theoretically a cost-neutral activity, any slight increase of a birth mother's entitlement to costs might allow reproduction to become profitable. Posner already suggests that regulated grey-market payments are prone to semi-fraudulent inflation.<sup>65</sup> However, he does not present any method which might prevent free-market adoption from experiencing the same semi-fraud. Most likely, he would treat this circumstance as an inevitable and unfortunate, but ultimately inconsequential, outcome of this preferable system.



Posner has since backed away somewhat from his original position on this subject, recognizing that the threat of child abusers and the potential influence of eugenics into such a market form serious obstacles to free-market adoption.<sup>66</sup> Still, according to Posner, the free market should be considered for its desirable effects of reducing abortions, providing an alternative to black-market adoption, and relieving the severe demand problem in lawful adoption.<sup>67</sup>

### *B. Personhood Model*

Opposite Posner's free-market version of adoption is Professor Margaret Radin's protest against the commodification of personhood interests.<sup>68</sup> Radin—who analyzes the markets for such concepts as genetic material, organs, and sexual intercourse—includes adoption in her spectrum of markets whose commodification threatens the personhood of individuals and the sanctity of individual rights. Her challenge to this (perceived) universal commodification of ideas tied to personhood places emphasis on both the literal and rhetorical markets revolving around these subjects.<sup>69</sup> As an example of the role market rhetoric plays in contested commodities, Radin uses Posner's 1978 article by emphasizing his monetary qualification of human interaction.<sup>70</sup> However, Posner is not alone, as Radin points out, in his financial perception of humanity: even Hobbes conceived of a person's needs, values, and desires in terms of price.<sup>71</sup>

The danger in this model of thinking, Radin argues, is that the objectification of a person's attributes to his or her personhood dangerously erodes his or her individual autonomy.<sup>72</sup> While the commodification of human commodities does not necessarily equate to slavery, the effect is similar:

[P]ersons . . . possess objects that they may control or manipulate to achieve their ends. Objectification is improper treatment of persons because it makes them means, not ends. As means, objects may be bought and sold in markets, to achieve

satisfaction of persons' needs and desires. Objects, but not persons, may be commodified.<sup>73</sup>

This threat is doubly true in adoption, which objectifies not only the child itself, but also the reproductive abilities of the birth parents.<sup>74</sup>

In addition to objectification, the subordination of persons is an effect of these contested markets.<sup>75</sup> Radin defined wrongful subordination as the “unjustified dominance or exercise of power by one person or group over another.”<sup>76</sup> Subordination could be viewed as a side-effect of objectification, such as when certain characteristics of a person are viewed as inferior or superior to those of others.<sup>77</sup> Hence, the marketability of human attributes—either through a direct market or through market rhetoric—has the initial effect of objectification, which leads to subordination. In short, putting quantifiable values on persons based on their most immediate characteristics would enforce social hierarchy.

Adoption potentially facilitates a particularly invasive form of subordination. When a baby or child is objectified, all of its attributes—sex, race, hair color, predicted intelligence, predicted height—become part of its “worth.”<sup>78</sup> In both a literal and a rhetorical market, therefore, there exist inferior and superior children. These categories of worth are based on demographics, such as race and gender, which reinforce stigmas that society might otherwise find offensive, or at least distasteful. This leads those who observe these commodified adoptions to base their own self-worth in terms of the adoption market.<sup>79</sup> This might be true not just for those individuals who participate in the adoptions, but also for anyone on the periphery who becomes aware of the price of the adoption and how that price differs based on a child's characteristics.<sup>80</sup> Posner himself was concerned about the implications of an open market in which prices for babies were racially stratified; unable to offer a solution, he admitted that his model could potentially exacerbate racial tensions.<sup>81</sup>

Radin speaks of this kind of pervasiveness as the “domino effect” of commodification. Under this theory, the existence of a commodified version

(such as prostitution) of a personhood interest (sexual intercourse, in this example) will contaminate the entire interest such that all versions can be spoken of in the market rhetoric of the commodified version.<sup>82</sup> The domino theory has great application in the adoption market, where people will not only view other parent-child relationships in market terms, but will view all children—and even themselves—in terms of their marketable attributes. Furthermore, if the commodification of persons at birth is permissible, then the commodification of persons at other points in their lives is less objectionable.

Radin does not actually believe that a free market for children would be a slippery slope to permissible slavery, but does argue that the social permissibility of adoption is due to the lack of a free market.<sup>83</sup> It is the two-part selflessness of adoption—of parting with one's child while another person accepts the child as his or her own—that distinguishes adoption from slavery; the positive perception that this selflessness creates is what makes adoption not only palatable to society but even noble.<sup>84</sup> The relinquishment of a child is typically viewed as admirable, since there is the presumption that it is being done for the child's best interests. Once the prospect of monetary gain appears, this sense of altruism might disappear.<sup>85</sup> The death of altruism is another common theme in Radin's view of universal commodification, and it plays an important role in the domino theory.<sup>86</sup> Even if the complete commodification of children did not lead to the erosion of adoption as a socially permissible practice, it might still have the effect of nullifying the majority of adoption's social importance and prestige. Adoption would be viewed as less honorable, for both the birth mother and the adoptive parents. Communities would be denied these examples of selflessness, and adopted children would suffer both by viewing themselves as commodities and by being perceived as commodities.

Taking all of these possibilities into account, Radin ultimately questions whether even the partial commodification of children via adoption could

truly lead to the results she fears.<sup>87</sup> Even if people come to view themselves according to the values of the adoption market, this does not preclude them from still retaining a noncommercial view of themselves.<sup>88</sup> In addition, the domino theory assumes that we cannot know the price of something and still view it as priceless.<sup>89</sup> Of course, there is no guarantee that the commodification of adoption would rob it of its social worth.

While Radin's view certainly gives a broader scope to the dynamics of adoption and its effects on the social fabric, its commitment to the preservation of personhood often leads it to overlook or dismiss the social benefits of present-day adoption. Adoptions tainted by objectification and subordination might still represent a superior result to any feasible alternative. The aspiration of removing all objectification and subordination from adoption is not only unrealistic, it also ignores the social wealth created by timely and well-executed traditional adoptions.

### *C. Poststructuralist View*

While the detriments of a legal free market for adoption severely outweigh its benefits, the free market does pose a solution to the adoption crunch. However, the threats of objectification, subordination, and the loss of altruism prevent the serious consideration of Posner's proposal.

Some synthesis of Posner's free-market adoption with that of Radin's personhood model has been suggested.<sup>90</sup> While both Radin and Posner's approaches have been designated as overly unitary and uncompromising,<sup>91</sup> a poststructuralist view of commodification would allow for market mechanisms to empower marginalized people who circumvent traditional reproduction.<sup>92</sup> This viewpoint perceives the introduction of economics into intimate relationships as noncontradictory, and often as an acceptable validation of relationships.<sup>93</sup> The ability to commodify something does not necessarily lead to commodification; instead, markets should be channeled to serve the single goal of enhancing human benefit.<sup>94</sup>

This poststructuralist view is of great use, allowing observers of adoption to speak of adoption in market rhetoric with the express interest of improving social wealth. Given Radin's own doubts about the danger of commodification in adoption, this article will proceed to evaluate the adoption process in its market terms, with the view that other market-conscious action besides free-market adoption can be taken without critically endangering personhood and adoption as a worthwhile social enterprise.

### III. PAST AND ONGOING MEASURES

This article will next explore past and proposed measures that have affected—or seek to affect—the adoption crunch. Although no past measures have expressly confronted the market forces in adoption, some measures have affected the market behavior of adoption and effectively achieved some of the benefits Posner sought to affect via free-market adoption while (in some instances) mitigating the fears posed by Radin. These measures can be organized into three categories: those designed to promote welfare adoption, those designed to curb black-market adoption, and those designed to dissuade grey-market adoption.

#### *A. The Uniform Adoption Act*

The first attempt at establishing a uniform set of adoption laws across states was made in 1953, when the National Conference of Commissioners on Uniform State Laws published its Uniform Adoption Act (UAA).<sup>95</sup> Not until the act was revised in 1969 did any state ratify the Act.<sup>96</sup> The Act was again ratified in 1994, to which only Vermont signed.<sup>97</sup>

In both the 1969 and 1994 versions, the UAA requires that adoptive parents report their expenditures related to their adoption, including any services related to such placement.<sup>98</sup> Prior to a final adoption hearing, the adoptive parents must file an account of any payment or exchange made on their behalf in connection with the adoption. This account must include the

date and amount of each payment, along with a statement as to its purpose. Any lawyers involved in the adoption—whether they represent the adoptive parents, the child, or the birth parents—must make a similar account of any payments received in connection with the adoption. Depending on whether the adoption was independent or not, any agency or guardian must do the same. The UAA encourages that accounting be as exact as possible, and to include the identity of any person or entity involved in the handling of adoption expenses.<sup>99</sup>

The UAA specifies both lawful and unlawful payments.<sup>100</sup> For example, the UAA forbids the exchange of money or any items of value for the express placement of a minor for adoption. The UAA also explicitly forbids any payment for the birth parents' consent or relinquishment. However, the act does allow payment to agencies for their services in connection with the adoption, including those incurred in locating the child—such as advertising costs. More importantly, it allows for several categories of compensation to the birth parents: (1) the medical, pharmaceutical, and traveling expenses incurred by the birth mother in connection with the birth (or any illness to the child); (2) any counseling services for the parent(s) for a reasonable time before or after the adoption placement; (3) living expenses for the mother within a reasonable time before the birth and for no more than six weeks after the birth; and (4) any legal costs incurred by the birth parents.

In addition, the UAA gives a framework for the fees and compensation that an agency may demand.<sup>101</sup> The agency may charge the adoptive parents for any of its own legal services made in connection with an adoption, along with costs relating to preplacement evaluations and background checks. Lastly, and perhaps most importantly, the agency may charge a percentage of the agency's annual expenses relating to locating and counseling the birth parents, the adoptees, and the adoptive parents; however, no guidelines are given as to determining this percentage.

The UAA, whose existence predates both Posner's and Radin's work, presents a middle ground between a deregulated model of free-market

adoption and a system devoted to personhood interests as described by Radin. Both Posner and the UAA strived to make adoption a cost-neutral process for the birth mother; first, by advocating for compensation for counseling and then by allowing the reasonable living expenses of the birth mother to be passed on to the adoptive family. However, the UAA differs in an important fashion from the payment structure proposed by Posner. First, any compensation for the birth mother's physical and emotional suffering is limited to the actual cost of treatment; there is no compensation for enduring the pregnancy and birth. Second, there is no compensation for the birth mother's opportunity costs over and above her living expenses. Therefore, the child cannot be exchanged for the value of her next best financial opportunity, most likely the employment that she missed out on due to her pregnancy. Because of these two differences in permissible payments, the UAA represents a nonprofitable alternative to the free-market model.

Because of this lack of profitability, the UAA retreats from the heightened form of commodification that Posner's model presented. Additionally, it preserves much of the altruism undertaken by birth mothers by maintaining their "volunteer" status in giving a child up for adoption. However, cost-neutralizing payments—even those limited to actual costs—still treat the birth mother as the means to an end. Additionally, the exchange of any payments between the birth mother and the adoptive parents creates a quid pro quo relationship that implies a compensatory scheme that rewards the birth mother for her genetic attributes. Assuming that some women cannot locate adoptive parents willing to provide payment for their pregnancy leading to adoption, the UAA still objectifies and subordinates adoptees and their birth mothers.

### *B. Baby Broker Acts*

"Black-market" adoption has been a topic of concern for American legislatures since at least the 1950s.<sup>102</sup> In order to expressly tackle the issue

of black-market adoption, multiple jurisdictions enacted “baby broker acts,” which penalize, by some mix of civil or criminal sanctions, the adoption of a child through unlicensed means.<sup>103</sup> Typically, these acts prevent the reception of money in exchange for arranging an adoption or for placing a child for adoption.<sup>104</sup> The important distinction to make between any illicit payments that these acts prohibit and the permissible payments made to lawyers, birth mothers, and agencies is that the permissible payments are viewed as a reimbursement for costs or services related to the adoption. Payments become illegal when they no longer pertain to these two categories and instead are intended as profit for the child itself. Predictably, considerable confusion has arisen trying to distinguish between lawful and unlawful payments.<sup>105</sup> This distinction becomes crucial in jurisdictions which follow the UAA’s recommendation of requiring judicial approval of all adoption expenses; in these jurisdictions, the unwitting inclusion of an improper payment can result in the refusal of the adoption petition.<sup>106</sup> Due to this and other consequences caused by uncertainty, a call has arisen for more definite direction as to permissible payments in independent adoption.<sup>107</sup>

In addition, the enforcement of baby broker acts has been hindered by the difficulty of distinguishing between illegal payments and permissible monetary benefits made to the child.<sup>108</sup> Some courts have interpreted the permissibility of reimbursement for a birth mother’s medical expenses as inconsistent with a prohibition on reimbursement for other expenses incurred but unpaid and have accordingly expanded the scope of permissible payments.<sup>109</sup> Essentially, this view of payment seems to embrace, at least somewhat, the broader vision of adoption reimbursement proposed by Posner.

Lastly, baby broker acts have encountered vagueness issues, with several courts finding that these statutes are overbroad and do not give sufficient certainty as to the prohibited behavior.<sup>110</sup> In *Illinois v. Schwartz*, a state district court found that the Illinois baby broker act, which forbade any



compensation for “placing out,” was unconstitutional by virtue of being vague, uncertain, and overbroad.<sup>111</sup> The defendant was prosecuted for placing an adoption-eligible child with his clients, but the district court found that the statute’s definition of “placing out” was so obscure that it failed to set forth constitutionally sufficient standards of conduct.<sup>112</sup> On appeal, the state supreme court found that the statute was in fact definite enough to inform attorneys of permissible and impermissible behavior.<sup>113</sup> Specifically, the statute provided that only a child welfare agency could request or receive compensation for the placement of children.<sup>114</sup> Therefore, the statute, when applied to an attorney, would not infringe upon his or her ability to perform legal services; it merely established that an attorney could not act as a paid intermediary or placement agent for a party desiring to buy or sell a child, the same as any other individual.<sup>115</sup>

While Posner took express measures to explain how his model would not allow for black-market adoptions, his free-market model would not likely be consistent with any active baby broker act. This is because of the difficulties that would likely arise in seeking payments for “middlemen” in independent adoption—agents whose sole function in the adoption process would be to connect birth mothers and adoptive parents. Such “middlemen” would likely function as the “baby brokers” that such measures were designed to eliminate. While agencies fulfill this function in most forms of adoption, in independent adoption this role usually falls on lawyers, doctors, or the birth parents themselves. Posner adamantly argued in favor of the permissible function for independent middlemen in order to provide efficiency in a dispersed and nuanced market. However, since such middlemen would not be providing any function autonomous from the adoption placement (such as legal advice or medical service), they could reasonably be judged to be profiting solely off the child. Therefore, they would likely be in violation of most (if not all) baby broker acts. This result might be avoided if middlemen were to provide some additional or nominal service—such as adoption counseling or advertisement. However, due to

the vague language and conceptions surrounding impermissible payment, there is no guarantee that a court might not interpret such a function as being equivalent to an adoption agent charging a commission for a successful sale and hence profiting off the adoption. There is no indication that Posner held a different view of these agents.

Radin, perhaps ironically, might agree with courts that have found the permissibility of medical expenses to be inconsistent with a prohibition on other expenses. However, while the judicial response has been to expand the scope of permissible payments,<sup>116</sup> Radin's proposal would almost certainly be to reduce—or even remove—the spectrum of legal payment. Even without resorting to a slippery-slope domino theory of commodification, the use of one set of justified payments in independent adoption would still create a subtext of objectification and subordination. It might then seem arbitrary to disallow another set of payments because of a lack of service or costs traditionally associated with adoption.

In defense of baby broker acts, Radin could point to their preservation of society's perception of altruism in adoption. Without such measures, the existence of for-profit adoption and baby brokers could create a social backlash against adoption. This disfavor might be limited to independent adoption, but the presence of a market for adoptees might jeopardize the entire concept. Baby broker acts therefore ensure that all adoption payments are made in pursuit of the adoptee's best interests.

### *C. Expansion of Categories of Potential Parents*

As already discussed, states have been allowing different categories of applicants for adoption. While this allowance might increase the demand for adoptive children by increasing the supply of potential adoptive parents, it might also increase the adoption rates for foster children and other less in-demand adoptees.

One proposed solution to the lack of interest in foster care adoption has been the use of joint adoption between two single persons who are not

married or otherwise romantically involved.<sup>117</sup> In such an adoption, two platonic individuals, whether cohabitating or living separately, would both be declared parents of a child and would share parental duties under their own informal structure. This departure from the traditional vision of nuclear family is in keeping with the expansion of categories of potential adoptive parents.<sup>118</sup> However, even though most state statutes do not expressly prohibit two persons who are not romantically involved from adopting, courts still adhere to the vision of co-parents sharing some similarity to a traditional family unit.<sup>119</sup>

This proposal is additionally unique in the fact that it is targeted specifically at providing greater adoption opportunities for hard-to-place children, who otherwise might never locate a set of parents to provide a family atmosphere.<sup>120</sup> In particular, this proposal seeks to increase the number of adoptive parents for African American children, under the theory that present categories of adoptive parents do not adequately fit the African American community.<sup>121</sup> African American children are disproportionately represented in foster care, and the prospect of single parenting—while burdensome for even a prosperous individual—may be particularly problematic for African Americans due to the economic barriers facing this demographic.<sup>122</sup> The need to encourage adoption within the African American community has been a topic for over a quarter-century, due to the issue of interracial adoption and the placement of African American children with white adoptive parents.<sup>123</sup> In 1994, the National Association of Black Social Workers called for the removal of barriers to intra-racial adoption.<sup>124</sup>

As mentioned earlier, the adoption avenues for gay and lesbian prospective parents are widening. This change in adoption practices has taken a variety of forms. Gay and lesbian adoption not only includes the adoption of a child by a homosexual couple, but also the second-parent adoption by a homosexual partner of a biological parent. Additionally, there is a growing acceptance of adoption by openly gay single individuals who

previously might have needed to conceal their homosexuality in order to qualify as a prospective parent.<sup>125</sup> Currently, these developments represent one of the most heated areas of discussion and concern in adoption. State courts and legislatures are rapidly confronting difficult issues surrounding same-sex adoption, often because of vague statutory language, constitutional equal protection issues, or a lack of precedent.<sup>126</sup> While this category of potential parents is currently in a great amount of fluctuation, what seems certain is that homosexual individuals are going to represent a larger percentage of adoptive parents in this century than in the last.

The expansion of adoption by means of increasing adoption by African American and same-sex parents presents a mostly positive outcome for the preservation of personhood and altruism in adoption. This expansion of adoption could potentially relieve much of the strain on the foster care system by increasing the supply of parents interested in special-needs adoption. The adoption of a special-needs child by a nontraditional family would likely be viewed as a perfectly selfless act. It could also be viewed as an epitome of social wealth maximization—even a kind of synergy. An otherwise unadopted child is given a familial home, the state is relieved of providing for one more foster child, and minorities—both in a communal and individual sense—are given access to a social institution that they otherwise could not take part in.<sup>127</sup>

Also, by increasing the involvement of under-represented categories of adoptive parents, these measures could also help relieve the objectification and subordination that Radin viewed as widespread in traditional adoption. Increased minority participation in adoption will counteract the perception of adoption as being a mainly Caucasian institution and provide a less overall biased market in independent or agency adoption. And any increase in foster care adoption is beneficial for personhood interests, since—on the whole—these adoptions are likely lacking in any objectification of the child according to preferred physical and genetic features.

*D. Adoption Assistance and Child Welfare Act*

The Adoption Assistance and Child Welfare Act (AACWA), passed by Congress in 1980, was an effort to provide financial incentives to any state that maintained a financial assistance program to promote the adoption of special-needs children.<sup>128</sup> It was expressly intended to enable families to provide permanent care to children who otherwise would likely spend their entire childhood in foster care.<sup>129</sup> Due to the sometimes prohibitive costs of adopting a child with physical or psychological disabilities, some guardians might be persuaded to remain foster parents due to the subsidies provided by state social services. Under AACWA, however, this consideration would be neutralized, and foster parents would feasibly be more inclined to form a permanent parent-child relationship via adoption.<sup>130</sup>

However, AACWA went beyond simply removing barriers to the adoption of the physically and mentally handicapped. It applied a very broad definition of a “special-needs child”: one which included age, ethnic background, or any other factor that would reasonably prevent adoptive placement.<sup>131</sup> Because it did not limit its definition of special needs to those situations which would inherently include extra financial burden, AACWA had the additional function of promoting foster adoption overall. This policy became explicit in subsequent amendments, and the portion of the act authorizing the adoption incentive program is now known as the Adoption Promotion Act of 2003.<sup>132</sup> Other federal law requires states to actively promote adoption assistance for children in foster care placements.<sup>133</sup> To qualify for federal funds, states must reimburse adoptive parents for any nonrecurring expenses and Medicaid coverage.<sup>134</sup> The statute dictates that “nonrecurring adoption expenses” include reasonable adoption fees, court costs and attorney fees.<sup>135</sup> Other expenses directly related to legal adoption, such as health and home examination fees or transportation costs, may also be compensated.<sup>136</sup>

However broad its definition of special needs, the AACWA still limits its incentives based on the financial status of the child. While states are

allowed to show discretion as to the design of their adoption support programs, they must still meet the Act's eligibility requirements. In addition to being a special-needs child, the child must either be (1) eligible for Aid for Families with Dependent Children (AFDC), (2) eligible for Supplemental Security Income (SSI), or (3) the child of a minor in foster care.<sup>137</sup> AFDC, reformed into Temporary Assistance for Needy Families (TANF) in 1997, is a monthly cash benefit for families who fall below the poverty line; the child is considered eligible if the family from which he or she was removed would have qualified for this support.<sup>138</sup> SSI has a somewhat higher income eligibility requirement, but the child must be disabled.<sup>139</sup> It is significant that while these requirements restrict the availability of AACWA funds based on the financial circumstances from which the child came from, accessibility is not restricted by the means of the adoptive parents; the consideration of the economic standing of the adoptive parents is forbidden by federal law.<sup>140</sup>

Other restrictions on the dissemination of AACWA subsidies remain. One is the requirement that a reasonable, but unsuccessful, attempt be made to place special-needs children without triggering the Act's financial assistance.<sup>141</sup> The only exception for this requirement is when, because of a significant emotional tie with foster parents now attempting to adopt, the child's best interests would dictate that he or she remain in this relationship rather than be placed elsewhere.<sup>142</sup> If the child's foster caregivers establish that they would be unable to adopt without a subsidy, this requirement would be met.<sup>143</sup> Otherwise, the child's caseworker must establish that an effort was made to place the child without assistance; this requirement can be met by submitting the child's profile to adoption agencies or exchanges.<sup>144</sup>

The other requirement is that "the State has determined that the child cannot or should not be returned to the home of his parents."<sup>145</sup> Usually, this requirement is satisfied by a court order terminating the original parental

rights. However, the filing of a petition for termination or voluntary relinquishment can suffice.<sup>146</sup>

While the AACWA represents an admirable attempt at removing the financial barriers of special-needs adoption and providing financial incentives for foster care adoption, its limitations hinder its ability to truly influence market behavior and provide a full-fledged push for foster care adoption.

#### *E. Adoption and Safe Families Act*

In 1997, Congress enacted the Adoption and Safe Families Act (ASFA), which was hailed as the “most sweeping chang[e] to the nation’s adoption and foster care system in nearly two decades.”<sup>147</sup> The bill had two major co-functions: (1) to move children quickly from foster care to adoption, and (2) to shift the interest of foster care from “reunification with birth parents” to “best interests of the child.”<sup>148</sup> The ASFA was intended to improve the policies embodied in AACWA, largely by amending the reasonable efforts to preserve original parental rights.<sup>149</sup>

The primary step toward accomplishing this goal was to expedite the termination of parental rights when: (1) a parent had subjected the child to “aggravated circumstances,” (2) the parent had committed certain criminal acts, or (3) parental rights had already been involuntarily terminated for a sibling.<sup>150</sup> Absent any of these circumstances, the law then mandated the filing of a petition for termination of parental rights within specified time constraints, usually within fifteen months of a child entering foster care.<sup>151</sup>

The only exceptions to the termination petition were if (1) the child was in the care of a relative, (2) the state agency determined that termination was not in the child’s best interests, or (3) when the parents had not been given access to social services that could potentially result in reunification.<sup>152</sup> State agencies were required to develop reasonable placement strategies for each individual foster child, regardless of the child’s situation, in order to encourage quick placement into a permanent

living situation.<sup>153</sup> States were also encouraged to enter into interstate compacts to facilitate adoption and protect the interests of the adopted child with regard to adoption assistance.

Congress strengthened the ASFA's ability to promote foster care adoption by offering federal funds to states that were able to increase placement of foster care adoptees, especially older and disabled children.<sup>154</sup> Under the incentive program, states would be credited \$4,000 for each foster care adoption in excess of the previous fiscal year, with an additional \$2,000 for each additional special-needs foster adoption.<sup>155</sup>

State courts began using ASFA as evidence of a federal interest to expedite the termination of all parental rights rather than prolong efforts to unify or repair broken and abusive families. Specifically, they concluded that previous policies promoting family reunification conflicted with the ASFA, and birth parents were no longer afforded an unlimited period of time to address and resolve negligence or abuse issues.<sup>156</sup> Some courts have gone further, and found that the ASFA's focus on child safety and its mandate for quick and permanent placement effectively precluded state agencies from working aggressively toward reunifying the child with its family if returning the child is not appropriate.<sup>157</sup> Courts have even interpreted the ASFA to give foster children an enforceable federal statutory right to have a state initiate termination of parental rights proceedings when they have been in foster care for the necessary fifteen months; children can also demand that states attempt to identify, recruit, and approve a qualified family for their adoption.<sup>158</sup> Several courts even interpreted the ASFA to apply retroactively, so that children who had entered foster care prior to state ratification or compliance with the ASFA would nonetheless have their relationship evaluated and processed according to the act's provisions.<sup>159</sup> While some states have found the fifteen-month limitation on reunification unconstitutional,<sup>160</sup> others have found that the act still preserves a parent's rights regardless of the time limits involved.<sup>161</sup>



With little doubt, the ASFA has been responsible for an increase in foster care adoption. Even after the enactment of the AACWA, the foster care adoption rate remained roughly fixed between 17,000 and 21,000 annual adoptions—about 10 percent of the national foster child population.<sup>162</sup> By 2000, the number had risen to 46,000; in 2002, 53,000 foster care adoptions took place.<sup>163</sup> This increase demonstrates not only the potential success of state incentives to adoption, but it also suggests that the potential demand for foster adoption is not limited to the traditional placement figures.<sup>164</sup> The ASFA also provides an excellent example of the influence legislation can have upon “market behavior.”

However, this increase in foster adoption might not have offset the increase in children whose relationships with their birth parents have been severed as a result of the ASFA.<sup>165</sup> Even by 2000, federal data indicated that ASFA had expanded the population of children needing adoptive parents, which had jumped from 86,000 in 1993 to 117,000 in 1999.<sup>166</sup> The biggest criticism of the ASFA has almost certainly been its focus on termination of parental rights without regard to a child’s real chances for adoption.<sup>167</sup> This effect has a particular potential for impact on children of color in foster care.<sup>168</sup> Such children represent a disproportionately large percentage of the foster care population, yet substantial barriers still exist for nonwhite prospective adoptive parents.<sup>169</sup>

Ultimately, the ASFA is the most ambitious example of adoption regulation—federal or otherwise—for the purpose of influencing market behavior in adoption. It provides incentives for states to encourage foster care adoption and removes the boundaries that still exist for potential adoptive parents to utilize the subsidies available under the AACWA. However, it accomplished these goals by increasing the supply of foster care children, arguably at the expense of the birth parents’ parental rights.<sup>170</sup> States, in their eagerness to facilitate the policy goals of the ASFA and to gain access to the cumulative federal funds, appear to have overlooked the consequences of an increased pool of potential foster adoptees. While an

increase in foster care adoption promotes altruism and diminishes the objectification of children and birth parents in adoption, under the ASFA, these benefits come at the cost of racial and classist subordination.

Again, as seen in the other measures explored in this article, no benefit in adoption law comes without costs. The question of whether these costs are acceptable, given the benefits, is beyond the scope of this article. However, this article will advocate several measures that confront the market forces at work in adoption that, hopefully, can produce benefits that outweigh any potential costs.

#### IV. PROPOSED REMEDIES

##### *A. Federalization of Adoption*

While such measures as the Uniform Adoption Act, the Adoption Assistance and Child Welfare Act, and the Adoption and Safe Families Act have sought in various ways to standardize adoption nationwide, their only method of implementation has been via voluntary subscription or financial enticement. A true and complete federalization of adoption would offer several benefits and would relieve adoption of some of its market-influenced shortcomings. Differences between states' adoption statutes could potentially deny adoptees protections they might have if they remained in their home states. Furthermore, absent some kind of agreement, an adoptee's home state could lose control over the adoption and any authority to protect the child's best interests.

Aware of these issues, all fifty states and the District of Columbia have implemented the Interstate Compact on the Placement of Children (ICPC), which was drafted in 1960.<sup>171</sup> As part of the ICPC, every state contains an office that is part of the department of public welfare or the state's equivalent agency; this office is designated to serve as the central clearing point for all referrals for interstate placements.<sup>172</sup> The office's administrator and deputies are authorized to conduct the necessary investigation of the

proposed placement.<sup>173</sup> This process requires that the prospective sending party (often an agency) submit a written notice of the proposed placement to the ICPC office in the receiving state.<sup>174</sup> Notice must also be submitted to the sending state's office.<sup>175</sup> The notice must include a social history of the child and a case plan. Before placement is finalized, a predetermined child welfare agency in the receiving state will conduct a study of the prospective adoptive home and then prepare a report on whether or not the placement should be made.<sup>176</sup> If either state's office determines that the placement cannot or should not be made, the placement will be denied.<sup>177</sup> The recommended time for this process is at least six weeks.<sup>178</sup>

While the ICPC does an admirable job of ensuring that interstate adoptees will be provided the same protections and services as if they had remained in their home states, the federalization of adoption would remove the need for this compact and its respective procedures and offices, thereby increasing the efficiency, expediency, and simplicity for interstate adoptions. A nationwide adoption act would ensure that the same placement standards were being applied across state borders, thus removing the need for communication between state offices concerning differing protections and definitions for child welfare.

Most notably, federalization of adoption would prevent the advantageous usage of more market-favorable statutes among jurisdictions. Adoptive parents seeking independent adoption across state lines are in a position to take advantage of less stringent baby broker or adoption payment statutes. Currently, the ICPC protects against this kind of forum shopping in agency placement.<sup>179</sup> However, numerous difficulties arise when applying the ICPC in independent adoption, and jurisdictions vary widely on when certain situations qualify as an "interstate placement."<sup>180</sup> Under the weightiest precedential interpretations of the ICPC, a birth mother is still allowed to travel from her home state to the state of the adoptive parents in order to complete the adoption free of any constraints in her home state.<sup>181</sup> Also, there is no penalty for working around interstate safeguards, except for

some additional cost and inconvenience, by having adoptive parents temporarily live within the birth mother's home state and finalize the adoption there before returning to their separate state.<sup>182</sup>

The barriers to true federalization of adoption are formidable, if not insurmountable, due to the current constitutional view of federalism and the noncommercial perception of adoption. However, an argument could be advanced that adoption falls under the Commerce Clause of Article I of the U.S. Constitution and therefore can be subject to mandatory federal regulation. While interpretation of the Commerce Clause has varied widely throughout American history, the current view allows for federal regulation of any activity that substantially impacts interstate commerce.<sup>183</sup> In light of the obvious market forces present in adoption, and the disparity between states influencing interstate adoption, one could argue that adoption—despite its apparent noncommercial nature—still impacts interstate commerce to a degree that allows for federal regulation. There are numerous barriers to this theory, the most obvious being the traditional state-oriented character of adoption and the rights of states to specifically monitor the future lives of its children. These concerns are unfortunately too immense to be considered further in this article. This article can only conclude that true federalization of adoption does not represent a likely solution.

#### *B. Quantitative Cap on Private Agency Adoption Fees*

A more feasible measure, one which will hopefully counteract the commodification of adoption while preserving the advantages of agency adoption, is a cap or limitation on private agency adoption fees. As discussed at the beginning of this article, adoption fees have grown at a seemingly exponential rate since they were first introduced in the 1950s.

A quantitative cap on private agency fees is a variation of a suggestion made by Posner, who viewed agency adoption as a state-sponsored semi-monopoly. Ideally, unlike most monopolies, private agencies would not

have the effect of inflating the price of adoption. This would theoretically be impermissible due to the regulations limiting agency fees to the average actual cost of an adoption. But as several authors point out, agency fees have inflated regardless of the adoption costs. Furthermore, as Posner suggested, private agencies also represent a possible deterrent to potential adoptive parents due to their increased monitoring and “inefficiency” in matching and placing adoptees with adoptive parents. Posner’s solution to this perceived inefficiency was the promotion of independent adoption.

However, as a normative view advocated by this article, agency adoption should be encouraged over independent adoption. The greater amount of oversight and attention paid to the qualities of prospective parents and best interests of adoptive children is an essential function that agencies serve. Not only does this protect adoptees from potential abuse and exploitation, but this level of investigation ensures a positive public perception of adoption as a responsibly monitored enterprise. To refer to these measures as “inefficient” overlooks not only their inherent necessity but the safeguards of personhood that they provide. Although agency adoption is still implicit in the commodification of adoption, this avenue of adoption has less potential for inflated costs and illicit activity than independent adoption.

As long as money changes hands in the course of adoption, some commodification of the process is inevitable. Even as acknowledged by Radin, these monetary exchanges are not likely to provide a slippery slope to the complete commodification of human interests. Furthermore, adoption holds some inherent selflessness and is not endangered by reasonable commodification, especially if that commodification occurs under regulations that are conscious of their potential effects of objectification and subordination. Using a poststructuralist view, this consciousness allows for commodification when doing so improves social wealth. Agency adoption represents the best compromise between the best interest of the child and the inherent market forces of adoption.

The desired effect of limiting agency costs is three-fold. The first goal is to promote agency adoption by lowering costs. The second goal is to decrease the attractiveness of independent adoption, chiefly by reducing the costs of agency adoption. An unintended result of the measure could be the increased attractiveness of agency adoption as opposed to intercountry adoption. This article is unbiased toward intercountry adoption. Again, the policy of intercountry adoption and its market forces are outside this article's scope. The third, and most important, goal is to decrease adoption as a source of profit, both for the parties and the agencies, in order to protect the personhood of the child and to preserve the image of adoption as an admirable social institution.

This proposal carries several possible drawbacks. Chiefly, it could potentially drive agencies out of business and decrease the quality and effectiveness of professional agents. This is a major concern that could undermine all of the measure's intended goals. A failure of private agency adoption could result in more independent adoption and a boost to the gray market. Also, putting a cap on private adoption fees might hamper the adoption system and drive more adoptions into state agencies, inflating foster care numbers and driving up costs to states.

One measure to prevent this outcome would be a state refund for agencies that adhere to a voluntary cap. Alternatively, the cap could remain mandatory but be accompanied with a state subsidy for all private adoption agencies. Both models would allow agencies to remain near their current solvency, while giving them the social impact of a nonprofit agency. However, this would effectively remove all incentive to operate a nonprofit agency and would be very expensive to states, essentially representing the socialization of adoption.

Another hurdle is that of implementation. For a cap to reach its full effect, it must be nationwide. Otherwise, states might be hesitant to adopt this measure due to the belief that it would negatively impact the quality of private agencies within the state. However, as already discussed, federal

implementation would encounter serious constitutional obstacles if made mandatory. To work around this limitation, implementation could take the same approach as the AACWA and ASFA and provide grants to states that adopt this measure.

Ultimately, all of these possible drawbacks would become moot if the measure were successful in promoting agency adoption over other forms of private adoption. With or without federal grants, states could still benefit by implementing a private agency cap. A single state implementing this cap would make it more attractive to out-of-state adoptive parents. While agencies might have the incentive to relocate or risk profit loss, they would more likely benefit from increased activity, both from out-of-state adoptive parents and from parents who might otherwise seek the benefits of independent adoption. An industry-wide reduction in price could feasibly reduce the attraction of independent adoption for prospective parents, thus increasing overall private agency adoption numbers and improving profitability for private agencies.

#### CONCLUSION

A cap on private agency adoption is a feasible and desirable step toward achieving the benefits of free-market adoption while both preserving the personhood of the adoptee and promoting agency adoption as an alternative to independent adoption. The measure's impact on the profitability of private adoption agencies should be considered, since the demise of these businesses could destroy this avenue of adoption and have the reverse of the measure's intended effects. This result could be prevented either by the complete socialization of private agencies by implementing a mandatory cap or by the institution of a state grant for agencies that voluntarily adhere to the cap. Additionally, adoption of this measure by single states could maintain the level of profitability for private agencies without the need for state subsidies, provided that the influx of interstate adoption makes up for the loss in individual fees.

<sup>1</sup> U.S. CONST. art. I, § 8, cl. 2.

<sup>2</sup> DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 171 (2006).

<sup>3</sup> *Id.*

<sup>4</sup> CYNTHIA R. MABRY & LISA KELLY, *ADOPTION LAW: THEORY, POLICY AND PRACTICE* 7–8 (2006); SPAR, *supra* note 2, at 170–71.

<sup>5</sup> MABRY & KELLY, *supra* note 4, at 6–7.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 7.

<sup>9</sup> SPAR, *supra* note 2, at 170.

<sup>10</sup> *Id.* at 170–71.

<sup>11</sup> *Id.* at 171.

<sup>12</sup> MABRY & KELLY, *supra* note 4, at 9. *See also* *Roe v. Wade*, 410 U.S. 113 (1973) (upholding a limited right to fetus abortion as a right of privacy under the Due Process Clause of the Fourteenth Amendment); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (establishing a right to oral contraceptives for married couples under the same constitutional basis).

<sup>13</sup> SPAR, *supra* note 2, at 173.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 9.

<sup>17</sup> Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 325 (1978).

<sup>18</sup> *Id.* at 123–24, 126.

<sup>19</sup> William D. Mosher & Christine Bachrach, *Understanding U.S. Fertility Continuity and Change in the National Survey of Family Growth*, 28 FAM. PLAN. PERSP. 4 (1996), available at <http://www.guttmacher.org/pubs/journals/2800496.pdf>.

<sup>20</sup> Both the topic of assisted reproduction techniques and the process of surrogacy have undeniable relation to this article. The sale of genetic material and reproductive services is a debate that bears great similarity to the controversies surrounding the market forces of adoption. However, the promotion of assisted reproduction is beyond the scope of this article, except to acknowledge that any such promotion would have the effect of decreasing the demand for adoption.

<sup>21</sup> A definition of “special needs” varies according to context; its various scopes will be detailed later in this article. At its broadest definition, this category includes children whose ethnicity, race, mental or physical handicap, or relation to a sibling with handicap suggests that they will experience difficulty and delays in locating an adoptive home.

<sup>22</sup> Child Welfare Information Gateway, *Infant Safe Haven Laws*, [http://www.childwelfare.gov/systemwide/laws\\_policies/statutes/safehaven.cfm#noteone](http://www.childwelfare.gov/systemwide/laws_policies/statutes/safehaven.cfm#noteone) (last visited April 5, 2010).

<sup>23</sup> *See* EVAN B. DONALDSON ADOPTION INSTITUTE, *UNINTENDED CONSEQUENCES: ‘SAFE HAVEN’ LAWS ARE CAUSING PROBLEMS, NOT SOLVING THEM* (2004), available at [http://www.adoptioninstitute.org/whowe/lastreport\\_coverage.html](http://www.adoptioninstitute.org/whowe/lastreport_coverage.html).

<sup>24</sup> SPAR, *supra* note 2, at 177.



<sup>25</sup> See Study of the Adoption Process of the State Office for Services to Children and Families, State of Oregon Joint Legislative Audit Committee, REP. NO. 98-2 (1998), available at <http://www.leg.state.or.us/comm/lfo/adoption.pdf> (estimating that state-provided adoption placement services for Oregon's foster children cost \$9.8 million for 1997-99).

<sup>26</sup> MABRY & KELLY, *supra* note 4, at 153.

<sup>27</sup> *Id.* at 152-53.

<sup>28</sup> JOAN H. HOLLINGER ET AL., ADOPTION LAW AND PRACTICE § 1.05(3)(a) (23rd ed. 2008).

<sup>29</sup> *Id.*

<sup>30</sup> Erika Lynn Kleiman, *Caring For Our Own: Why American Adoption Law and Policy Must Change*, 30 COLUM. J.L. & SOC. PROBS. 327, 344 (1997).

<sup>31</sup> *Id.* at 344-45.

<sup>32</sup> *Id.* at 336-37.

<sup>33</sup> HOLLINGER, *supra* note 28, at § 1.05(3)(a).

<sup>34</sup> MADELYN FREUNDLICH, ADOPTION ETHICS: THE MARKET FORCES IN ADOPTION 13 (2000).

<sup>35</sup> *Id.* at 13-14.

<sup>36</sup> VIVIANA A. ZEILZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN 201 (1985).

<sup>37</sup> FREUNDLICH, *supra* note 34, at 14.

<sup>38</sup> HOLLINGER, *supra* note 28, at § 1.05(3)(a).

<sup>39</sup> FREUNDLICH, *supra* note 34, at 14.

<sup>40</sup> SPAR, *supra* note 2, at 179.

<sup>41</sup> FREUNDLICH, *supra* note 34, at 15.

<sup>42</sup> *Id.*

<sup>43</sup> MABRY & KELLY, *supra* note 4, at 153.

<sup>44</sup> KY. REV. STAT. ANN. § 199.590(3-5) (West 2009); N.J. STAT. ANN. § 9:3-39.1 (West 2002).

<sup>45</sup> See Melinda Lucas, *Adoption: Distinguishing Between Gray Market and Black Market Activities*, 34 FAM. L.Q. 553 (2000) (examining the blurred line between legitimate and illegitimate behavior in modern adoption).

<sup>46</sup> Landes & Posner, *supra* note 17.

<sup>47</sup> *Id.* at 328.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 328-29.

<sup>51</sup> *Id.* at 335-36.

<sup>52</sup> *Id.* at 336.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 336-37.

<sup>55</sup> *Id.* at 337.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

- <sup>59</sup> *Id.*
- <sup>60</sup> *Id.* at 338.
- <sup>61</sup> *Id.*
- <sup>62</sup> *Id.* at 342.
- <sup>63</sup> *Id.* at 342–43.
- <sup>64</sup> *Id.* at 343–44.
- <sup>65</sup> *Id.*
- <sup>66</sup> See Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59 (1987).
- <sup>67</sup> *Id.* at 68.
- <sup>68</sup> See MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996).
- <sup>69</sup> *Id.* at 12–13.
- <sup>70</sup> *Id.* at 3–4.
- <sup>71</sup> *Id.* at 6.
- <sup>72</sup> *Id.* at 155–56.
- <sup>73</sup> *Id.* at 156.
- <sup>74</sup> *Id.* at 137.
- <sup>75</sup> *Id.* at 156–59.
- <sup>76</sup> *Id.* at 157.
- <sup>77</sup> *Id.*
- <sup>78</sup> *Id.* at 137.
- <sup>79</sup> *Id.* at 138.
- <sup>80</sup> *Id.*
- <sup>81</sup> Landes & Posner, *supra* note 17, at 345.
- <sup>82</sup> RADIN, *supra* note 68, at 95.
- <sup>83</sup> *Id.* at 138–39.
- <sup>84</sup> *Id.*
- <sup>85</sup> *Id.*
- <sup>86</sup> *Id.* at 96–99.
- <sup>87</sup> *Id.* at 99–101.
- <sup>88</sup> *Id.* at 100.
- <sup>89</sup> *Id.* at 101.
- <sup>90</sup> See Martha M. Ertman, *What's Wrong with a Parenthood Market?*, 82 N.C. L. REV. 1 (2003).
- <sup>91</sup> *Id.* at 48.
- <sup>92</sup> *Id.* at 48–49.
- <sup>93</sup> *Id.* at 49.
- <sup>94</sup> *Id.* at 53.
- <sup>95</sup> MABRY & KELLY, *supra* note 4, at 11.
- <sup>96</sup> Marygold S. Melli, *The United States: Focus on Adoption*, in *THE INTERNATIONAL SURVEY OF FAMILY LAW* 483 (1994).
- <sup>97</sup> MABRY & KELLY, *supra* note 4, at 11.
- <sup>98</sup> UNIF. ADOPTION ACT § 3–702, 9 U.L.A. 1 (1994).
- <sup>99</sup> *Id.* § 3–702 cmt.
- <sup>100</sup> *Id.* §§ 7–102 & 7–103.

<sup>101</sup> *Id.* § 7–104.

<sup>102</sup> HOLLINGER, *supra* note 28, at § 1.05(3)(c).

<sup>103</sup> Kristine C. Karnezis, Annotation, *Criminal Liability of One Arranging for Adoption of Child Through Other than Licensed Child Placement Agency*, 3 A.L.R. 4th 468 (2008).

<sup>104</sup> MABRY & KELLY, *supra* note 4, at 183.

<sup>105</sup> HOLLINGER, *supra* note 28, at § 1.05(3)(c).

<sup>106</sup> Lucas, *supra* note 45, at 559–60.

<sup>107</sup> *See id.*

<sup>108</sup> MABRY & KELLY, *supra* note 4, at 185.

<sup>109</sup> *Gorden v. Cutler*, 471 A.2d 449, 458–59 (Pa. Super. Ct. 1983).

<sup>110</sup> *See Illinois v. Schwartz*, 356 N.E.2d 8 (Ill. 1976).

<sup>111</sup> *Id.* at 10.

<sup>112</sup> *Id.* The statute specifically defined “placing out” as “to arrange for the free care of a child in a family other than that of the child’s parent, stepparent, grandparent, brother, sister, uncle or aunt or legal guardian, for the purpose of adoption or for the purpose of providing care.”

<sup>113</sup> *Id.* at 11.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *See generally In re Adoption of Infant Girl Banda*, 53 Ohio App. 3d 104, 559 N.E.2d 1373 (Ohio Ct. App. 1988); *In re Adoption of M.M.H.*, 981 A.2d 261 (Pa. Super. Ct. 2009).

<sup>117</sup> *See Angela Mae Kupenda et al., Aren’t Two Parents Better Than None: Contractual and Statutory Basics for a “New” African American Coparenting Joint Adoption Model*, 9 TEMP. POL. & CIV. RTS. L. REV. 59 (1999).

<sup>118</sup> *Id.* at 64.

<sup>119</sup> *Id.* at 64–66.

<sup>120</sup> *Id.* at 64.

<sup>121</sup> Angela Mae Kupenda, *Two Parents are Better Than None: Whether Two Single, African American Adults—Who Are Not in a Traditional Marriage or a Romantic or Sexual Relationship with Each Other—Should be Allowed to Jointly Adopt and Co-Parent African American Children*, 35 U. LOUISVILLE J. FAM. L. 703, 706–11 (1997).

<sup>122</sup> *Id.* at 708–09.

<sup>123</sup> MABRY & KELLY, *supra* note 4, at 409.

<sup>124</sup> National Association of Black Social Workers, *Preserving African American Families: Research and Action Beyond the Rhetoric* 28, 31 (1994).

<sup>125</sup> Barbara Bennett Woodhouse & Kelly Reese, *Reflections on Loving and Children’s Rights*, 20 U. FLA. J.L. & PUB. POL’Y 11, 24–25 (2009).

<sup>126</sup> *Id.* at 23–26.

<sup>127</sup> The last clause of this statement relies, *inter alia*, on the assumption that couples adopt who would not have adopted as single individuals otherwise.

<sup>128</sup> 42 U.S.C. § 673 (2008).

<sup>129</sup> MABRY & KELLY, *supra* note 4, at 238.

<sup>130</sup> *Id.*

<sup>131</sup> 42 U.S.C. § 673(c)(2)(A) (2008).

- <sup>132</sup> Adoption Promotion Act of 2003, Pub. L. No. 108–145, 117 Stat. 1879 (2003).
- <sup>133</sup> Adoption Assistance Program: Administrative Requirements to Implement Section 473 of the Act, 45 C.F.R. § 1356.40(f) (2010).
- <sup>134</sup> 42 U.S.C. § 673(a) (2008).
- <sup>135</sup> *Id.* § 673(a)(6)(A).
- <sup>136</sup> Adoption Assistance Program: Administrative Requirements to Implement Section 473 of the Act, 45 C.F.R. § 1356.41(i) (2010).
- <sup>137</sup> 42 U.S.C. § 673(a)(2) (2008).
- <sup>138</sup> *Id.* In 1996, AFDC was renamed Temporary Assistance to Needy Family. *See* 42 U.S.C. § 601 (1997).
- <sup>139</sup> 42 U.S.C. § 1382c(a) (2004).
- <sup>140</sup> Adoption Assistance Program: Administrative Requirements to Implement Section 473 of the Act, 45 C.F.R. § 1356.40(c) (2010).
- <sup>141</sup> 42 U.S.C. § 673(c)(2)(B) (2008).
- <sup>142</sup> *Id.*
- <sup>143</sup> Policy Interpretation Question, Log No. ACYF-CB-PA-01-01, (Dep’t of Health and Human Services, Children’s Bureau, Jan. 23, 2001).
- <sup>144</sup> *Id.*
- <sup>145</sup> 42 U.S.C. § 673(c)(1) (2008).
- <sup>146</sup> Policy Interpretation Question, *supra* note 143.
- <sup>147</sup> Katharine Q. Seelye, *Clinton to Approve Sweeping Shift in Adoption*, N.Y. TIMES, Nov. 17, 1997, at A20.
- <sup>148</sup> 42 U.S.C. § 671(a)(15)(C) (1998). *See generally* 42 U.S.C. §§ 620–628, 670–679a (1998) (quotation marks are only for readability).
- <sup>149</sup> 143 CONG. REC. S12,668–71 (daily ed. Nov. 13, 1997) (statement of Sen. DeWine).
- <sup>150</sup> 42 U.S.C. § 671(a)(15)(D) (1998).
- <sup>151</sup> 42 U.S.C. § 675(5)(E) (1998) (mandating termination when a child has spent fifteen out of the prior twenty-two months in foster care).
- <sup>152</sup> *Id.*
- <sup>153</sup> 42 U.S.C.A. § 671(a)(15)(B) (2008).
- <sup>154</sup> Adoption and Safe Families Act of 1997, Pub. L. No. 105–89, § 201 (1997) (codified as 42 U.S.C. §§ 629, 673b (2006)).
- <sup>155</sup> *Id.*
- <sup>156</sup> *See generally* Hughes v. Div. of Family Services, 836 A.2d 498 (Del. 2003), *cert. denied*, 541 U.S. 911 (2004); State ex rel. Children, Youth & Families Dept. v. Maria C., 94 P.3d 796 (N.M. Ct. App. 2004).
- <sup>157</sup> *See generally* *In re* N.J., 2001 WL 488067 (Iowa Ct. App. 2001).
- <sup>158</sup> Jeanine B. v. McCallum, 2001 WL 748062 (E.D. Wis. 2001).
- <sup>159</sup> Toni W. v. Arizona Dept. of Economic Sec., 993 P.2d 462, 464–466 (Ariz. Ct. App. Div. 1999) (holding that the state’s amendment of termination statutes was a clarification of pre-existing policies); *In re* Marino S., 795 N.E.2d 21, 26–27 (N.Y. 2003), *cert. denied*, 540 U.S. 1059 (2003) (holding that the provision was remedial in nature and did not impair rights).
- <sup>160</sup> *In re* H.G., 757 N.E.2d 864 (Ill. 2001) (applying strict scrutiny to the provision and holding that the statute is not narrowly tailored to the “compelling goal of identifying

unfit parents” because it fails to account for the fact that, in many cases, the length of a child’s stay in foster care has nothing to do with the parent’s ability or inability to care safely for the child).

<sup>161</sup> See *Phelps v. Sybinsky*, 736 N.E.2d 809 (Ind. Ct. App. 2000); *In re M.J. & J.J.*, 8 P.3d 936 (Okla. Civ. App. 2000).

<sup>162</sup> SPAR, *supra* note 2, at 177.

<sup>163</sup> *Id.* at 177–78.

<sup>164</sup> *Id.* at 178.

<sup>165</sup> FREUNDLICH, *supra* note 34, at 75.

<sup>166</sup> *Id.*

<sup>167</sup> See JENNIFER TOTH, *ORPHANS OF THE LIVING: STORIES OF AMERICA’S CHILDREN IN FOSTER CARE* (1998).

<sup>168</sup> MABRY & KELLY, *supra* note 4, at 452–53.

<sup>169</sup> Ruth-Arlene W. Howe, *Adoption Laws and Practices in 2000: Serving Whose Interests?*, 33 FAM. L.Q. 677, 688 (1999); Ruth-Arlene W. Howe, *Transracial Adoption (TRA): Old Prejudices And Discrimination Float Under A New Halo*, 6 B.U. PUB. INT. L.J. 409, 471 (1997).

<sup>170</sup> See TOTH, *supra* note 167.

<sup>171</sup> MABRY & KELLY, *supra* note 4, at 529.

<sup>172</sup> American Public Human Services Association, *Guide to the Interstate Compact on the Placement of Children 5* (2002), available at [http://icpc.aphsa.org/Home/Doc/Guidebook\\_2002.pdf](http://icpc.aphsa.org/Home/Doc/Guidebook_2002.pdf).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 6.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 7.

<sup>178</sup> *Id.*

<sup>179</sup> HOLLINGER, *supra* note 28, at § 3.07(3) (with the exception of adoption placements in New Jersey).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* (citing *Yopp v. Batt*, 467 N.W.2d 868 (Neb. 1991)).

<sup>182</sup> *Id.*

<sup>183</sup> *U.S. v. Lopez*, 514 U.S. 549 (1995).