

Stork Markets: An Analysis of "Baby-selling"

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A baby is an inestimable blessing and bother.

Mark Twain

If some who have babies find them a bother and some who do not have them believe them a blessing, mutually beneficial exchange may be possible. One possible mechanism of exchange is a market, an arrangement in which those who want to rear a child and are unable or unwilling to produce "their own" make competing bids or offers for the opportunity to raise a child someone else finds or would find a bother. Indeed, three "baby markets" presently exist, though the black market is perhaps more readily recognized as a market than are the gray and white markets.

This essay presents a conceptual and moral rather than an economic analysis of "baby-selling." Its purpose is to address certain fundamental issues concerning the moral status of children, the moral basis of the family, the moral propriety of commerce, and the ways in which these moral presuppositions and principles find expression in law and social institutions. We seek to shed light on immediate and practical concerns including the present "shortage" of babies in the white market and contemplated federal legislation regulating adoption.¹ We also hope to provoke consideration now of related forms of commerce that technology will soon permit. Specifically, we are concerned about the possibility that in the not-too-distant future, someone who wants to rear a child may be able to obtain one by hiring another to combine genetically screened and selected sperm and ova in an appropriate artificial environment, and to transplant the blastocyst to a mechanical womb which, after a suitable gestation period, yields a healthy

"newborn" infant. Before the technology making such commerce possible exists, the morality of the arrangement ought to be closely examined and clearly understood; this paper is intended as a contribution to that endeavor.

I. The Present and Proposed Markets

We propose for consideration a market in the rights and duties constituting legal parenthood. In this market, buyers and sellers agree on a price for which the seller will relinquish and the buyer obtain these rights and duties. The buyer assumes the same legal role with respect to the child as natural parents have with respect to their offspring.

Although a child is transferred to a different household and established in a new legal relationship, the cluster of rights and duties that define the role of legal parent—and *not the child*—is the commodity exchanged in this market. On this important point, our analysis differs radically from that of Landes and Posner, who treat natural and adoptive parents as having property rights in their children.² Although parental rights are like property rights in including rights of control, not all rights of control over an entity are rights of ownership, and parents do not own nor can they sell their children.

Were the legal role of the parent defined differently, of course, parental rights could constitute ownership of the child. The Roman tradition of *patria potestas*, which endowed the father with unlimited and lifelong powers over his children, approximates ownership of children by their father.³ Were parental rights ownership of the child, parents would be entitled to control and use the child much as masters control and use slaves; parents would be legally permitted to use or dispose of their children at whim (though with due regard for the rights of others, that is, the rights of other adults)—to sell, loan, alter or destroy their children as they chose.

In the context of unlimited parental rights persisting until the parents' deaths, the distinction between selling an infant and selling parental rights over an infant would indeed be insignificant. But the present situation is quite different: parental rights are limited in extent and duration; they rest on the temporary incapacity of children to comprehend, secure or promote their own well-being. Parental rights include the right, within certain limits, to determine what the child's well-being is and how it shall be promoted (e.g., whether it includes or excludes religious training, corporal punishment, vegetarianism, travel, professional medical care, and, to a lesser degree, education), where the child shall reside and with whom he shall associate, etc. But legal parenthood does not include the right to use the child for gratification of one's sexual appetites, as the object of one's cruelty, or as a prostitute or a pornographic film star. Proceedings for removal can

be instituted against any parent—natural or adoptive—who neglects or abuses his child or otherwise endangers the child's welfare.⁴

Other things being equal, parental rights cease when the child reaches some legally specified age, regardless of whether the parents wish to relinquish those legal rights at that time.⁵ The right to rear a child is not the right to rule it for a lifetime. After reaching a certain age, the child has the right to remove himself from the parental household, to decide for himself about his education, religion, employment, marital status, and the like, and, in general, to take responsibility for those matters previously within parental authority.

Because transactions in the envisioned market involve moving children from one household to another, the mechanism we propose is restricted in ways that reflect the recognition that a child is a person, a being having needs and wants worthy of satisfaction in their own right; it does not treat children as insensate objects or pieces of property, or as the mere means for achieving the satisfaction of adult desires.⁶

The legal requirements for the capacity to enter into a contract in this market would aim at eliminating from eligibility potential bidders who have no interest in or ability to promote the child's well-being, or who have grossly inappropriate reasons for wanting to obtain the rights of parenthood.⁷ Persons convicted of child abuse, neglect or cruelty, rape or incest, or other relevant criminal offenses might thus be excluded from the pool of potential bidders. So, too, might those having severe physical, mental and financial disabilities, as well as those whose general patterns of conduct are incompatible with the conditions conducive to successful child-rearing.

The possible appearance of "baby-brokers," individuals who purchase parental rights and duties solely in order to resell them for profit, raises interesting and difficult questions. Because the profit to be made depends in part on the quality of care given children in their custody, these brokers are not necessarily especially likely to neglect or abuse the children. But the relationship between the broker and child is typically one in which the child's well-being is promoted not for the child's sake at all but solely for the sake of the broker's profit. If having been in such a relationship proves damaging to the child's welfare or self-esteem, or the existence of such a relationship proves destructive of relationships in which the well-being of children is promoted for the children's sake, it might be reasonable to eliminate these brokers from the marketplace.⁸

In order to further protect the child's interests, the law could specify precise, uniform terms for any legally binding exchange agreement, including terms that commit the adoptive parents to meeting clear and stringent responsibilities with respect to the child's welfare. Alternatively, the law might require that a child-interest advocate participate in the bargaining

process and determine that the specific terms of the contract (or perhaps those that go beyond some legally specified minimum requirement) be tailored to the child's particular needs (e.g., a physical handicap) and to the adoptive parents' particular situation.⁹ Depending on the effect on adoptive children of the various possible forms of remedy, the law could give the child himself or some other appropriate person legal standing to sue for breach of contract and either specific performance or damages.¹⁰

We now turn to the points of similarity and difference between the present and the proposed arrangements. The device we propose is an explicit market. Since, however, a market is a mechanism in which people make competing bids and offers—though not necessarily in money—for goods and services,¹¹ nonprofit adoption (the white market), independent adoption (the gray market), illegal exchange (the black market), and the market we propose are *markets* in exactly the same sense. In the white market, prospective parents compete against one another, but the competitive bidding takes forms other than (open and legal) cash offers to relinquishing parents or responsible authorities. Prospective parents can compete by trying to convince the social worker or other decision-maker that their aspirations and activities are particularly suitable for the role they seek, or that they more than other prospective parents have the background and character that promise success as parents; or they can compete by trying to be the first in line among those eligible for available infants. They may be called upon to sacrifice privacy and pride to the probings of the investigators: their unwillingness to pay this kind of price could disqualify them from consideration.

To say that a mechanism is a market is not to say (of any of the present or possible forms of exchange) that bidders necessarily seek only the goods and services that will accrue *to them* from their obtaining the legal role of a parent. They might in any case be impersonally benevolent toward a child as yet unborn, or personally benevolent toward some particular child they hope to adopt; they might be seeking *for the child's sake* the goods they believe will accrue to him if they obtain these rights.

In the current situation, there may be several equally but differently well-qualified prospective parents for any particular child. Under the present arrangement, the decision to place the child in one household rather than another may rest on arbitrary fiat or on the preference of the responsible authority. It may depend on the social worker's attitude toward one applicant's political activities or another's religious convictions, or one applicant's profession or another's wealth. It may depend on an unreliable or unfounded estimate of the relative strength and sincerity of the applicants' desire or ability to rear a child, or on the queuing principle (who was in line first). The proposed arrangement, on the other hand, would leave it to prospective adoptive parents to decide what they are willing to sacrifice in order to obtain parental rights.¹²

The present arrangement is not intended to prevent mutually beneficial exchanges—that is, exchanges that benefit both the relinquishing parents and the adopting parents; it generally prohibits or restricts the acceptance by the relinquishing parents of pecuniary benefits. Not all pecuniary benefits are prohibited; particularly but not exclusively in independent adoptions, prospective adoptive parents may reimburse the natural mother for medical expenses associated with pregnancy and for other “legitimate” adoption expenses.¹³ The proposed market recognizes that the out-of-pocket medical expenses may be but a small portion of the cost a woman incurs by carrying the pregnancy to term and relinquishing her parental rights; the primary cost may well be her opportunity cost, the value to her of the opportunities she foregoes by not terminating the pregnancy or alternatively by not keeping the child.¹⁴ It would also permit the adoptive parents, if they chose, to subsidize extraordinary medical or other care for the woman in the hope of enhancing the child’s health.

If the transfer of parental rights is itself not morally impermissible or intrinsically wrong, and there is no morally significant difference between out-of-pocket expenses and other costs of pregnancy or child-relinquishing, or between the use of cash and the use of other media of exchange (such as barter goods), and if the sorts of transactions presently legal are morally permissible, then the exchanges we propose are also morally permissible.

The introduction of this device would not change the evident fact that not everyone places a high or even a positive value on having parental rights, or the fact that the rights with respect to different children are not equally valued. Older children and those of racially mixed backgrounds are presently available for adoption; under the present arrangement, many of them will not be placed. They are not desired or not thought adoptable. An explicit market, on the other hand, might well permit them to find loving homes—though the purchasers of the parental rights would probably pay less than those who obtain the rights with respect to a white male infant.¹⁵

The commerce we propose would not have the sometimes deleterious effects of the present illegal exchange. The very illegality or marginal legality of adoption for profit generates hazards for the child, the adoptive parents, the relinquishing parents, and the intermediary. The risk of criminal and other legal sanctions means that relatively fewer doctors, lawyers and social workers will engage in this activity and that the prospective parents cannot readily obtain information about the intermediary with whom they deal: they cannot shop around, seeking an intermediary who will give them more information about the child’s health and medical history, better assurances that the exchange is legally sound, etc. They have to take what they can get—a child about whom they might know nothing and whom they cannot be certain of keeping. Or they might have to perjure themselves in order to obtain court approval of the adoption. The relinquishing parents, too, have

fewer alternatives when the market is illegal: they cannot consult the Better Business Bureau or previous clients for information about the reputations and past practices of various intermediaries; they cannot readily bargain for credible assurance that the child will be properly placed.

The fact that various unfortunate consequences might ensue from illegal or marginally legal market transactions does not imply that similar consequences will ensue if the market is legally recognized. Were the market we describe legal, adoptive children and natural and adoptive parents would be afforded at least as much protection as they are presently. The relinquishing parent might have made an informed, reflective decision with sound assurance that the adoptive parents are suitable; the adoptive parents would obtain clear legal standing with respect to a child on whom they might lavish affection and care, and about whose family and medical history they would be suitably informed.¹⁶

II. Some Comments on Justice and the "Baby Market"

Those generally skeptical of the justice of all market arrangements will certainly object to this proposal. Though we cannot address the broader issues involved, we shall consider some important aspects of these objections as they apply specifically to the market in parental rights.

Some might suggest that reliance on the ability and willingness to pay a cash price puts an unfair burden on the less wealthy or guarantees the wealthy a disproportionate share of the goods allocated in this market. But it must be recognized that the market we describe does not operate solely on the criterion of the prospective parents' ability and willingness to pay a cash price. The requirements of contractual capacity and the specification of explicit parental responsibilities mean that the ability and willingness to pay must be accompanied at least by the absence of egregious unfitness and by willingness to accept certain long-term legal responsibilities. Meeting these requirements imposes no particular hardship on the less wealthy. Nor would the arrangement necessarily make them worse off than they are in the present competition for infants, for those currently authorized to place children undoubtedly tend to favor adoptive parents having a more secure financial standing.¹⁷

Moreover, the arrangement could be instituted in conjunction with public and charitable arrangements, and with subsidies supporting the placement of children presently not adoptable. Furthermore, those who have relatively less ready cash might be able to borrow against future resources. Or, assuming that the child's welfare would not be adversely affected, collective entities other than married couples might be included in the pool of eligible bidders, and the less wealthy could combine their pecuniary resources in order to make a bid.

More importantly, changes in the distribution of wealth would not necessarily meet the issues this proposal addresses—the mismatch of the desire to rear and the ability to produce children, the welfare of children not wanted by their natural parents, and the fact that for many adults the opportunity to rear a child is an important constituent of a satisfying life. Insofar as birth control information becomes widely available and its technology improves, it is to be expected that fewer people who have the capacity and lack the desire to rear children will be producing them; the supply of infants available for adoption will therefore diminish. And, while the supply is diminishing, the demand might well increase: medical advances will not necessarily remedy all sterility, and people other than those who have traditionally sought parenthood—including single or divorced individuals, or homosexual couples—may join the ranks of prospective parents. Moreover, children not wanted by their natural parents ought to be placed in loving homes if possible. The market we propose aims at this end. The eligible competitors can indicate the sacrifices they are willing to undertake in order to have the opportunities of legal parenthood; it would be up to them to decide whether they are willing to “pay the price.”

Some might suggest that only in an unjust society would natural parents be willing to relinquish their parental rights in a commercial exchange; that in a just society no one would seriously consider doing so. Although unjust disparities in income, education, opportunities, health care and the like have doubtless inspired some to avoid procreation and others to relinquish their parental rights, it does not follow from this that *only* in an unjust society would there be people willing to make these exchanges. It seems to us not unlikely that even in a just society not everyone capable of procreation will be enthusiastic about parenthood and unwilling to exchange parental rights for other things he values. Our proposal allows for this possibility without necessarily predicting it.

Moreover, it is important to distinguish the issues of how unjust disparities in education, opportunity, income and the like are to be remedied from the question about what may be done with infants not wanted by their natural parents. We should eliminate exchanges in which a loving parent relinquishes a child in order to give him opportunities and advantages he ought in justice to have had anyway. We should eliminate the unjust lack of opportunity or advantage; doing this will not necessarily eliminate the circumstances that make other transfers advantageous to the child and both natural and adoptive parents.

The mechanism we suggest would not exacerbate an unjust distribution of wealth; it in no way requires the less wealthy to undertake parental responsibilities they do not want. They can use their resources to meet these responsibilities if they choose to undertake them, but they might choose to devote their resources to other purposes—such as increasing their wealth.

III. The Basis of Some Objections to the Proposed Market

The objections considered so far address only certain sources of antipathy to an explicit baby market and do not touch the concerns of those who would be unpersuaded of the moral propriety of this market even if empirical or other evidence conclusively demonstrated that the market would tend to maximize satisfactions (including those of children) or wealth. Were the critics to express themselves somewhat graphically, they might contend that:

- 1) the natural mother prostitutes herself by selling these services for money;
- 2) *the commerce corrupts the attitudes of adults toward children by encouraging adults to think of children as valuable because and insofar as parental rights have cash value; and*
- 3) the commerce degrades the adoptive child, leading him to conceive of himself and value himself as merchandise rather than as a person.

Underlying these objections is a strong distaste for money as a means of exchange, for explicit rather than implicit commerce, and for bargaining and calculation, as well as a deep suspicion concerning the desire for wealth.

Before addressing the objections directly, we want to consider some of their underpinnings, to try to identify the reasons for this distaste and suspicion. This is necessary in order to make clear that by proposing this market we are not suggesting that the desire for wealth, or commerce as a form of exchange, or money as a means of exchange, is in itself morally admirable. We do suggest, however, that the objections we shall consider rest on misunderstandings and confusions, and on exaggerations of insights about the nature of the desire for wealth, of commerce and money. We claim that commerce and the use of money are not necessarily or in themselves more dubious morally than other forms and means of exchange, and that the desire for wealth is not necessarily or in itself corrupt or evil.

Let us first consider the desire for wealth. Distaste for this desire may arise from failure to distinguish it from the vice of greed or avarice. Not all desire for money (or for other "economic" goods) is greed; that vice consists in excessive or particularly single-minded or petty absorption with the task of accumulating wealth. It is particularly manifested in someone's desiring to accumulate wealth for its own sake or to take unfair advantage of others in order to obtain wealth for himself. Moreover, the desire for wealth is not necessarily crass or selfish or even self-regarding. Someone might want money in order to produce goods having some higher form of value than "mere" economic (i.e., instrumental and pecuniary) worth. He might, for example, want it in order to be able to endow a music school, underwrite an archaeological expedition or build a hospital. He might want it in order to promote aesthetic or intellectual ends, or the good of others. The desire for wealth does not therefore seem inherently wicked or dishonorable, corrupt or evil.

To be sure, there is nothing morally admirable about someone whose primary commitment is to the accumulation of wealth for its own sake,

someone who derives his identity and sense of self-worth from egregious success in that endeavor. The accumulation of wealth for its own sake is not among the ends that can be pursued with integrity, for it is characteristic of the person of integrity to refuse to compromise (particularly for the sake of personal or pecuniary gain) the principles and commitments with which he identifies himself: the person of integrity is willing to make financial and other sacrifices in order to uphold or further these principles and commitments.¹⁸

Two further sources of distaste for money, commerce and the desire for wealth are what we shall call *the principle of the imperialism of the economic* and *the aesthetic ideal*.

The principle of the imperialism of the economic holds that the economic has a tendency to expand its sphere of influence. "The economic" includes various desires, attitudes, means and forms of exchange; "economic" desires and attitudes are self-interested, calculating, impersonal and concerned primarily with money; "economic" means of exchange are money and barter goods; the form characteristic of "economic" exchange is explicit trade or sale.

According to this principle, these attitudes, desires, valuations and means and forms of exchange tend to spread: once self-interested desires, and particularly the desire for wealth, are permitted to guide any aspects of someone's conduct, they tend to expand their influence over him until they govern most or all of it. Pecuniary and instrumental valuations tend to exclude, obliterate or obscure other kinds of valuations. Once someone comes to see a particular relationship or transaction as even partly "economic," he will tend to see it as mainly economic, and moreover will tend to see other (and eventually all) relationships and transactions as mainly economic—as impersonal, calculated and based on self-interest. He will value them as instruments and for their pecuniary worth, for these kinds of valuations tend to drive out others. Explicit contracts for purchase, sale and trade will tend to be his characteristic form of exchange. Having once agreed to accept money for certain goods and services, moreover, he becomes more likely to accept money in exchange for others. Eventually he will tend to be willing to sell all goods and services others might seek to buy; he will therefore tend to become a prostitute, someone willing to sell anything he has and even to betray others for the sake of money.

If the principle of the imperialism of the economic is correct, a world into which "the economic" has been introduced may be dismal indeed: in it, each person tends to view every other from a standpoint of mutual disinterest and tends to seek in all of his relationships and activities to bring advantages, especially wealth, to himself. Once all of these tendencies are realized, no association or activity is thought more than instrumentally valuable; none is thought to have a value not captured in its pecuniary worth.

Notice that the principle does not assert that the expansion invariably or necessarily occurs, or that it follows from someone's seeing an economic aspect of a relationship that he sees the relationship as wholly or primarily economic. The connection asserted is not a matter of logical implication or conceptual linkage; it is rather causal and psychological.

Perhaps no one has held a complete and consistent form of this principle. But some economists seem to hold it, and certain critics of the market hint at one or another of its instantiations.¹⁹

We shall not seek to refute this principle here. We do suggest, however, that it might be constructive to compare the attitude, and the arguments that can be mustered in favor of the principle, with religious condemnations of sensuality and the desire for sex. In both cases, it is alleged that the condemned desire has a remarkable power to destroy or override all others; a positive attitude toward sex and sensuality has been alleged to lead to excessive concern with this domain, and insufficient attention to others.

Yet another source of hostility to money, commerce and the desire for wealth is the aesthetic ideal, the vision of a world in which everyone is engaged wholly or at least primarily in pursuits that can be done for their own sakes, in developing the arts and literature, furthering knowledge, and enjoying personal relationships valuable in themselves.

Clearly in the case of certain natural and trainable attributes there is an ideal of developing and using the talent for the sake of an art or other intrinsically valuable activities to which it is essential. We admire the poet, musician, dancer, painter or physician who exploits her natural abilities and refined skills for the sake of art, or solely for the benefit of others. We admire the scholar who pursues truth for its own sake, the teacher who teaches for the love of it. We admire the artist or scholar who refuses to "demean" herself or to "degrade" her pursuit by accepting payment for it, who believes that to accept money would reduce her work to the level of "mere" commerce.

This ideal finds commerce vulgar; held in conjunction with the principle of the imperialism of the economic, it finds commerce corrupting as well.

One might have serious doubts, on various grounds, concerning the acceptability of the aesthetic ideal. An artist who depends for survival on the largess of a benefactor may be as much demeaned as one whose subsistence depends on payments he can demand as owed by his customers.²⁰ The former cannot demand benefits from his patron as a matter of right; the latter has a right to payment from those who accept his services. Either *might* have to temper his artistic judgment in order to produce goods satisfactory to others.

Moreover, even for those gifted with talents capable of being developed and exercised for the sake of some intrinsically valuable activity, the aes-

thetic ideal expresses a vision of perfection, not a minimum standard of achievement. We do not regard everyone having a given talent as bound to strive for this ideal, as acting wrongly or ignobly if he does not.

Many economists believe that complex networks of competitive and impersonal relationships are necessary in order to bring about the production of the goods and services that make life possible for most people, and for many, something better than sheer drudgery and an unremitting struggle for survival. If they are correct, then the aesthetic ideal is also an *ascetic* ideal: it urges all to simplify their lives, to get along with fewer of these goods and services in order to minimize the intrusion of self-interest, commerce and profit. It is only with caution and with a wistful regard for the close personal ties of the tribe or the small city-state that these arrangements and attitudes are to be allowed at all.

It seems likely, moreover, that most of the populace has little talent for the pursuits revered by the aesthetic ideal. Even the capacity that seems to be most widely distributed—the talent for forming intrinsically valuable personal relationships—is more readily exercised by people who enjoy a modicum of comfort and leisure and are not in imminent danger of starvation. Much of the current population of the earth, however, is quite fully occupied in finding ways to survive. Unless the means of survival and comfort are abundant and easily obtained by all, and the characteristics cultivated in the pursuit of activities valuable in themselves are at least widely distributed among the populace, the aesthetic ideal is also an *aristocratic* ideal.

IV. Objections to the Proposed Market

Having examined some of the views that may underlie these objections, let us turn to the objections themselves.

The suggestion that commerce in parental rights is a form of prostitution draws attention to a parallel objection to the sale for cash (or other “economic” goods) of sexual uses of one’s body. In both forms of commerce, someone permits the use of his body by another whom he might neither love nor even care about; and since someone’s sexual and reproductive powers are bodily capacities that might be thought closely connected to his sense of self, an objection to these practices might be that to permit these uses of one’s body in the absence of love (in the one case, for the partner in sex; in the other, for the anticipated offspring) and for the sake of money is degrading, damaging to the seller’s self-respect.²¹

Of course this objection applies at most to commercial exchange based on the present (lack of) technology. It would not apply if technological changes made it possible to use machines rather than human bodies for gestation.

It is not generally held that just *any* exploitation of a talent or capacity

closely associated with one's sense of self is improper, vulgar or dishonorable, or that any such exploitation of one's talents for personal advantage is necessarily to be condemned. Instead, prostituting oneself—"selling oneself" as well as one's services—is distinguished from permissible and quite honorable exploitation of one's talents for personal advantage. Although the former degrades, the latter need not.

Someone who is naturally rhythmic, agile and graceful exploits her natural abilities for personal advantage by becoming a dancer. So does the naturally compassionate, gentle and dexterous person who becomes a physician, or the naturally intelligent, perceptive and communicative person who becomes a teacher. Surely they do not act wrongly in exploiting these abilities and capacities; surely they do not necessarily act dishonorably in making these attributes—which may be quite closely entwined with their senses of self—the bases of their professions, and their professions the bases of their livelihoods.

To say that someone—for example, a musician—prostitutes himself for money is to say such things as the following: he relinquishes his artistic integrity and judgment; he knowingly and willingly gives shoddy performances and endorses the work of incompetents for the sake of obtaining more lucrative employment; he is not directly concerned with the quality of his work, only with the quantity of his pecuniary gain. Similarly, to say that a scholar prostitutes himself might be to say that he does not exercise his scholarly judgment and preserve his scholarly integrity; that, for example, he distorts and misrepresents the evidence he gathers in order to avoid reaching conclusions unpalatable to some benefactor or employer—whether a university, a government agency, an industry or a foundation. Someone who prostitutes himself is typically but not exclusively seeking pecuniary gain; he might debase himself in order to gain fame, political power, reputation or some other good.

The distinction between prostituting oneself and exploiting one's talents permissibly and honorably is not a distinction between kinds of talents exploited, nor between talents of varying distance from one's self; nor is it a distinction between those who exploit their talents for personal advantage and those who do not. And it is decidedly not a distinction between those who have talents and those who do not. Someone who prostitutes himself is not incompetent; he must have the talent in order to misuse it.

We suggest that it is at least an open question whether a woman prostitutes herself by accepting pecuniary or other goods in the market we describe. She might. She might not. Infants transferred in these exchanges might have been conceived in loveless sexual intercourse, and the natural parents might be indifferent or hostile toward the child; but there is no necessary connection between this market and either of these circumstances. Nor must the

woman regard this use of her reproductive capacities as damaging to her self-esteem; her ability to reproduce need not be integral to her self-identity, and she might regard the payment she receives as a proper acknowledgment of the sacrifices she makes by carrying the pregnancy to term and relinquishing her parental rights.

We turn now to the suggestion that commerce in parental rights would corrupt the attitudes of adults, particularly their attitudes toward children. According to this objection, which relies on the principle of the imperialism of the economic, the proposed commerce, by giving recognition to the economic aspects of legal parenthood, would heighten awareness of these features of the relationship and would therefore encourage adults to view parenthood as *primarily or solely an "economic" relationship*, children as primarily or solely "economic" assets or liabilities; so viewed, children are not thought ends in themselves but sources of pecuniary benefits or means of satisfying self-regarding adult desires.

The proponent of this objection might illustrate and develop it through several examples. He might suggest that the existence of an opportunity to obtain financial benefit by relinquishing parental rights will encourage adults in general to contemplate and stress the economic value of parental rights and, if they have children, to value their children primarily or solely for the economic worth of parental rights over them. Such valuation is of course thought incompatible with love and intimacy between adult and child.

Moreover, the critic might claim that this commerce will tend to corrupt the attitudes of adults toward their reproductive capacities, which they will tend to come to regard as economic assets or liabilities no different from their skill as computer programmers or their incompetence as nuclear physicists.

Both claims by the critic—that parental love will be corrupted and that attitudes toward reproductive capacities will be corrupted—resemble familiar criticisms of legalized prostitution. A person ordinarily counts among his assets and liabilities the car or furniture or stocks he owns, or the talents he can use in some socially acceptable form of employment. Legalized prostitution, some would contend, brings to the individual's attention the fact that his sexual abilities, too, have a market value, a pecuniary worth. Sex "for free" with a loved one might therefore come to represent a pecuniary sacrifice. Legalized prostitution, some contend, would therefore tend to corrupt the ideal of sexual intimacy by encouraging individuals to view their sexual capacities and activities as having none but market value. Similarly, the critic of the proposed market in parental rights might suggest that this commerce would encourage adults to think of both their children and their reproductive capacities (and derivatively, perhaps, their sexual capacities and activities) as having only instrumental and pecuniary value, thereby

corrupting both the ideal of parental love beyond price and also some important ideal concerning the significance and proper role of reproductive capacities.

The critic may additionally suggest that parents who decide to sell their parental rights, only to discover that the price they initially set exceeds the price any current bidder is willing to pay, will cease to nurture the child, and might even come to despise him. Furthermore, he might suggest that their taking explicit account of pecuniary considerations when negotiating for parental rights will influence the attitudes of adoptive parents toward the child, that they will therefore tend to view him as a commodity of specific pecuniary value rather than a person of indefinite or infinite intrinsic worth.

The proponent of the objection might also suggest that some adults will produce children solely for the sake of the exchange value of parental rights and that they might even do so without prior contractual arrangement with a purchaser—thereby risking what is otherwise an avoidable tragedy, a child whom no one wants. Like other parents who are unable to sell their rights at the price they initially set, they may cease to nurture the child or come to despise him.

The suggestion that this commerce, if legalized, will tend to corrupt the attitudes of adults toward children and themselves, relies on the supposition that “the economic” tends to expand its scope and influence, or what we have called *the principle of the imperialism of the economic*. Since that principle asserts a causal or psychological connection between certain attitudes, valuations, characteristics, etc., and a tendency for certain transfers to occur, the proponent of the objection can admit that someone’s valuation of a particular relationship is logically distinct from his valuation of the person to whom he is related, and that a “commercial” origin of a relationship does not imply that the individuals involved entertain “commercial” attitudes toward one another. Nor is the critic committed to saying that if someone takes a calculating and self-interested attitude in negotiations preceding the initiation of some legal relationship, he necessarily entertains these attitudes toward the person to whom he is legally related, or that he necessarily values the other primarily or solely as a means to the satisfaction of his own self-interested ends.

The proponent of this objection cannot suggest, on the other hand, that the arrangement described would *introduce* an “economic” element into a relationship utterly free from such mundane considerations. The legal relationship between parent and child presently has and is widely thought to have economic dimensions. Except among those who believe contraception impermissible or procreation a moral or religious duty, decisions about parenthood are already thought rationally and properly based on reflection about the effects of establishing the relationship now rather than later or not

at all, or in the case of conventional adoption, with this child rather than another. Whether someone obtains the legal rights of parenthood through the mechanisms available presently or through the market we propose, self-regarding considerations—including the financial burden of meeting parental responsibilities and the personal satisfactions of rearing children—seem pertinent and can be brought to bear on the decision.²²

In short, then, “economic” considerations seem already a part of deliberations and decisions about parenthood; and their involvement is no less explicit or important now than it would be under the proposed system.

Perhaps the critic is suggesting that someone who not only explicitly considers the pecuniary aspects of parenthood but is also willing to make cash sacrifices in order to obtain the legal rights of parenthood will have motives different from the motives of those who do not explicitly consider these aspects or who seek to acquire parental rights by making other kinds of sacrifices. If this is correct, however, it need not work against the proposed market, for it seems likely that those who have considered the pecuniary costs of obtaining parental rights will also have considered the pecuniary costs of fulfilling parental responsibilities. If this is correct, then these parents may be less likely than others to experience frustration and hostility toward the child when they discover that child-rearing is costly, not only in money, but in time, energy, and forgone opportunities for other activities and pursuits.

Empirical studies of parents who have obtained children through the current black market might give some indication of differences in motives between parents willing to make cash sacrifices and other adoptive parents. In lieu of evidence from such studies, we can draw tentative conclusions from a somewhat analogous situation. In transactions regarding pet animals, people do not generally seem to make the kinds of suppositions this objection suggests they would. They do not seem to believe, for example, that those who *buy* pets are likely to have motives or expectations different from—or less suitable than—the motives or expectations of those who pay no cash price. Nor do they seem to think them less likely to love and care for the pet once they have it, or that their having paid cash (as opposed to using some other or no medium of exchange) is itself likely to corrupt their attitude toward the pet. Indeed, some who have young animals to distribute prefer to charge at least a nominal cash price rather than to give the animals away; they apparently believe that, other things being equal, the purchaser's willingness to make an explicit sacrifice is a sign that the pet is “really wanted” and will be given good care.

Other criticisms we have set forth are directed not at the buyer's willingness to make a pecuniary sacrifice, but at the seller's opportunity to make a pecuniary profit. If that is the worry, it is important to recognize that

transactions in the nonprofit system may also bring financial advantages to the relinquishing parents—even if the law forbids reimbursement by the adoptive parents of the natural mother's medical and associated expenses. The cessation or elimination of the expenses and opportunity costs of childrearing brings financial benefit to the relinquishing parents. The proposed system differs from the present one in making *further* financial gain possible, and in making it possible for that gain to take the form of cash or barter payment. If it is merely the *amount* of potential gain that is thought objectionable, the critic may simply be disputing a detail of the proposal rather than the principle. If it is the nature of the costs covered that is at issue, the critic must indicate the morally significant difference between opportunity costs and expenses (or condemn the reimbursements now allowed by law). If it is the form of the gain that is thought objectionable, then the critic must advance reasons for considering explicit cash or barter transactions and benefits morally different from indirect mutual bestowal of financial advantage.

We suggest that the difference in benefits to be gained under the present and proposed arrangement will not significantly alter the emphasis adults presently place on the economic aspects of parenthood. The explicit deliberation and money payment allowed in the proposed market may perhaps draw attention to a fact that many might prefer to ignore: people who want to become parents are not necessarily willing to sacrifice or disregard all of their other interests and ends for the sake of establishing this legal relationship. They are not necessarily willing to relinquish certain other goods in order to do so, nor to incur just *any* cost (pecuniary or other) in order to do so. Instituting this relationship requires sacrifice in some form or another; and the value to anyone of acquiring the role (or of having the relationship with one particular child rather than another) might be neither infinite nor greater than the value of all (or certain) other things he desires.

The fact that not all are willing to make the necessary sacrifices is already evident in the phenomenon of chosen childlessness. The market arrangement would neither alter this fact nor change its significance.

Nor is it the case, as the critic seems to presume, that instrumental and intrinsic value cannot both attach to the same good. A person, or some other good, can be valued both as an instrument and as an end: a collector, for example, might value a painting both for its intrinsic and aesthetic worth and for its exchange value. Nor is there an essential conflict between these kinds of valuations: a mathematician can esteem a proof both for its cogency and for its elegance. Such combined valuation of persons seems permissible as well as possible: the familiar Kantian injunction condemns valuing persons *solely as means*, but does not mandate valuing them *solely as ends*.

With respect to the suggestion that this commerce will corrupt the atti-

tudes of adults toward their children, themselves, and their reproductive capacities (and the analogy with prostitution), we shall mention only that there is some difficulty in showing that the predictions are well-founded, just as there is difficulty in showing that legalized prostitution would corrupt ideals of sexual intimacy. Moreover, the needed evidence must demonstrate not only that a legalized market tends to promote these attitudes, but also that it has a significantly greater tendency to do so than has an *illegal* market. That, not the difference between a legal market and *no* market, is the relevant point of comparison in the present context.

It cannot be guaranteed that if the proposed arrangement is instituted, no child will ever be produced for the sake of profitable exchange of parental rights and that no relinquishing parents will ever set an asking price higher than any potential bidders are willing to pay. Nor can it be guaranteed that parents who do not value their children as persons will relinquish them to a nonprofit agency, or lower their price until a bidder can be found, or else nurture the children themselves. The importance of these admissions, however, should not be exaggerated. It should not be assumed that these undesirable episodes will occur frequently. Indeed, the legal market itself will give prospective parents more information than they presently have concerning the exchange value of parental rights—information that might well influence their decisions about conceiving and rearing children.

Insofar as the principle of the imperialism of the economic is an unsound basis for criticism of market arrangements generally, it is an unsatisfactory basis of criticism of this proposal. It also has difficulties specific to this use.

Finally, we suggest that the criticism advanced here is strikingly and revealingly like certain arguments against laws enabling married women to have independent control of property, and other proposals to alter the terms of the unwritten contract that initiates and governs that legal relationship. Both allege that the proposed change would somehow corrupt some important ideals of love and intimacy, that the proposed legal recognition of the economic aspects of the given relationship would encourage people to think of the relationship as essentially or wholly captured by a list of the legal rights and duties of each party, and moreover as a relationship essentially or wholly described by rights, duties, contracts and self-regarding considerations. Critics of these proposals point out that the legal aspect of marriage is not its whole, that spouses ought to enjoy mutual love, trust and respect. They further suggest that some (or even all) forms of legal recognition of certain of the economic aspects of the relationship would be inappropriate and destructive of this ideal mutuality between spouses. According to this view, talk of legal rights and mutually agreeable terms reached by negotiation and explicitly stated in a contract, or indeed any concern with "mere" economic advantages and disadvantages to either party, is inappropriate in

discussions of this exalted relationship, alien to the realization of these ideals. It is further suggested that legal recognition will encourage spouses to assess the economic effects and aspects of their relationship, and that once they begin to think of marriage as having economic aspects, this element will come to dominate their view of each other and their relationship, altering their valuation of one another, undermining or corrupting their love and replacing it with calculating mutual disinterest.

To accept this argument with respect to the adoption mechanism and to reject it with respect to marriage seems *prima facie* inconsistent.

The similarities between marriage law reform proposals and the proposed market in parental rights arise because certain of the proposed changes in the legal definition of marriage embody recognition of the distinctness of spouses, recognition of the fact that, however trusting and mutually affectionate they might be, spouses do not cease to be individuals, do not cease to have distinct and sometimes conflicting interests, ends and wants. These proposed changes reject the traditional view that affection and trust imply the wife's willingness to relinquish all distinct and conflicting claims and interests, her willingness to allow her interests, needs and desires, as well as her very self, to be absorbed by the husband. That traditional view was embodied in the legal doctrine that a married woman's legal personality was her husband's. The proposed laws embody a rejection of the view that wifely love necessitates self-abnegation and self-destruction, and a rejection of that view's associated legal doctrine.

The proposed commerce in parental rights is likewise a step toward abolishing the submersion of the child's legal personality in that of his parents, toward emphatic recognition of the child's distinctness. Although it does not necessarily extend children's legal rights or confer new ones, it stresses that children have legitimate claim to certain kinds of treatment from adults, that they have needs and interests worthy of satisfaction in their own right, and perhaps also distinct from and conflicting with the desires of the adult or adults entrusted with the legal responsibility of parenthood.

Neither marital love nor parental love necessitates one's servility, self-abnegation, or utter dependence on the good will of the other. Even those who love one another have rights—moral and legal—against one another. And those rights ought to be acknowledged and respected.

The loving parent encourages the child to think of himself as a bearer of rights, as a distinct individual having (sometimes) distinct interests as well as needs worthy of consideration in their own right.²³ The loving parent fosters the child's self-respect and his belief that he is worthy of the love and esteem of others. He teaches the child that sometimes at least he may quite properly demand—and not merely request—that he be treated in certain ways (particularly by his peers). He teaches the child that on occasion, he may or even ought to insist on his rights.

In regarding the child as a bearer of rights and in showing respect for those rights, the parent exhibits attitudes quite compatible with love, for he thereby treats the child as a person.

Because the market is restricted in ways that aim at recognizing and promoting the child's individual interests, it stresses that the legal rights of parenthood do not constitute ownership of the child, and it announces that legal parenthood is a position of trust, not an arbitrary authority to shape a child as one wills. Thus, it encourages adults to think of children as bearers of rights, as persons rather than as means by which adults can attain satisfaction of their self-regarding desires.

In neither marriage nor parenthood does the origin of the legal relationship determine the nature of the private relationship. That someone considering marriage seeks mutually agreeable and explicit arrangements that protect the distinctness of each party need not signify a lack of affection but instead might indicate a proper regard for the individuality of each spouse. That the marriage agreement is the product of negotiation does not indicate that the future private relations will be tainted by "commercial" attitudes. Similarly, that a prospective parent negotiates about (rather than with) a child indicates little if anything about his attitude toward the child himself, or about the character of the relationship he seeks to establish.²⁴

We turn finally to the suggestion that the existence of this commerce will lead children to think of themselves as merchandise, as "economic" goods.

As we have stressed previously, the proposed market does not literally treat the adoptive child as a piece of merchandise, as an entity owned and sold: the commodity in this market is a set of legal rights and duties, not the child. But it might be suggested that the fact of having been transferred from one household to another in the way envisioned will substantially affect the child's self-esteem, his conception of himself and his moral worth. It might be thought that even though he is not literally treated as merchandise, he will see himself as having been (and perhaps continuing to be) merchandise; he will value himself as merchandise rather than as a person.

If a case can be made for the principle of the imperialism of the economic, this objection poses a substantial difficulty, for the attitudes of the adoptive parents toward the child and the transaction may well shape the child's attitude toward himself.

The manifest love of the adoptive parents and the pattern of their interaction with the child, more than the origin of the legal relationship, however, will determine the strength of the child's sense of worth and his confidence that he is valued as a person.²⁵ If the practice is openly accepted and discussed, if the parents do not regard it as more shameful to have paid someone to carry a pregnancy to term than to have paid someone to deliver the child or save him from the ravages of a serious illness or to educate and care for him, then there need be no special trauma for the adopted child who

knows that his parents paid for the right to rear him. Moreover, if the natural parents have retained the right to visit him and know about the child, their conduct can evidence their concern for him, and the child need not believe that their decision to relinquish their parental rights was a rejection of him personally or a reflection of a low estimate of his worth as a person.²⁶ Unless parental and social attitudes foster the belief, the child need not regard the fact that his parents paid for the right to rear him as central to his identity, or the price paid for that right as indicative of his moral worth.

Prior to the interaction that can engender mutual love of parent and child, prospective parents may feel only an undifferentiated benevolence toward the child. After they have associated with him and come to love him, however, they might honestly affirm that the price they paid for the opportunity to rear him does not reflect what they presently feel. To say that they love him is to say that they wish him well—for his sake—that they value him for himself and not solely, if at all, because he enhances or is a means of their achievement of self-interested ends. A child who knows he is loved does not see and value himself as merchandise.

V. Concluding Remarks

By proposing this market in parental rights, we hope to provoke reconsideration of the legal character of the family and the moral status of children, and examination of widely shared attitudes toward commerce and human reproduction. Perhaps all would find more estimable a world in which no one who is unwilling or unfit to assume the legal role of parent reproduces, and no one who is both willing and fit to assume that role is incapable of reproducing. The market we propose is designed to meet important needs and interests in a world that fails to achieve that ideal.

NOTES

1. See Elisabeth M. Landes and Richard A. Posner, "The Economics of the Baby Shortage," *Journal of Legal Studies* 7 (1978):323; see also Staff of the Subcommittee on Children and Youth of the Senate Subcommittee on Labor and Public Welfare, *Report of Foster Care and Adoption*, 94th Congress, 1st Session (1975); *Hearings on S.3201 before a Subcommittee of the Senate Committee of the Judiciary*, 84th Congress, 1st Session (1955) and 84th Congress, 2nd Session (1956), cited in Grove, "Independent Adoptions," *Villa. L. Rev.* 13 (1967):116.
2. Cf. Landes and Posner, "Baby Shortage," p. 344.
3. On *patria potestas*, see Henry Sumner Maine, *Ancient Law* (New York: Henry Holt and Company, 1885), Ch. V, esp. pp. 128-56.
4. See, e.g., *Brownfield v. Brown*, 54 Cal. App. 3d 840, 850-1, 126 Ca. Rptr. 863 (1976).
5. This feature of parental rights is at best anomalous if parental rights are thought property rights in children. That they terminate at a definite date helps distinguish parental rights from restricted property rights in animals. The legal rights of animal owners, like the legal rights of parents, may be limited in ways aimed at protecting the welfare of the creature

(e.g., by prohibiting cruelty or other maltreatment), but the rights of an animal owner persist until he relinquishes, sells or abandons the creature, and are not bound or expected to end at any definite time.

It should be mentioned that in some jurisdictions parents have certain rights against their adult offspring. In most states the parents have the right to inherit as next of kin from a deceased, intestate child. And in some states they have a right to support by their children when they are unable to support themselves.

Other things are not equal if someone of legal age is adjudged incapable of meeting adult responsibilities; such a person may continue to be in a child-like legal status, perhaps as a ward of the state or under the guardianship of his parents or other relatives. But this is not a routine continuation of parental rights; it aims at meeting definite and atypical circumstances.

6. Given their view that children *are* the property of their parents, Landes and Posner face special difficulties in the matter of treating children as objects or mere means. Their brief response is curious, for they admit that economic analysis ordinarily makes no commitment regarding the satisfactions of things traded and concerns itself rather with the satisfactions of traders. They then say: "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," "Baby Shortage," p. 342.

But the crucial question is how, if at all, given their analysis, they can justify including the child in that community; that there is no presumption against including them would not, of course, be an argument for including them. (To argue in that way would be to commit the fallacy of appeal to ignorance.) The burden of proof rests with Landes and Posner: they must provide reasons, consistent with the rest of their analysis, for concerning themselves with these satisfactions.

7. It should be noted that legal regulations concerning marriage which specify requirements concerning the ages, degree of consanguinity, soundness of mind and physical health of spouses, aim also at controlling access to the legal role of parent. See, e.g., Cal. Civ. Code §§ 4101, 4300, 4400, and 4425 (1971). The mother of a child born out of wedlock, however, like the parents of a legitimate child, can exercise parental rights, subject only to the restrictions defined in legal prohibitions of abuse and neglect. See, e.g., Cal. Civ. Code § 203 (1971). Her absolute parental right excludes any right the father claims by virtue of paternity, though he can legitimate the child through marriage or adopt the child and acquire all the rights held by a father of a legitimate child. See, e.g., Cal. Civ. Code § 200 (1971).

Restrictions with respect to who may become a parent through adoption are generally based on age, residence or domicile. Rights extend to grandparents (to adopt grandchildren), stepparents (to adopt stepchildren), and to aliens; and they may extend to unmarried adults. Although we generally speak of adoptive parents, we do not mean to suggest that bidders be required to be married, heterosexual pairs. In California almost any adult may adopt any unmarried minor child. Cal. Civ. Code § 222 (1971). A married person not lawfully separated from his or her spouse must have the consent of the spouse to adopt a child. See Cal. Civ. Code § 223 (1971).

8. Moreover, the care that enhances the market value of parental rights is not always the care that promotes the child's well-being. Cosmetic surgery might in some cases serve the child's interest without benefiting the broker, and vice versa. Nor is it certain that the market value of parental rights will always increase sufficiently to cover the cost of care necessary for the child's well-being. Therefore, even though prohibiting brokers might reduce the general market value of parental rights, it might be desirable to exclude such brokers.

For further discussion of these issues, see section III.

Identifying these brokers for purposes of exclusion is another problem. Prohibiting the sale of any purchased parental rights—i.e., all resales—would perhaps be the easiest method. This would probably affect only a very few other than brokers, since most others will not find themselves with appropriate reasons for relinquishing a child the parental rights over whom they have just recently purchased. Alternatively, most brokers, but few others, might be excluded by a prohibition of the resale of more than one set of parental rights, i.e., rights with respect to more than one child.

For some, the primary objection to market arrangements in general is not that there is exchange for mutual advantage but that there are intermediaries who make profits by arranging or facilitating exchanges. This view may rest on misapprehensions about the services intermediaries perform in collecting information (e.g., identifying and screening potential relinquishing and adopting parents) and in arranging for parties to come to terms on a price and other contractual matters.

9. Indeed, one might well inquire whether those who wish to purchase parental rights should be subjected to any more stringent requirements than couples who wish to have children of their own, or to adopt through conventional agencies—especially if the child has no special needs. However, for purposes of assessing our proposal, it is sufficient to point out that the proposed arrangement seems as likely to protect the interests of children as present mechanisms for adoption, and in certain respects more likely to protect their interests than the assignment of parental rights to “natural” parents. Many who have the capacity to reproduce have no talents as parents and take no interest in the well-being of their offspring, even those who remain in their households. Since “purchasers” explicitly undertake the responsibility of providing adequate food, housing, clothing, education, etc., for the child, they, more than those who rear inadvertently conceived children biologically “theirs,” seem likely to give serious thought to their ability and desire to carry out these responsibilities over the long run.
10. There are a number of other related issues tangential to our concern with the morality of a market in parental rights. Will the arrangement lead to a more or less optimum allocation of resources than the present system? Will the external costs and benefits of producing and rearing children be more likely to be internalized than they are presently? Should there be a tax on producers and purchasers of parental rights in order to reflect external costs not internalized?
11. For this definition of “market,” see Paul T. Heyne, *The Economic Way of Thinking* (Chicago: SRA, Inc., 1973), p. 88.
12. For a different analysis with similar conclusions, see Landes and Posner, “Baby Shortage,” pp. 342–43.
13. See, e.g., Cal. Civ. Code § 224r (1971).
14. On opportunity cost, see Heyne, *The Economic Way*, p. 50. The natural father, too, might incur opportunity costs in relinquishing his parental rights.
15. For related arguments, see Landes and Posner, “Baby Shortage,” pp. 344–45.
16. For a different analysis with similar conclusions, see *ibid.*, pp. 338–42. Recent reports from the Comptroller of the City of New York, the Children’s Defense Fund (Washington, D.C.) and the Edna McConnell Clark Foundation (New York City) suggest that nonprofit agencies do not effectively promote the best interests of children entrusted to them. Their incentive, in fact, is to keep children “in transit”—in foster care or in institutions—as long as possible: the more children under the agency’s aegis, the larger its payment from the government. Landes and Posner (p. 342) cite important empirical evidence suggesting that parents who obtain children through independent adoption are at least as fit as those who adopt through nonprofit agencies; this suggests that strict screening of adoptive parents may be unnecessary.
17. Cf. Landes and Posner, “Baby Shortage,” p. 342.
18. See Bernard Williams, “A Critique of Utilitarianism” in *Utilitarianism: For and Against*, B. Williams and J. J. C. Smart (Cambridge, Mass.: Cambridge University Press, 1973), pp. 108–111.
19. See, e.g., Gordon Tullock and Richard B. McKenzie, *The New World of Economics* (Homewood, Ill.: Richard D. Irwin, Inc., 1975); Richard Titmuss, *The Gift Relationship* (New York: Random House, 1971); Peter Singer, “Altruism and Commerce,” *Philosophy and Public Affairs* 2 (1973):312–320. In his early manuscripts, Marx claimed that money changes “fidelity into infidelity, love into hate, virtue into vice, vice into virtue, servant into master, stupidity into intelligence, and intelligence into stupidity.” See T. D. Bottomore, ed., *Karl Marx: Early Writings* (New York: McGraw-Hill Book Company, 1963), p. 193.
20. Adam Smith argues, for example, that the rise of commerce helped to eliminate the servile dependence of medieval tenants, retainers and artisans. Smith, *The Wealth of Nations*, ed. Edwin Cannan, Book III, Chapter IV, esp. pp. 384–85, 390.

21. Others have suggested, however, that the degradation of prostitution has less to do with permitting the use of one's body than with relinquishing control over the judgments and opinions one expresses: on this view, what is humiliating and degrading about prostitution is the necessity of deceitful, polite concurrence with whatever opinions one's customer happens to express. As articulated by a former prostitute, this view is discussed in Kate Millett, "Prostitution: A Quartet for Female Voices," in *Woman in Sexist Society*, ed. Vivian Gornick and Barbara K. Moran (New York: New American Library, 1971), pp. 104-109.
22. See Landes and Posner, "Baby Shortage," for some of the relevant economic literature.
23. This discussion draws from many sources, including John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), pp. 463-64; Gregory Vlastos, "Justice and Equality," in *Social Justice*, ed. Richard B. Brandt (Englewood Cliffs, N.J.: Prentice-Hall, 1962), pp. 31-72, esp. pp. 44-45; Joel Feinberg, "On the Nature and Value of Rights," *Journal of Value Inquiry* 4 (1970):252-53; Thomas E. Hill, Jr., "Servility and Self-Respect," *Monist* 57 (1973):87-104; Bernard R. Boxill, "Self-Respect and Protest," *Philosophy and Public Affairs* 6 (1976):58-69; and Richard A. Wasserstrom, "Rights, Human Rights, and Racial Discrimination," in *Human Rights*, ed. A. I. Melden (Belmont, Calif.: Wadsworth Publishing Company, 1970), pp. 107-210.
24. An objection related to the one we have been considering goes like this: if the parents purchase rights over child A, who turns out to be a bother, and they then discover that rights over child B, a much more attractive child, are on the market at a price they can afford, will they not be tempted to turn over child A to an agency, or to sell the rights over him, and then replace him with child B?

Our reply is that first, a ban on resale, which we earlier discussed in connection with "baby-brokers" (see note 8 *supra* and accompanying text), would eliminate the situation to which this objection applies. Second, a maximum limit on the age at which a child may have his parental rights sold, which limit would be desirable for other reasons (see note 26 *infra*), will also remove the incentive for purchasing parents to continue "shopping around" after the purchase.

Will parents in the situation described come to resent or despise a child if they are prevented from exchanging his rights for those over another? There is no more reason to think so than to think that present adoptive parents will feel similarly toward their adopted child when they discover that a more attractive child was also available for adoption. Having purchased the rights over a particular child knowing that they were precluded from further shopping, the purchasing parents will undoubtedly have been at least as careful in their selection as are present adoptive parents.

25. It might be observed that the fact that foster parents currently receive payments for a foster child's care (or that the child's natural parents receive welfare subsidies or family allowances from the government) need not undermine the mutual affection that supports the child's sense of worth.
26. Contracts in the envisaged market need not prohibit all contact between the child and his natural parents; they might instead be modeled after arrangements, not uncommon in the past and currently existing under the rubric, "open adoption," that permit extensive and direct acquaintance of the child and his natural parents. See Arthur D. Sorosky, *et al.*, *The Adoption Triangle* (Garden City, N.Y.: Doubleday, 1978), pp. 209-14.

Someone who has a continuing interest in the child he relinquishes might want to reserve visitation rights and the right to sue for breach of contract should the adoptive parents fail to meet their responsibilities; he might seek a warmth and intimacy comparable to the relationships aunts and uncles sometimes enjoy with their nephews and nieces.

Someone interested in the child he relinquishes can simply decline to sell to prospective buyers whose views on child-rearing differ radically from his own. If the contract specifies standards of child-rearing, reserves visitation rights for the natural parents, and gives them standing to sue, the adoptive parents occupy a role more like that of a guardian or trustee than a parent.

These arrangements could lead to conflicts between the natural and adoptive parents about how the child's well-being is to be defined and promoted, conflicts resembling those arising from the arrangements made in some cases of divorce and remarriage. Legal

prohibitions of contact between the natural parent and the relinquished child, and the "sealing" of the birth records of adopted children, were perhaps instituted in order to protect the child from such conflicts. But it is not at all clear that these arrangements are not themselves the causes of other, more serious problems.

It should be kept in mind that what we have characterized as "conventional" adoption is in fact a rather localized phenomenon, familiar enough in the United States at the present time, but of recent origin even here and not typical at other times or in other places. Moreover, it was not instituted because of any clear evidence that children are harmed by knowledge of or contact with the parents who relinquished them; researchers are now accumulating evidence that these practices harm the adoptee as well as the natural parents and the adoptive parents. See Sorosky, *Adoption Triangle*, and its bibliography; and note, "The Adult Adoptee's Constitutional Right to Know His Origins," *S. Cal. L. Rev.* 48 (1975):1196.

The range of contracts permitted will depend in other ways on the effects of adoption on children. Consider, for example, the possible ways of dealing with an infant born with physical or other impairments (or advantages) not anticipated during the negotiation; the adoptive (or natural) parents might want to withdraw their offer (or cancel their acceptance of the offer). Were these cases handled in the way that the risks associated with unforeseen product defects and assets are treated in current contract law (see, e.g., *Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919 [1887]), the defective child who is rejected by both natural and adoptive parents—and who knows it—might suffer serious emotional stress. The problem might instead be handled by limiting enforceable contracts to those negotiated after the child's birth, although this would impose on the woman the risk that no one will compensate her for the costs of the pregnancy. A more promising approach would be to require prenatal contracts to state explicitly the assignments of the risks of all un contemplated assets and defects.

If warranted by consideration of the child's welfare, the records of bids and prices paid could be sealed, insuring that the child and the general public would not know the money price paid for parental rights in any particular case.

The above devices and restrictions would afford the child protection comparable to that presently provided.

Finally, there should be a maximum age beyond which no child may be "sold." The age should be lower than the age at which the child becomes aware of the market in parental rights. Otherwise, many children might have fears that if their parents run into financial difficulties, they will be "sold." Every wish expressed by a parent for enough money to purchase some desired good might arouse in the child the fear that his parents will turn to him as an asset exchangeable for a new car, a vacation, and so forth. Children might feel that their parents' attention to their health, grooming, manners and education is not for their own sake but for the sake of their "sale" value. Thus, the necessity for a maximum age for the sale of parental rights, or at least sale without the child's consent.