

The Economics of the Baby Shortage

ELISABETH LANDES AND RICHARD POSNER

Although economists have studied extensively the efforts of government to regulate the economy, public regulation of social and personal life has largely escaped economic attention. With the rapid development of the economic analysis of nonmarket behavior, the conceptual tools necessary for the economic study of social (as distinct from narrowly economic) regulation are now at hand. Nor is there any basis for a presumption that government does a good job of regulating nonmarket behavior; if anything, the negative presumption created by numerous studies of economic regulations should carry over to the nonmarket sphere. An example of nonmarket regulation that may be no less perverse than the widely criticized governmental efforts to regulate imports, transportation, new drugs, bank entry, and other market activities is the regulation of child adoptions—the subject of this paper. . . .

Ordinarily, potential gains from trade are realized by a process of voluntary transacting—by a sale, in other words. Adoptions could in principle be handled through the market and in practice, as we shall see, there is a considerable amount of baby selling. But because public policy is opposed to the sale of babies, such sales as do occur constitute a black market. . . .

[T]his paper develops a model of the supply and demand for babies for adoption under the existing pattern of regulation and shows (1) how that regulation has created a baby shortage (and, as a result, a black market) by preventing a free market from equilibrating the demand for and supply of babies for adoptions and (2) how it has contributed to a glut of unadopted children maintained in foster homes at public expense. . . .

Disequilibrium in the Adoption Market

The Baby Shortage and the Baby Glut

Students of adoption agree on two things. The first is that there is a shortage of white babies for adoption; the second is that there is a glut of black babies, and of children who are no longer babies (particularly if they are physically or mentally handicapped), for adoption. . . .

Contrary to popular impression, [federal government statistics show] that the increased availability of contraception and abortion has not perceptibly diminished the number of illegitimate births. A partial explanation may be that the availability of contraception and abortion, by reducing the risk of producing an unwanted child (but not to zero), has reduced the expected cost and hence increased the incidence of sexual

intercourse outside of marriage. However, while the illegitimate birth rate remains high the availability of babies for adoption has declined, apparently because a larger proportion of parents of illegitimate children are keeping them. This trend may be due to inexplicable (on economic grounds) changes in moral standards; or it may be due to the fact that the increased opportunities for women in the job market have made them less dependent on the presence of a male in raising a child. An additional feature is that, given the increased availability of contraception and abortion, an illegitimate baby is more likely than formerly to be a desired baby.

Students of adoption cite factors such as the declining proportion of illegitimate children being put up for adoption as the “causes” of the baby shortage. But such factors do not create a shortage, any more than the scarcity of truffles creates a shortage; they merely affect the number of children available for adoption at any price. At a higher price for babies, the incidence of abortion, the reluctance to part with an illegitimate child, and even the incentive to use contraceptives would diminish because the costs of unwanted pregnancy would be lower while the (opportunity) costs to the natural mother of retaining her illegitimate child would rise.

The principal suppliers of babies for adoption are adoption agencies. Restrictive regulations governing nonagency adoption have given agencies a monopoly (though not a complete one) of the supply of children for adoption. However, while agencies charge fees for adoption, usually based on the income of the adoptive parents, they do not charge a market-clearing (let alone a monopoly-profit-maximizing) price. This is shown by the fact that prospective adoptive parents applying to an agency face waiting periods of three to seven years. And the (visible) queue understates the shortage, since by tightening their criteria of eligibility to adopt a child the agencies can shorten the apparent queue without increasing the supply of babies. Thus some demanders in this market must wait for years to obtain a baby, others never obtain one, and still others are discouraged by knowledge of the queue from even trying. Obtaining a second or third baby is increasingly difficult.

The picture is complicated, however, by the availability of independent adoptions. An independent adoption is one that does not go through an agency. Most independent adoptions are by a relative, for example a stepfather, but some involve placement with strangers and here, it would seem, is an opportunity for a true baby market to develop. However, the operation of this market is severely curtailed by a network of restrictions, varying from state to state (a few states forbid independent adoption by a nonrelative) but never so loose as to permit outright sale of a baby for adoption.

Just as a buyer's queue is a symptom of a shortage, a seller's queue is a symptom of a glut. The thousands of children in foster care . . . are comparable to an unsold inventory stored in a warehouse. Child welfare specialists attribute this “oversupply” to such factors as the growing incidence of child abuse, which forces the state to remove children from the custody of their natural parents, and the relatively small number of prospective adoptive parents willing to adopt children of another race, children who are no longer infants, or children who have a physical or mental handicap. No doubt these factors are important. However, some children are placed in foster care as infants and remain there until they are no longer appealing to prospective adoptive parents. We believe that the large number of children in foster care is, in part, a manifestation of a regulatory pattern that (1) combines restrictions on the sale of babies

with the effective monopolization of the adoption market by adoptive agencies, and (2) fails to provide effectively for the termination of the natural parents' rights.

A Model of the Adoption Market

. . . Whereas in 1957 only 53 percent of all nonrelative adoptions went through adoption agencies, in 1971 the proportion was almost 80 percent. This would be a matter of limited significance from the economic standpoint if adoption agencies were both numerous and free from significant restrictions on their ability to operate as efficient profit-maximizing firms. The first condition is more or less satisfied but not the second. While agencies are generally not limited in the fees they may charge prospective adoptive parents, they are constrained to other inefficient restrictions. For example, they are constrained to operate as "nonprofit" organizations which presumably retards, perhaps severely, their ability to attract capital, and may have other inefficient effects as well. The most significant restriction is the regulation of the price at which the agencies may transact with the natural parents. Adoption agencies that are also general child-welfare agencies must accept all children offered to them at a regulated price (but may place them in foster care rather than for adoption); and they may offer no additional compensation to suppliers (the natural parents) in order to increase the supply of babies. The regulated price is generally limited to the direct medical costs of pregnant women plus (some) maintenance expenses during the latter part of the pregnancy. To be sure, agencies have some flexibility in the kinds of services they may offer the natural parents, such as job counseling, but they cannot thereby transfer to the natural parents anything approaching the free-market value of the child.

There are rough counterparts to such regulation in many explicit markets. . . . Similar regulatory patterns are found in industries as otherwise diverse as taxi service and television broadcasting. Nevertheless the regulation of adoption has several peculiar characteristics reflected in our model: collusion among agencies, including market division (often along religious lines), is permitted; there exists a very close substitute for the good supplied by the agencies—*independent adoption*; and the agency has, as mentioned, no power to refuse to take the children tendered to it. . . .

The Effects of the Baby Shortage

The baby shortage generates social costs in excess of the traditional welfare loss of monopoly. The counterpart to that loss would be the lost consumer surplus from sales not made at all because of the artificial unavailability of the product. . . . [But there is a further welfare loss if] the nonprice rationing methods used by agencies to allocate children are random with respect to willingness to pay. . . . To be sure, some of this loss is offset by the availability of children in the independent market, but the search costs in the independent market also represent a substantial social cost. . . .

In these circumstances, the economist expects a black market to emerge. Some fraction—we do not know what—of the 17,000 independent adoptions are indeed black-market adoptions in the sense that the compensation paid either the natural parents or the middlemen, or both, exceeds the lawful limits. However, the potent criminal and professional sanctions for the individuals involved in baby selling not only

drive up the costs and hence the price of babies (and so reduce demand) but necessarily imply a clandestine mode of operation. This imposes significant information costs on both buyers and sellers in the market, which further raise the (real) price of black-market babies to buyers and reduce the net price to sellers. . . .

A further consideration is that there will be more fraud in a black market for babies than in a lawful market, so fear of being defrauded will further deter potential demanders. In lawful markets the incidence of fraud is limited not only by the existence of legal remedies against the seller but also by his desire to build a reputation for fair dealing. Both the clandestine mode of operation of current baby sellers and the lack of a continuing business relationship between seller and buyer reduce the seller's market incentives to behave reputably. To summarize, we cannot, simply by observing the black market, estimate the market-clearing prices and quantities of babies in a lawful baby market.

The constraints on the baby market may also be responsible in part for the glut of children in foster care—and this quite apart from the possible incentives of adoption agencies to place children in foster care rather than for adoption. Since the natural parents have no financial incentive to place a child for adoption, often they will decide to place it in foster care instead. This is proper so long as they seriously intend to reacquire custody of the child at some later date. But when they do not the consequence of their decision to place the child in foster care may be to render the child unadoptable, for by the time the parents relinquish their parental rights the child may be too old to be placed for adoption. This would happen less often if parents had a financial incentive to relinquish their rights at a time when the child was still young enough to be adoptable.

The total effect of the baby-market constraints on the number of foster children is, to be sure, a complicated question. In particular, the limited supply of desirable babies for adoption may lead some prospective adoptive parents to substitute children who would otherwise be placed in foster care. We suspect that this substitution effect is small, but in any event it is partly controlled by the agencies; they can manipulate the relative "prices" of infants and children residing in foster care by modifying the criteria for eligibility that must be satisfied by prospective adoptive parents.

Objections to a Free Baby Market

The foregoing analysis suggests that the baby shortage and black market are the result of legal restrictions that prevent the market from operating freely in the sale of babies as of other goods. This suggests as a possible reform simply eliminating these restrictions. However, many people believe that a free market in babies would be undesirable. . . . The objections to baby selling must be considered carefully before any conclusion with regard to the desirability of changing the law can be reached.

Criticisms Properly Limited to the Black Market

We begin with a set of criticisms that in reality are applicable not to the market as such, but only, we believe, to the black market. The first such criticism is of the high

price of babies and the bad effects that are alleged to flow from a high price, such as favoring the wealthy. This criticism of the use of the price system is based on the current prices in the black market. There is no reason to believe that prices would be so high were the sale of babies legalized. On the contrary, prices for children of equivalent quality would be much lower.

The current black-market price is swollen by expected punishment costs which would not be a feature of a legalized baby market. In a legal and competitive baby market, price would be equated to the marginal costs of producing and selling for adoption babies of a given quality. These marginal costs include certain well-known items, such as the natural mother's medical expenses and maintenance during pregnancy and the attorney's fee for handling the legal details of the adoption proceeding, that are unlikely to exceed \$3,000 in the aggregate. The question marks are the additional fees that would be necessary (1) to compensate a woman either for becoming pregnant or, if she was pregnant already, for inducing her to put the baby up for adoption rather than abort or retain it, and (2) to cover the search costs necessary to match baby and adoptive parents.

With regard to the first item (the natural mother's opportunity costs of adoption), the most important point to be noted is that these costs may be no greater than the cost savings to the adoptive mother of not undergoing pregnancy and childbirth herself. Adoption is a process by which the adoptive mother in effect contracts out one of the steps in the process of child production and rearing, namely the actual pregnancy and childbirth. The anxieties and inconveniences of pregnancy are a cost to the biological mother but a cost saving to the adoptive mother. Equally, all or most of the out-of-pocket expenses of the natural mother, including the obstetrician's fee, represent a cost saving to the adoptive mother. Therefore, at least as a first approximation, the only net cost of purchasing a baby in a free and competitive market should be the cost of the search, which would presumably be low.

Also, because the adoption agencies give substantial emphasis to the employment and financial situation of adoptive parents, a baby market might actually provide more opportunities for the poor to adopt than nonprice rationing does. If we are correct that the (acquisition) costs of babies in a lawful and competitive market would often be small, perhaps no more than the cost of an automobile, low-income families who would normally be considered financially ineligible by adoption agencies would be able in a free market to obtain a child.

Another prevalent criticism of the market, and again one that pertains primarily to the operations of the black market, is that fraud and related forms of dishonesty and overreaching pervade the market method of providing children for adoption. It is contended, for example, that the health of the child or of the child's mother is regularly misrepresented and that frequently after the sale is completed the seller will attempt to blackmail the adoptive parents. Such abuses are probably largely the result of the fact that the market is an illegal one. Sellers cannot give legally enforceable guarantees of genealogy, health, or anything else to the prospective parents, and even the seller's adherence to the negotiated price is uncertain given the buyer's inability to enforce the contract of sale by the usual legal procedures. Any market involving a complex and durable good (i.e., one that yields services over a substantial period of time) would probably operate suboptimally in the absence of legally enforceable con-

tracts or, at a minimum, regular, repetitive business relations between (the same) sellers and (the same) buyers. Both conditions are absent from the illegal baby market and this is the likeliest explanation for the number of complaints about the honesty of the sellers in that market. . . .

Criticisms of a Legal Market

We now consider criticisms of baby selling that are applicable to a legal market rather than just to the present illegal market. The first is that the rationing of the supply of babies to would-be adoptive parents by price is not calculated to promote the best interests of the children, the objective of the adoption process. This criticism cannot be dismissed as foolish. The ordinary presumption of free-enterprise economics is no stronger than that free exchange will maximize the satisfaction of the people trading, who in this case are the natural and adoptive parents. There is no presumption that the satisfactions of the thing traded, in most instances a meaningless concept, are also maximized. If we treat the child as a member of the community whose aggregate welfare we are interested in maximizing, there is no justification for ignoring how the child's satisfactions may be affected by alternative methods of adoption.

Very simply, the question is whether the price system would do as good a job as, or a better job than, adoption agencies in finding homes for children that would maximize their satisfactions in life. While there is no direct evidence on this point, some weak indirect evidence is provided in a follow-up study of independent adoptions which suggest that children adopted privately do as well as natural children. . . . It is true that some, perhaps most, independent adoptions do not involve price rationing, but the most important thing is that independent adoption involves a minimum of the sort of screening of prospective parents that the adoption agencies do. If children adopted without the screening seem nevertheless to do about as well as natural children, then one is entitled to be skeptical of the need for or value of the screening.

This conclusion is reinforced by the way in which adoption agencies screen. Agencies attempt to allocate children only to "fit" or caring parents. But after determining the pool of fit, or eligible-to-adopt, couples, they allocate available children among them on a first-come, first-served basis. The "fittest" parents are not placed at the head of the queue.

Further, and perhaps most important, agencies have no real information on the needs of a particular child they place for adoption beyond its need for love, warmth, food, and shelter. One cannot read from the face of a newborn whether he or she will be of above or below normal intelligence, or be naturally athletic, musical, or artistic. Hence agencies cannot be presumed to match these very real, if inaccessible, qualities of infants with the qualities of the adoptive parents any more effectively than a market would.

One valuable function agencies may perform is screening out people whose interest in having children is improper in an uncontroversial sense—people who wish to have children in order to abuse or make slaves of them. The criminal statutes punishing child abuse and neglect would remain applicable to babies adopted in a free market, but the extreme difficulty of detecting such crimes makes it unlikely, at least given current levels of punishment, that the criminal statutes alone are adequate. This

may make some prescreening a more effective method of prevention than after-the-fact punishment. But the logical approach, then, is to require every prospective baby buyer to undergo some minimal background investigation. This approach would be analogous to licensing automobile drivers and seems as superior to the agency monopoly as licensing is to allocating automobiles on a nonprice basis.

Moreover, concern with child abuse should not be allowed to obscure the fact that abuse is not the normal motive for adopting a child. And once we put abuse aside, willingness to pay money for a baby would seem on the whole a reassuring factor from the standpoint of child welfare. Few people buy a car or a television set in order to smash it. In general, the more costly a purchase, the more care the purchaser will lavish on it. Recent studies suggest that the more costly it is for parents to obtain a child, the greater will be their investment in the child's quality attributes, such as health and education.

A further point is that today some fetuses are probably aborted because the cost to the mother of carrying them to term and placing them for adoption exceeds the permissible return. In a free adoption market, some of the 900,000 fetuses aborted in 1974 would have been born and placed for adoption. If the welfare of these (potential) children is included in the calculation of the welfare of adopted children, both actual and potential, the heavy costs imposed on the market by adoption regulation may actually decrease child welfare.

Another objection to the market for babies is the alleged vulnerability of both natural and adoptive parents to overreaching by middlemen. Parenthood is thought to be so emotional a phenomenon that people cannot reason about it in the same way they reason about the goods and services normally traded in the market. But many of those goods and services, such as medical care, also involve a strong emotional component, yet it has rarely been thought appropriate to exclude such goods from market exchange. And studies of marriage and procreation have shown that people in fact calculate in family matters, whether implicitly or explicitly, in the same way they do when purchasing ordinary goods and services.

Other objections to legalizing the market in babies are more symbolic than pragmatic. For example, to accord a property right in the newborn child to the natural parents seems to some observers to smack of slavery. But allowing a market in adoptions does not entail giving property rights to natural parents for all purposes. Laws forbidding child abuse and neglect would continue to be fully applicable to adoptive parents even if baby sales were permitted. Further, we are speaking only of sales of newborn infants, and do not suggest that parents should have a right to sell older children. The creation of such a right would require identification of the point at which the child is sufficiently mature to be entitled to a voice in his placement. However, the question is largely academic given the lack of any significant market for adopting older children.

Moreover, it is incorrect to equate the possession of property rights with the abuse of the property, even if the property is a human being. For example, a serious problem with foster care is the foster parents' lack of any property rights in the foster child. The better the job the foster parents do in raising the child, the more likely are the natural parents to reclaim the child and thereby prevent the foster parents from reaping the full fruits of their (emotional as well as financial) investment. This possibility in

turn reduces the incentive of foster parents to invest in foster children, to the detriment of those children's welfare.

The antipathy to an explicit market in babies may be part of a broader wish to disguise facts that might be acutely uncomfortable if widely known. Were baby prices quoted as prices of soybean futures are quoted, a racial ranking of these prices would be evident, with white baby prices higher than nonwhite baby prices. One is reminded of Professor Tribe's objection to instructing the jury on the numerical probability implicit in the concept of proof beyond a reasonable doubt. He argues that while the system of criminal justice would be unworkable if subjective certainty of guilt were required, to acknowledge explicitly that people are convicted on less than such certainty might tear the social fabric. Similarly, anyone who thinks about the question will realize that prices for babies are racially stratified as a result of different supply and demand conditions in the different racial groups, but perhaps bringing this fact out into the open would exacerbate racial tensions in our society.

Some people are also upset by the implications for the eugenic alteration of the human race that are presented by baby selling. Baby selling may seem logically and inevitably to lead to baby breeding, for any market will generate incentives to improve the product as well as to optimize the price and quantity of the current quality level of the product. In a regime of free baby production and sale there might be efforts to breed children having desirable characteristics and, more broadly, to breed children with a known set of characteristics that could be matched up with those desired by prospective adoptive parents. Indeed, one can imagine, though with some difficulty, a growing separation between the production and rearing of children. No longer would a woman who wanted a child but who had a genetic trait that might jeopardize the child's health have to take her chances on a natural birth. She could find a very close genetic match—up to her and her husband's (healthy) genetic endowment in the baby market. However, so long as the market for eugenically bred babies did not extend beyond infertile couples and those with serious genetic disorders, the impact of a free baby market on the genetic composition and distribution of the human race at large would be small.

The emphasis placed by critics on the social costs of a free market in babies blurs what would probably be the greatest long-run effect of legalizing the baby market: inducing women who have unintentionally become pregnant to put up the child for adoption rather than raise it themselves or have an abortion. Some of the moral outrage directed against the idea of "trafficking" in babies bespeaks a failure to consider the implications of contemporary moral standards. At a time when illegitimacy was heavily stigmatized and abortion was illegal, to permit the sale of babies would have opened a breach in an otherwise solid wall of social disapproval of procreative activity outside of marriage. At the same time, the stigma of illegitimacy, coupled with the illegality of abortion, assured a reasonable flow of babies to the adoption market. Now that the stigma has diminished and abortion has become a constitutional right, not only has the flow of babies to the (lawful) adoption market contracted but the practical alternatives to selling an unwanted baby have increasingly become either to retain it and raise it as an illegitimate child, ordinarily with no father present, or to have an abortion. What social purposes are served by encouraging these alternatives to baby sale?

The symbolic objections to baby sale must also be compared with the substantial costs that the present system imposes on childless couples, aborted fetuses (if they can be said to incur costs), and children who end up in foster care. In particular, many childless couples undergo extensive, costly, and often futile methods of fertility treatment in order to increase their chances of bearing a child. Some people produce unhealthy offspring (due to various genetic disorders) because of their strong desire to have children. And no doubt many people settle for childlessness because of the difficulties of obtaining an adopted child.

The Sources of Opposition to Baby Selling

Even though the benefits of free baby selling might well outweigh the costs, still it will come as no surprise to students of government regulation to find that there are well-organized interests opposed to an improvement in social welfare. The most vocal and organized opponents of the baby market are the adoption agencies. This is logical: . . . both the supply of babies to agencies and agency revenues from adoption would be greater if the private market were regulated out of existence. Assuming that agencies would have no cost or efficiency advantage over private firms in an unregulated market, they would be reduced to operating at the competitive margin if such a market were permitted. They might even be competed out of the market.

To be sure, adoption agencies are generally not specialized in adoptions but engage in a variety of child welfare services—the primary one being foster care. Children placed in foster care are maintained at agency expense, although some fraction of the maintenance expenditures may be offset by government reimbursement. Today some 350,000 children are in foster care at an annual expense to the U.S. government alone of some \$700 million. Clearly, healthy infants and older, perhaps less healthy, children are substitutes in adoption, albeit imperfect substitutes. By obtaining exclusive control over the supply of both “first-quality” adoptive children and “second-quality” children residing in foster care but available for adoption, agencies are able to internalize the substitution possibilities between them. Agencies can charge a higher price for the children they place for adoption, thus increasing not only their revenues from adoption but also the demand for children who would otherwise be placed or remain in foster care at the agency’s expense. Conversely, if agency revenues derive primarily from foster care, the agencies can manipulate the relative price of adopting “first-quality” children over “second-quality” children to reduce the net flow of children out of foster care.

The group that has the largest stake in the adoption agencies’ net revenues is their professional personnel. If the principal effect of eliminating the agency monopoly in adoptions was to force agencies to operate at the competitive margin, it would surely reduce any rents now being received by agency personnel. Nor can it be argued that if baby selling were legalized the agency personnel would simply become the middlemen of the legal market; if the Securities and Exchange Commission were abolished, few of its personnel would become stockbrokers. One is not surprised that professional social workers’ organizations have been strong proponents of governmental restrictions on nonagency adoptions.

Potentially allied to the agencies and the social welfare professionals who staff them in opposition to baby selling are those prospective adoptive parents who by virtue of their contacts and general sophistication are able to jump to the head of the queue or procure a baby easily in the (lawful) independent market, either way paying less than they would have to pay in a free market. The analogy is to the effect of usury laws in reducing the interest rate paid by the most credit-worthy borrowers.

The potential supporters of baby selling are difficult to organize in an effective political coalition. They consist of unborn babies, children in foster care, taxpayers (each only trivially burdened by the costs of foster care), and people who have only a low probability of ever wanting to adopt a baby, as well as couples currently wanting to adopt one. The members of this last group have the most concentrated interest in a free baby market, but they are relatively few and widely scattered at any given time.

Interim Steps toward a Full-fledged Baby Market

We close by speculating briefly on the possibility of taking some tentative and reversible steps toward a free baby market in order to determine experimentally the social costs and benefits of using the market in this area. Important characteristics of a market could be simulated if one or more adoption agencies, which typically already vary their fees for adoption according to the income of the prospective parents, would simply use the surplus income generated by the higher fees to make side payments to pregnant women contemplating abortion to induce them instead to have the child and put it up for adoption.

This experiment would yield evidence with respect to both the demand and supply conditions in the adoption market and would provide information both on the value that prospective adoptive parents attach to being able to obtain a baby and on the price necessary to induce pregnant women to substitute birth for abortion. Follow-up studies of the adopted children, comparing them with children that had been adopted by parents paying lower fees, would help answer the question whether the payment of a stiff fee has adverse consequences on the welfare of the child.

Some states appear not to limit the fees that adoption agencies pay to natural parents. The experiment we propose could be implemented in such states without new legislation.