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# Race and Market Values in Domestic Infant Adoption

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# RACE AND MARKET VALUES IN DOMESTIC INFANT ADOPTION\*

BARBARA FEDDERS\*\*

*For prospective parents seeking to adopt U.S.-born babies, white infants are the most in demand and, relatively speaking, in the shortest supply. Some domestic adoption agencies have responded to this mismatch by assessing higher fees for the adoption of white infants than for infants of other races. After briefly considering the historically prominent role played by race in the different forms of domestic adoption, this Article explores the ethical and child-welfare concerns raised by race-based pricing in private adoption agencies.*

“Desires are not rights. A child is not a consumer good.”<sup>1</sup>

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1. PATRICIA WILLIAMS, *THE ROOSTER’S EGG* 241 (1995) (quoting Italian Health Minister Pia Garavaglia discussing the case of a black woman, married to a white man, who was implanted with a white woman’s egg so the couple could bear a white child who would be “spared the misery of racism”).

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## INTRODUCTION

In the realm of adoption in the United States, the demand for white<sup>2</sup> infants exceeds their supply.<sup>3</sup> The laws regulating private adoption grant agencies much discretion in how they set fees,<sup>4</sup> and a significant number of agencies charge prospective adoptive parents a higher fee to adopt a white infant than to adopt a black infant.<sup>5</sup> Fees for infants of other races are either in an intermediate range or the same as those for white infants.<sup>6</sup> Agencies that employ race-based pricing sometimes defend the practice on the ground that it is necessary to ensure the timely adoption of black children.<sup>7</sup> Yet race-based pricing problematically instantiates historical notions of black inferiority and may not serve the best interests of adopted children. This Article suggests that because less stigmatizing means are available to agencies to ensure that children in their custody are adopted, agencies could end their use of race-based pricing without sacrificing their child-welfare mission.

Part I provides factual background, outlining the basic differences between the public and private domestic adoption systems. It discusses the characteristics and numbers of children adopted each year. It then considers the imbalance between the supply of white infants and the demand for them and examines how fees imposed in domestic adoptions reflect that imbalance. Because a central question explored in this Article is whether race-based pricing

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2. Unless otherwise indicated, “white” in this Article describes an individual who appears to be and/or self-defines as a non-Hispanic white person. “Black” describes an individual who appears to be and/or who self-defines as a non-Hispanic person of African descent. Cf. ROBERT B. HILL, CASEY-CSSP ALLIANCE FOR RACIAL EQUITY IN THE CHILD WELFARE SYSTEM, SYNTHESIS OF RESEARCH ON DISPROPORTIONALITY IN CHILD WELFARE: AN UPDATE 7 n.1 (2006) [hereinafter RACIAL EQUITY IN WELFARE SYSTEM], available at [http://www.racemattersconsortium.org/docs/BobHillPaper\\_FINAL.pdf](http://www.racemattersconsortium.org/docs/BobHillPaper_FINAL.pdf).

3. DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 173 (2006).

4. See Michele Goodwin, *The Free-Market Approach to Adoption: The Value of a Baby*, 26 B.C. THIRD WORLD L.J. 61, 65–66 (2006) (characterizing most adoptions as subject to the free market and under-regulation); Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203, 248 (2009).

5. Goodwin, *supra* note 4, at 66–67.

6. PAMELA ANNE QUIROZ, *ADOPTION IN A COLOR-BLIND SOCIETY* 5 (2007).

7. See *infra* note 136 and accompanying text (discussing agency explanations for race-based pricing).

serves or harms black children's best interest, Part II briefly surveys the historical treatment of these children in the private and public adoption systems in the United States. It discusses the disproportionate expansion of the numbers of black children available for adoption in the public system beginning in the late 1980s and explores one legislative response to that expansion—the 1994 Multiethnic Placement Act (“MEPA”)<sup>8</sup>—which prohibits adoption agencies from delaying or denying a child's adoptive placement based on the unavailability of adoptive families whose race matches that of the child.<sup>9</sup> As this Part explains, MEPA has had no clearly discernible impact on the numbers of black children adopted from foster care, and it does not regulate the private agencies that are this Article's focus. Yet debates regarding the desirability of transracial adoption that preceded MEPA's passage find echoes in the critiques of race-based pricing explored in Part III. This final Part weighs justifications offered by those who employ or support race-based pricing against the harms of the practice. It suggests that agencies could replace race-based pricing with less stigmatizing fee structures and provides examples of such structures. This Article concludes by advocating a scholarly reappraisal of the appropriateness of market values in infant adoption.

## I. SUPPLY AND DEMAND IN DOMESTIC INFANT ADOPTION

### A. *Adoption in the United States: Systems and Laws*

Adults seeking to adopt a child born in the United States may do so in one of three ways:<sup>10</sup> (1) by accessing the public child-welfare

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8. Multiethnic Placement Act of 1994, Pub. L. No. 103-382, § 551, 108 Stat. 3518, 4056 (codified as amended at 42 U.S.C. §§ 1996b, 5115a (2006)), *repealed in part* by Small Business Job Protections Act of 1996, Pub. L. No. 104-188, § 1808(d), 110 Stat. 1755, 1904 (codified at 42 U.S.C. § 1996b (2006)).

9. 42 U.S.C. § 1996b (2006) (“A person or government that is involved in adoption or foster care placements may not . . . delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.”).

10. The focus of this Article is on the domestic adoption of children into nonkinship families through for-profit and not-for-profit agencies. Beyond the scope of this Article are considerations of intercountry, tribal, and kinship adoptions. *See generally* CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., INTERCOUNTRY ADOPTION: WHERE DO I START? 1–5 (2009), [http://www.childwelfare.gov/pubs/f\\_inter/f\\_inter.pdf](http://www.childwelfare.gov/pubs/f_inter/f_inter.pdf) (noting that 17,433 children were adopted from other countries by U.S. citizens in 2008, that this number has grown significantly in the past twenty years, that the ages of children adopted internationally range from three months to sixteen years old, and that costs can run well over \$40,000); CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF

system, which has custody over children who have been removed involuntarily from their birth parents pursuant to allegations of abuse or neglect, or whose parents have died, been incarcerated, or abandoned them; (2) by working with a nongovernmental for-profit or not-for-profit agency to adopt a child whose birth parents have voluntarily<sup>11</sup> placed him or her into the care of that agency for purposes of adoption; or (3) by arranging an independent adoption directly with birth parents, without mediation by an agency though often with the assistance of attorneys or other adoption intermediaries.<sup>12</sup>

In order for an adoption to be legally valid, the following conditions must be met:

- (1) [P]arental consent or a constitutionally sound reason for dispensing with parental consent but requiring, instead, the acquiescence of the child's public or private custodian; (2) the consent of the child, if of sufficient age or maturity; (3) a determination that the prospective parents are eligible and suitable to adopt; (4) proof that any payments for adoption-related expenses were not intended to induce a birth parent's

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HEALTH & HUMAN SERVS. & FRIENDS NAT'L RES. CTR. FOR COMMUNITY-BASED CHILD ABUSE PREVENTION, STRENGTHENING FAMILIES AND COMMUNITIES: 2010 RESOURCE GUIDE 72 (2010), [http://www.childwelfare.gov/pubs/res\\_guide\\_2010/guide.pdf](http://www.childwelfare.gov/pubs/res_guide_2010/guide.pdf) (offering guidance on raising grandchildren); Mary Annette Pember, *New Law Will Boost Tribal Adoptions*, DAILY YONDER, Apr. 8, 2009, <http://www.dailyyonder.com/new-law-will-boost-tribal-adoptions/2009/04/08/2039> (describing tribal adoptions and foster care services).

11. I use the term "voluntarily" advisedly. While these adoptions do not involve the nonconsensual removal by the State of children from their birth parents, they nevertheless are often not without some element of economic or social duress such as poverty or single parenthood. See generally BARBARA KATZ ROTHMAN, *WEAVING A FAMILY: UNTANGLING RACE AND ADOPTION* 18 (2005) (arguing that most birth mothers who place their children for adoption do so out of lack of resources and opportunities); RICKIE SOLINGER, *BEGGARS AND CHOOSERS: HOW THE POLITICS OF CHOICE SHAPES ADOPTION, ABORTION, AND WELFARE IN THE UNITED STATES* 67 (2001) (same). But see Brent C. Miller & Diana D. Coyl, *Adolescent Pregnancy and Childbearing in Relation to Infant Adoption in the United States*, 4 *ADOPTION Q.* 3, 16 (2000) (noting that unmarried women who place their children for adoption come from higher socioeconomic backgrounds and have higher educational and vocational goals for themselves than those who keep their babies).

12. Evan B. Donaldson Adoption Inst., Research: Adoption Facts, Private Domestic Adoption, <http://www.adoptioninstitute.org/research/domesticadoption.php> (last visited Jan. 18, 2010).

consent or relinquishment; and (5) a judicial finding that the adoption is in the child's best interests.<sup>13</sup>

Adoptions from the child-welfare system are processed through public agencies, which sometimes contract with private agencies to recruit, train, and license adoptive parents.<sup>14</sup> Unlike infants in the private adoption system, who are typically placed with adults not known to the birth parents, children adopted from the public system are most often adopted by foster parents who have had temporary custody of them prior to the court's termination of the rights of their birth parents.<sup>15</sup>

In 2007, 52,000 children were adopted from the child-welfare system, out of a total of 132,000 children whose birth parents' parental rights had been terminated and who were thus available for adoption.<sup>16</sup> The mean age of children adopted from the public system in 2007 was just over six years old.<sup>17</sup> The children available for adoption in 2007 were 38% white, 30% black, 21% Hispanic of any race, 2% Alaska Native/American Indian, 1% Asian, 5% two or more races, and 2% unknown or unable to determine.<sup>18</sup> White children were disproportionately adopted relative to their numbers as waiting children: of the children adopted from foster care in 2007, 45% were white, while 25% were black and 20% were Hispanic.<sup>19</sup> The market that exists in private adoptions does not apply in the foster care context. Unlike infants adopted in the private system, children in foster care are wards of the State, which bears responsibility for their placement. Additionally, white infants are almost entirely unavailable through child-welfare adoptions.<sup>20</sup> Costs

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13. Joan Heifetz Hollinger & Naomi Cahn, *Forming Families by Law: Adoption in America Today*, HUM. RTS., Summer 2009, at 16, 16–17 (2009), <http://www.abanet.org/jirr/hr/hrsummer2009.pdf>.

14. Child Welfare Info. Gateway, U.S. Dep't of Health & Human Servs., Foster Care Adoption, <http://www.childwelfare.gov/adoption/foster/> (last visited Jan. 18, 2010).

15. *Id.*

16. ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT 5, 7 (2009), available at [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/tar/report15.pdf](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report15.pdf).

17. *Id.* at 7.

18. *Id.* at 5.

19. *Id.* at 7.

20. See SPAR, *supra* note 3, at 177–78 (explaining that as of 2002 over a third of children in foster care were African American and roughly one-quarter were over five years old and noting a “dearth of (healthy white) babies” available for adoption).

for these adoptions relative to agency or independent adoption options are therefore minimal, typically ranging from zero to \$2,500.<sup>21</sup>

Adoptive parents seeking to adopt a child who has been voluntarily placed by her birth parents may choose to work through an agency or to participate in an independent adoption. Agencies provide services often unavailable to those who adopt independently. For example, the more than 2,000 licensed adoption agencies nationwide<sup>22</sup> provide pre- and post-adoption counseling to birth parents and also obtain medical and social histories of birth parents and their families for adoptive parents.<sup>23</sup> Agencies arrange all contact and communication between adoptive and birth parents. They can typically offer an expectant birth mother and father several prospective adoptive parents, from which the birth parents can choose.<sup>24</sup> Agencies can also find an adoptive family for a child whose birth parents do not want to be involved in the selection.<sup>25</sup>

In independent adoptions, which are lawful in nearly every state, birth parents and adoptive parents find each other without the assistance of an agency.<sup>26</sup> Most states also allow intermediaries, typically attorneys, to establish connections between adoptive and birth parents; the range of functions they may employ and the costs they may charge are regulated by statute and vary from state to state.<sup>27</sup> A handful of states permit advertising by adoptive parents, birth parents, agencies, and/or adoption intermediaries.<sup>28</sup>

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21. Adoption.com, *The Costs of Adopting: A Factsheet for Families*, <http://costs.adoption.com/articles/the-costs-of-adopting-a-factsheet-for-families.html> (last visited Jan. 18, 2010); *see also* SPAR, *supra* note 3, at 177 (“In economic terms . . . foster adoption is both a purely nonprofit venture for the agencies involved and a relative bargain for adoptive parents.”).

22. Child Welfare Info. Gateway, U.S. Dep’t of Health & Human Servs., *How to Assess the Reputation of Licensed, Private Adoption Agencies*, <http://www.childwelfare.gov/pubs/twenty.cfm> (last visited Jan. 18, 2010) (reporting over 2,000 licensed agencies processing domestic adoptions).

23. CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVS., *ARE YOU PREGNANT AND THINKING ABOUT ADOPTION?* 8 (2007), [http://www.childwelfare.gov/pubs/f\\_pregna/f\\_pregna.pdf](http://www.childwelfare.gov/pubs/f_pregna/f_pregna.pdf).

24. *See id.*

25. *See, e.g.*, Adoption-Link, *FAQs for Birth Parents*, <http://www.adoption-link.org/birth-parents-faqs.aspx> (explaining that a birth parent can either choose an adoptive family or direct the agency to choose).

26. Evan B. Donaldson Adoption Inst., *supra* note 12.

27. CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 23, at 7 (explaining that some states require intermediaries to be licensed while others permit anyone to serve that role); CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVS., *USE OF ADVERTISING AND FACILITATORS IN ADOPTIVE PLACEMENTS: SUMMARY OF STATE LAWS 3* (2009) [hereinafter *CHILD WELFARE INFO. GATEWAY, USE OF ADVERTISING*], <http://www.childwelfare.gov/systemwide/laws>

The numbers of children adopted through agencies or independently are more difficult to ascertain than numbers from the child-welfare system. States are not required to record or report on the number of private, domestic adoptions;<sup>29</sup> consequently, there are few sources of information on the frequency of these adoptive placements, the fees paid for them, or the demographics of the parents who adopt or the children who are adopted. The most recent and comprehensive data available on private adoptions are from 2001, when the National Center for State Courts (“NCSC”) reported that adoptions of 127,407 children were finalized in state courts nationwide.<sup>30</sup> Of this number, about thirty-nine percent were adoptions from the public system, and fifteen percent were intercountry adoptions.<sup>31</sup> The remaining forty-six percent—approximately 58,500 children—were tribal, kinship, private agency, or independent adoptions.<sup>32</sup> Neither the NCSC nor any other agency is able to disaggregate this number;<sup>33</sup> the Evan B. Donaldson Adoption Institute estimates that independent infant adoptions are growing and now constitute between one-half and two-thirds of all

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\_policies/statutes/advertisingall.pdf (“Two States (Delaware and Kansas) strictly prohibit any use of facilitators or intermediaries; eight states prohibit their use by restricting the placement of children to licensed agencies only.”).

28. CHILD WELFARE INFO. GATEWAY, USE OF ADVERTISING, *supra* note 27, at 2.

Connecticut specifically allows advertising by birth parents and prospective adoptive parents only. An additional 12 States allow advertising by agencies and other entities including attorneys (Florida, Indiana, Mississippi), physicians (Mississippi), crisis pregnancy centers (Louisiana), birth parents (Illinois, Nebraska), facilitators (North Carolina), prospective adoptive parents (Illinois, Kansas), and those prospective adoptive parents with approved preplacement assessments or home studies (North Carolina, Oklahoma, Oregon, Washington, and Wisconsin). Georgia allows the use of public advertising by agencies only; individuals including birth parents and prospective adoptive parents may exchange information by private means only, such as letters or telephone calls.

*Id.*

29. See Evan B. Donaldson Adoption Inst., Overview of Adoption in the United States, <http://www.adoptioninstitute.org/FactOverview.html#head> (last visited Jan. 18, 2010).

30. CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVS., HOW MANY CHILDREN WERE ADOPTED IN 2000 AND 2001? 2 (2004), [http://www.childwelfare.gov/pubs/s\\_adopted/s\\_adopted.pdf](http://www.childwelfare.gov/pubs/s_adopted/s_adopted.pdf).

31. *Id.* Adoptions through the child-welfare system are recorded and reported by the Federal Adoption and Foster Care Analysis and Reporting System (“AFCARS”); data on intercountry adoptions are collected by the State Department and Office of Immigration Statistics. Estimates of private adoptions are acquired by subtracting AFCARS and intercountry adoptions from the total adoptions reported by the National Center for State Courts. QUIROZ, *supra* note 6, at 10.

32. CHILD WELFARE INFO. GATEWAY, *supra* note 30, at 2.

33. *Id.* at 1.



infant adoptions.<sup>34</sup> The children placed through independent adoptions are most often infants.<sup>35</sup>

The percentages of women placing infants for adoption have decreased dramatically over the last thirty years, particularly among white women.<sup>36</sup> Prior to 1973, when *Roe v. Wade*<sup>37</sup> decriminalized abortion, 19.3% of babies born to never-married white women were relinquished for adoption; by 1995 that number had dropped to 1.7%.<sup>38</sup> During that same period, relinquishment rates among never-married black women dropped from 1.5% to nearly zero.<sup>39</sup> Scholars attribute the sharp decrease in the availability of infants for adoption over the last thirty years to increased access to contraception and abortion.<sup>40</sup>

Compared with adoptions from the public child-welfare system, private adoptions are extremely expensive. Agency adoptions are estimated to range from \$4,000 to \$100,000; the numbers are similar for independent adoptions.<sup>41</sup> The fees are typically structured as follows: prospective adoptive parents pay an application fee (usually between \$100 and \$500) to the agency or agencies of their choice; they then pay anywhere between \$750 and \$3,000 for a “home study,” in which a licensed social worker charged with determining whether they will be suitable parents evaluates their finances, physical and

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34. Evan B. Donaldson Adoption Inst., *supra* note 12.

35. See R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875, 898 n.90 (1998). “Infants, black or white, are more likely to be placed through private or independent adoption than through the public system.” *Id.* at 898.

36. CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., VOLUNTARY RELINQUISHMENT FOR ADOPTION 3 (2005), [http://www.childwelfare.gov/pubs/s\\_place.pdf](http://www.childwelfare.gov/pubs/s_place.pdf).

37. 410 U.S. 113 (1973) (striking down state laws banning abortion).

38. CHILD WELFARE INFO. GATEWAY, *supra* note 36, at 3.

39. *Id.*

40. See, e.g., SPAR, *supra* note 3, at 173 (attributing the significant decline in adoptions in the 1970s to availability of birth control and the *Roe v. Wade* decision); Sandra Patton-Imani, *Redefining the Ethics of Adoption, Race, Gender, and Class*, 36 LAW & SOC'Y REV. 813, 824 (2002) (arguing that *Roe v. Wade* affected the availability of healthy white infants for adoption by decriminalizing abortion and empowering some women to decide to be single mothers).

41. CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., COSTS OF ADOPTING 2 (2004), [http://www.childwelfare.gov/pubs/s\\_cost/s\\_costs.pdf](http://www.childwelfare.gov/pubs/s_cost/s_costs.pdf) (\$5,000–\$40,000 or more for agency; \$8,000–\$40,000 or more for independent); QUIROZ, *supra* note 6, at 65 (\$4,000–\$40,000 for agency and independent); SPAR, *supra* note 3, at 180 (“As of 2004, the typical cost of an infant adoption in the United States ranged between \$10,000 and \$40,000. In a handful of cases, prices as high as \$100,000 were reported.”); Evan B. Donaldson Adoption Inst., *supra* note 12 (\$4,000–\$30,000 for agency; \$8,000–\$30,000 for independent).

mental health histories, and housing conditions, among other factors, and conducts extensive personal interviews.<sup>42</sup> If a child is placed, another fee is assessed of adoptive parents, which can range from \$6,500 to more than \$50,000.<sup>43</sup> Some agencies charge one fee at the time of the match and another at the time of placement.<sup>44</sup> Additionally, many adoptive parents pay for the birth mother's medical expenses and other costs during her pregnancy.<sup>45</sup> A variety of additional administrative fees may be assessed.<sup>46</sup> The costs for an independent adoption include home studies, advertising, and birth mother expenses.<sup>47</sup> Intermediaries who facilitate private, independent adoptions and who are permitted by state law to charge for their services typically earn \$250 to \$300 per hour.<sup>48</sup>

### *B. Race-Based Marketing in Adoption*

Substantially more white adults enter the formal private adoption process as prospective adoptive parents than do adults of any other race, and most of these individuals express a preference for adopting white babies.<sup>49</sup> White infants are—because of this same-race

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42. SPAR, *supra* note 3, at 178; *see, e.g.*, N.J. STAT. ANN. 9:3-54.2 (West 2002) (requiring a home study to include background checks for criminal activity as well as child abuse and neglect).

43. SPAR, *supra* note 3, at 178–79.

44. *See, e.g.*, Adoption-Link, Domestic Adoption Program, <http://www.adoption-link.org/ALink-African-American-Fees-Agmt-NR.pdf> (assessing one fee upon identification and referral of a birth mother and a second fee at time of child placement).

45. *See, e.g.*, N.C. GEN. STAT. § 48-10-103 (2009) (allowing an adoptive parent to pay reasonable and actual fees and expenses for agency services as well as medical fees, travel fees, and living expenses of birth mother during pregnancy and up to six weeks after birth).

46. SPAR, *supra* note 3, at 178–79. For samples of fee breakdowns charged by agencies, *see* Web sites for Adoption-Link and Adoption Services. Adoption Contract, Adoption-Link, Domestic African American Infant Program Service and Fee Agreement for Non-Illinois Residents, *available at* <http://www.adoption-link.org/ALink-African-American-Fees-Agmt-NR.pdf> (last visited Mar. 16, 2010); Adoption Servs., Domestic Adoption Costs, [http://www.adoptionservices.org/adoption/adoption\\_costs\\_domestic.htm](http://www.adoptionservices.org/adoption/adoption_costs_domestic.htm) (last visited Mar. 2, 2010).

47. CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., REGULATION OF PRIVATE DOMESTIC ADOPTION EXPENSES: SUMMARY OF STATE LAWS 3 (2008), [http://www.childwelfare.gov/systemwide/laws\\_policies/statutes/expensesall.pdf](http://www.childwelfare.gov/systemwide/laws_policies/statutes/expensesall.pdf).

48. SPAR, *supra* note 3, at 179. For discussion of variability among state laws in regulating expenses, *see* MARILYN FREUNDLICH, THE MARKET FORCES IN ADOPTION 11–12 (2000).

49. ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION 87 (1999) (stating that most Americans actively seeking to adopt are white and that, at least early in their search, they generally wish to adopt within their race).

preference—in the shortest supply relative to the pool of prospective adoptive parents who want to adopt them.<sup>50</sup> In the application process, agencies routinely elicit the racial preferences of prospective adoptive parents.<sup>51</sup>

Many agencies classify babies available for adoption according to race, prominently advertising on their Web sites and other promotional materials the different races available.<sup>52</sup> Some of these agencies appear to believe that white parents may easily accept as substitutes Latino, Asian, or Native American babies as well as those born to one black parent and one parent of a different race.<sup>53</sup> As a result, they may include babies of those races with white babies in their racially classified groupings.<sup>54</sup>

Agencies with race-based programs sometimes structure fees in a way that seems responsive to supply and demand dynamics, charging one fee to adoptive parents for the placement of a black baby and a higher fee for the placement of a white baby.<sup>55</sup> Fees for Latino, Asian, Native American, and biracial children may be the same as those for white babies; sometimes they are priced in between.<sup>56</sup>

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50. *See id.* at 86–87; SPAR, *supra* note 3, at 173.

51. Banks, *supra* note 34, at 899–900. Professor Patricia J. Williams, who adopted a son through a private domestic adoption agency, recounts the experience of being asked questions regarding racial preferences. WILLIAMS, *supra* note 1, at 219 (“‘What races would you accept? . . . And what racial combinations?’ There followed a whole menu of evocative options, like Afro-Javanese, Sino-Germanic, and just plain ‘white.’ [T]his list [suggested] the multiple combinations of meat offered at, say, Kentucky Fried Chicken . . .”).

52. QUIROZ, *supra* note 6, at 58, 60 (discussing the results of an original research study of adoption agencies advertising on the Internet, which showed approximately one-third of agencies had separate programs for racial minorities and some of these agencies advertised race-based policies explicitly).

53. *See id.* at 5–6 (describing “three-tiered adoption pricing schemes” in which children are classified as white, “honorary white,” and “collective black”).

54. *Id.* Twila Perry notes that this practice of grouping almost-white with white runs counter to the powerful “one-drop” rule that has dominated thinking about race, in which “one drop” of nonwhite blood was sufficient to exclude someone from the white race. Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 81 n.219 (1993).

55. Martha M. Ertman, *What’s Wrong with a Parenthood Market?: A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 10, 27–30 (2003) (“Children who are racial minorities, such as African-American children, are sometimes cheaper to adopt than white children, a differential that seems to turn . . . on supply and demand . . .”); Goodwin, *supra* note 4, at 66–67; *see* QUIROZ, *supra* note 6, at 5.

56. Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. DAVIS L. REV. 1415, 1426 (2006) (“Some agencies, guided by the laws of supply and demand, charge lower fees for African American children, higher fees for children who are only half African American, and the highest fees for all other (non-African American) children. . . . Under this framework, the same fee applies to adoptions of Caucasian, Latino, Asian American, or Native American children or any combination thereof.”); *see*

In addition to lower fees offered by adoption agencies, many states subsidize adoptions of “hard-to-place” or “special needs” children and explicitly include children in these categories as a result only of their race.<sup>57</sup> Further, the federal tax code provides for a supplemental adoption credit in addition to the standard adoption credit to those parents who adopt a child labeled “special needs” by an agency.<sup>58</sup> Internal Revenue Service (“IRS”) regulations indicate that membership in a racial minority group may constitute “special needs” for purposes of tax credits.<sup>59</sup>

A survey of fifty-six private adoption agencies that process domestic adoptions was conducted for this Article,<sup>60</sup> revealing that ten, or approximately eighteen percent, charge higher fees for the adoption of white infants than black infants.<sup>61</sup> One adoption expert

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*also QUIROZ, supra note 6, at 5 (describing “three-tiered adoption pricing schemes” in which children are classified as white, “honorary white,” and “collective black”).*

57. *See, e.g., NEV. REV. STAT. § 127.008 (2009) (stating that a “child with special needs” includes a child who, due to factors that include a child’s race, is determined to be more difficult to place by the administrator or designee of his agency); N.M. STAT. ANN. §§ 32A-5-43 to -44 (West 2009) (providing for subsidized adoptions for hard-to-place children, which can include children in “special circumstances by virtue of . . . racial background”). Other “special needs” characteristics include age (being an older child as opposed to an infant or toddler) and physical or mental disability. *Id.**

58. 26 U.S.C. § 23 (2006); Internal Revenue Service, Topic 607—Adoption Credit, <http://www.irs.gov/taxtopics/tc607.html> (last visited Jan. 31, 2010) (providing a tax credit for the adoption expenses of “a child with special needs if the child otherwise meets [certain specified criteria] . . . and a state determines that the child cannot or should not be returned to his or her parent’s home and probably will not be adopted unless assistance is provided”).

59. 26 U.S.C. § 23(d) (2006) (citing “ethnic background” as a characteristic permitting “special needs” designation); Rev. Proc. 2008-66, 2008-2 C.B. 1107 (providing a \$12,150 tax credit in 2009 for the adoption of a child with special needs). Additionally, at least one state provides nonfinancial benefits to adults who adopt children of color, such as allowing nonresident adopters to finalize adoptions in their state’s courts when they would otherwise be precluded from doing so. IND. CODE ANN. § 31-19-2-3 (LexisNexis 2007) (stating that a nonresident adopting a hard-to-place child may file a petition for adoption within the state of Indiana rather than the nonresident’s home state).

60. This survey involved examination of agency Web sites and, where necessary for clarification, follow up telephone interviews with agency staff.

61. GLADNEY CTR. FOR ADOPTIONS, DOMESTIC ADOPTION PROGRAM HIGHLIGHTS 1 (2008), <http://www.adoptionsbygladney.com/resources/pdf/WhichProgramRightForYou.pdf> (offering programs for adopting African American and biracial infants and toddlers (\$11,100–\$32,100); Caucasian, Hispanic, Asian, and/or Native American infants and toddlers (\$26,500–\$46,500); and foster children (\$0–\$6,500)); ABBA Adoptions, <http://www.abbaadoption.com/> (last visited Mar. 3, 2010) (noting that costs vary); Abrazo, <http://www.abrazo.org/apinfo.html> (last visited Mar. 3, 2010) (ranging from \$18,000 to \$22,000); Adoption Support Ctr., Options for Adoption, [http://www.adoptionssupportcenter.com/options\\_adoptive.html#1](http://www.adoptionssupportcenter.com/options_adoptive.html#1) (last visited May 2, 2010) (offering three plans: “Caucasian or Hispanic” for \$24,000 to \$35,000, “International” for \$13,000 to \$42,000, and “Full and Biracial African American” for \$19,000 to \$27,000); Beacon House

estimates that up to one-half of all agencies employ race-based pricing.<sup>62</sup> Because of the large number of U.S. adoption agencies, and the fact that many of them do not advertise on the Internet, a comprehensive survey of all agencies' pricing practices was not feasible. Yet it seems likely that many more agencies utilize race-based pricing than the number advertising that they do.<sup>63</sup>

Two examples from this survey follow. The Adoption Support Center in Indianapolis, Indiana, employs one price for the adoption of white and Hispanic infants and another, lower price, for that of "full or biracial" African American babies.<sup>64</sup> Mississippi Children's Home Services advertises on its Web site that it has an income-based sliding scale for those individuals who adopt either a "full" African American baby or a baby with one African American parent and one Caucasian parent.<sup>65</sup> No other infant adoptions facilitated by this agency are subject to a sliding scale.<sup>66</sup>

While private adoption agency practices of eliciting racial preferences of adoptive parents and structuring fees to reflect racial supply and demand may be ethically troubling—a consideration explored in Part III—they do not appear to violate the Constitution. The First and Fourteenth Amendments and their respective penumbræ confer on individuals the "right to make decisions about

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Adoption Agency, <http://www.beaconhouseadoption.com/adoptionnutshell.html> (last visited Mar. 3, 2010) (costing between \$10,000 and \$40,000 depending on the type of adoption); Carolina Hope Christian Adoption Agency, <http://www.nightlight.org/adoption-services/domestic/expenses-and-financing.aspx> (last visited Mar. 3, 2010) (noting that costs depend upon the "individual characteristics" of the adoption); Children's Home Soc'y of N.C., <http://www.chsnc.org/adoption-families-interested-in-adoption.html> (last visited Mar. 3, 2010) (placing children based on parent preferences); A Child's Hope, [http://www.achildshope.com/adopt\\_faq.htm](http://www.achildshope.com/adopt_faq.htm) (last visited Mar. 3, 2010) ("How much it costs to adopt a child also depends upon a number of factors including your preferences."); A Gift of Hope, <http://www.agiftofhopeadoptions.com/services/> (last visited Mar. 3, 2010) (striving to "customize our services" because "every adoption situation is unique"); Mississippi Children's Home Servs., Information for Adoptive Parents, <http://www.mchscares.net/New%20MCHSCARES/adoptiveparent.html> (last visited Mar. 3, 2010) ("Minority adoption fees are based upon a sliding scale.").

62. Dusty Rhodes, *Baby Trade*, ILL. TIMES, Feb. 17, 2005, at 11, available at <http://www.illinoistimes.com/Springfield/article-1823-baby-trade.html> (quoting Beth Hall of Pact, an adoption agency in Oakland, California) (on file with the North Carolina Law Review).

63. See, e.g., QUIROZ, *supra* note 6, at 11 ("Social acceptability leads agencies to downplay the extent or existence of race-based practices . . .").

64. Adoption Support Ctr., *supra* note 61.

65. Mississippi Children's Home Servs., *supra* note 61.

66. *Id.*

intimate affiliations in private settings.”<sup>67</sup> The paradigmatic example is the right to make decisions about the creation and raising of a family, unfettered by government interference.<sup>68</sup> States may not lawfully deny an individual the right to select the race of the person with whom she will cohabit or marry.<sup>69</sup> Even those choices about intimate partners that are motivated by racial animus are not subject to legal regulation.<sup>70</sup> Thus, an individual’s racial preferences about an adopted child appear constitutionally unproblematic, protected both by the right to make decisions about family life and the right to make choices about the race of one’s intimate associates.<sup>71</sup>

The racially stratified market that has emerged around the accommodation of adoptive parents’ racial preferences is possible because state laws typically allow agencies wide latitude in setting fees for domestic infant adoption.<sup>72</sup> While “baby selling”—the direct payment of money to a person for that person’s child—is outlawed in

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67. See Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1407 (2004); see also Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 640 (1980) (naming the freedom to or not to procreate as a right of intimate association); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 802–03 (1989) (listing the freedom of association as a “principle[] of implicit constitutional law”); Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1445–46 (1992) (inferring a constitutional right to privacy from the freedom of association inherent in the First Amendment).

68. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (recognizing fundamental rights of parents to control custody and care of their children); *Moore v. City of E. Cleveland*, 431 U.S. 494, 513 (1977) (plurality opinion) (striking down a zoning ordinance that limited residential occupancy to a statutorily defined family); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974) (“[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”); *Roe v. Wade*, 410 U.S. 113, 166 (1973) (striking down state laws prohibiting abortion); *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972) (recognizing the privacy right of unmarried persons to use contraception); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that the use of contraception by married persons falls within the zone of privacy); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (finding that parents have fundamental right to “establish a home and bring up children”).

69. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down statutes prohibiting interracial marriage); *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964) (holding unconstitutional Florida’s law banning interracial cohabitation but not same-race cohabitation).

70. Elizabeth F. Emens, *Intimate Discrimination: The State’s Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1308 (2009) (noting both persistence of discrimination in the intimate realm and difficulty of regulating this realm through traditional forms of state action).

71. *But see* Banks, *supra* note 34, at 881 (arguing that the practice of state agencies of eliciting and facilitating adoptive parents’ racial preferences violates the Equal Protection Clause).

72. Krawiec, *supra* note 4, at 248; cf. LESLIE J. HARRIS ET AL., FAMILY LAW 1165 (1st ed. 1996) (describing that adoption is primarily governed by state law and noting significant variations among states).

every state and in international law,<sup>73</sup> state law does allow for agencies to charge a variety of fees for adoption-related services and to pass along to adoptive parents a birth mother's costs associated with pregnancy and childbirth.<sup>74</sup> Few states place a cap on, or significantly restrict, the costs that may be assessed.<sup>75</sup> No federal agency is charged with providing oversight of this process,<sup>76</sup> leaving adoption agencies free to charge whatever fees they deem appropriate.<sup>77</sup>

Important background for the discussion of the child-welfare and ethical concerns raised by race-based pricing is a look at how black children have traditionally fared in the private adoption and child-welfare systems, to which Part II now turns.

## II. BLACK CHILDREN IN THE ADOPTION SYSTEM

Throughout U.S. history, child-welfare officials and policy makers have neglected the well-being of black children in need of permanent homes. In the 1990s, this long-standing indifference came into sharp relief when federal legislators began to examine causes for and propose solutions to the disproportionate number of black children in the foster care system. Ultimately, Congress passed and President Clinton signed a federal law designed to accelerate the adoption process for black children in foster care.<sup>78</sup> Some of the concerns expressed in the debates preceding this law's passage are

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73. Krawiec, *supra* note 4, at 247; *see, e.g.*, ARIZ. REV. STAT. ANN. § 13-3625 (2010) (criminalizing the sale or purchase of a child); *see also* Hollinger & Cahn, *supra* note 13, at 16–17 (noting that a requirement of adoption is that payment of any adoption-related expenses was “not intended to induce a birth parent’s consent or relinquishment”); *cf.* SPAR, *supra* note 3, at 160, 176 (linking “baby-selling” to slavery).

74. Goodwin, *supra* note 4, at 66; *see supra* note 44 and accompanying text.

75. Krawiec, *supra* note 4, at 247; *see* FREUNDLICH, *supra* note 48, at 12. An adoptive parent in a state that includes adoption agencies within its public accommodation law might have a civil rights claim under that law if she could demonstrate that she was charged a particular fee by an agency for discriminatory reasons. *See, e.g.*, 775 ILL. COMP. STAT. ANN. 5/5-101(A)(12) (West 2009) (including nonsectarian adoption agencies in public accommodation provisions of state civil rights law); 775 ILL. COMP. STAT. ANN. 5/5-102(A) (West 2009) (making it a civil rights violation for anyone, on the basis of unlawful discrimination, to “[d]eny or refuse to another the full and equal enjoyment of the facilities, goods, and services of any public place of accommodation”). Establishing that a fee was borne of discriminatory motivation could well present difficult problems of proof, however, given the discretion enjoyed by agencies in setting fees.

76. Goodwin, *supra* note 4, at 66.

77. *See id.* at 66–67. *See generally* Dean Schabner, *Why It Costs More to Adopt a White Baby*, ABC NEWS, Mar. 12, 2002, <http://abcnews.go.com/US/story?id=91834&page=1> (describing agencies and facilitators that employ race-based pricing and offering some explanations for it).

78. *See infra* Part II.C for a discussion of the Multiethnic Placement Act.

relevant to the consideration of race-based pricing. This Part looks at the early treatment of black children unable to be raised by their birth families and then considers the federal legislation and surrounding debates.

### A. *Slavery, the Black Family, and Adoption*

In the pre-Civil War United States, black children who were slaves were subject to the absolute authority of their white owners and could be separated at will from their biological families.<sup>79</sup> When separation occurred, black children were often accepted by other black families that cared for and emotionally supported them.<sup>80</sup> Post-emancipation, many black children who could not be cared for by their biological families continued to be supported by extended families and family friends.<sup>81</sup> Meanwhile, child-welfare agencies maintained their focus on white children that had been developed during the era of slavery and largely were able to disregard black children, thus excluding them from their services.<sup>82</sup>

Adoption agencies that did work with pregnant black women would not for the most part have considered arranging adoptive placements by white families during the latter part of the nineteenth and first half of the twentieth century, because transracial placements were unlawful in many states and sharp racial segregation and anti-miscegenation laws were prevalent.<sup>83</sup> The prevailing child-welfare practice was to “match” children as closely as possible to their adoptive parents;<sup>84</sup> social workers and other child-welfare

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79. Lori Askeland, *Informal Adoption, Apprentices, and Indentured Children in the Colonial Era and the New Republic, 1605–1850*, in CHILDREN AND YOUTH IN ADOPTION, ORPHANAGES, AND FOSTER CARE: A HISTORICAL HANDBOOK AND GUIDE 3, 11 (Lori Askeland ed., 2006).

80. *Id.* at 12–13; Gilbert Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy*, 68 TEMP. L. REV. 1649, 1665 (1995); Barbara Bennett Woodhouse, *Waiting for Loving: The Child’s Fundamental Right to Adoption*, 34 CAP. U. L. REV. 297, 313 (2005).

81. Dianne Creagh, *Science, Social Work, and Bureaucracy: Cautious Developments in Adoption and Foster Care, 1930–1969*, in CHILDREN AND YOUTH IN ADOPTION, ORPHANAGES, AND FOSTER CARE: A HISTORICAL HANDBOOK AND GUIDE, *supra* note 79, at 31, 36.

82. RACIAL EQUITY IN WELFARE SYSTEM, *supra* note 2, at 7.

83. EVAN B. DONALDSON ADOPTION INST., FINDING FAMILIES FOR AFRICAN AMERICAN CHILDREN: THE ROLE OF RACE AND LAW IN ADOPTION FROM FOSTER CARE 12 (2008) [hereinafter FINDING FAMILIES], available at <http://adoptioninstitute.org/publications/MEPApaper20080527.pdf>.

84. JULIE BEREBITSKY, LIKE OUR VERY OWN: ADOPTION AND THE CHANGING CULTURE OF MOTHERHOOD, 1851–1950, at 137 (2000).



professionals who arranged adoptions<sup>85</sup> worked to ensure adoptive placements would be with families that shared the race, religion, and other salient characteristics of the birth parents.<sup>86</sup>

*B. Black Children in the Child-Welfare System and Transracial Placements*

In comparison with the minimal number of adoptive placements from the private adoption system, black children consistently have been heavily—disproportionately—involved in the public child-welfare system.<sup>87</sup> Beginning in the late 1960s, social workers began to place some of these black children with white families.<sup>88</sup> While the civil rights movement had engendered new ideas about the possibilities and benefits of racial integration,<sup>89</sup> a more pressing issue was that the number of healthy white infants available for adoption had begun to shrink as a result of increased access to contraceptives and abortion, as described in Part I.A.<sup>90</sup> By 1971, the number of black children who were adopted transracially had reached a peak of 2,574.<sup>91</sup>

The following year, the National Association of Black Social Workers (“NABSW”) issued a statement opposing transracial adoption of black children by white adults for any reason.<sup>92</sup> The NABSW’s stance was that black children belong in black families in order to develop a sense of their own racial and ethnic identity, learn about their histories and cultures, and develop the skills necessary for coping with race discrimination.<sup>93</sup> The organization argued that

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85. FINDING FAMILIES, *supra* note 83, at 12 (stating that by mid-century, adoption fell under the purview of professional social workers, who are governed by state and federal regulations).

86. BEREBITSKY, *supra* note 84, at 138.

87. Many factors contribute to the disproportionate representation of black children in foster care. See generally DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002) (citing poverty, racism, racial biases of adoption workers, and federal policies); Ruth McRoy et al., *Making MEPA-IEP Work: Tools for Professionals*, CHILD WELFARE, Mar.–Apr. 2007, at 49, 52 (citing racial bias in child-welfare decision making, poverty, abuse and neglect, institutional racism, and kinship care).

88. FINDING FAMILIES, *supra* note 83, at 12–13.

89. See JOYCE A. LADNER, MIXED FAMILIES 93 (1977) (describing adults who adopt black children transracially as having a commitment to “universal brotherhood” and a focus on a strong core family unit).

90. See *id.*

91. FINDING FAMILIES, *supra* note 83, at 13.

92. Nat’l Ass’n of Black Soc. Workers, *NABSW’s Position on Trans-Racial Adoption*, BLACK CAUCUS: THE BLACK CHILD, Summer 1973, at 9, 9.

93. *Id.*; see also Banks, *supra* note 34, at 879 n.11 (summarizing arguments proffered by the NABSW on transracial adoption). Scholars, politicians, and adoption advocates

adoptive placements of black children with white families were made not because they were best for the children but because of the demand for children by white parents that would otherwise go unmet.<sup>94</sup> Around this same time, many African American leaders criticized what they viewed as minimal and half-hearted efforts of adoption professionals to recruit black families—who had historically cared for, albeit informally, black children who could not live in their families of origin—into the formal adoption process.<sup>95</sup> In the wake of the NABSW statement, other adoption organizations such as the Child Welfare League of America and the North American Council on Adoptable Children also expressed concern about transracial placements as a solution to the problem of overrepresentation of black children in foster care.<sup>96</sup> Subsequently, the number of adoptions of black children by white adults declined—in 1973 the number was 1,091, and in 1974 it was 747.<sup>97</sup>

The issue of how best to address the disproportionate number of black children in foster care took on added urgency in the 1980s. In the early part of that decade, the population of children in foster care began to expand rapidly,<sup>98</sup> owing to changing federal child-welfare priorities that emphasized foster care over family reunification.<sup>99</sup> This trend continued throughout the decade.<sup>100</sup> The median length of stay for children in foster care increased to over two years, as children “drifted” from one temporary placement to another.<sup>101</sup> African American children waited the longest for adoptive placements.<sup>102</sup>

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have criticized—even demonized—the National Association of Black Social Workers (“NABSW”) for its stance. *See, e.g.,* BARTHOLET, *supra* note 49, at 111–17.

94. *See* Nat’l Ass’n of Black Soc. Workers, *supra* note 92, at 9.

95. FINDING FAMILIES, *supra* note 83, at 13.

96. *Id.*

97. RANDALL KENNEDY, *INTERRACIAL INTIMACIES* 396 (2003).

98. NAT’L COAL. FOR CHILD PROT. REFORM, *SETTING THE RECORD STRAIGHT ABOUT RECENT CHILD WELFARE HISTORY: A CHILD WELFARE TIMELINE, 1961 TO DATE*, at 1–2 (2009), <http://www.nccpr.org/reports/timeline> (noting sharp increase from 243,000 in the early eighties to present-day levels).

99. Martin Guggenheim, *Somebody’s Children: Sustaining the Family’s Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1728 (2000) (reviewing ELIZABETH BARTHOLET, *NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (1999)) (“[Despite the Adoption Assistance and Child Welfare Act of 1980,] [o]ut-of-home placement continued to be the principal child welfare policy in the United States through the 1980s.”).

100. *See* Martin Guggenheim, *The Foster Care Dilemma and What to Do About It: Is the Problem that Too Many Children Are Not Being Adopted Out of Foster Care or that Too Many Children Are Entering Foster Care?*, 2 U. PA. J. CONST. L. 141, 144–46 (1999); Guggenheim, *supra* note 99, at 1729.

101. *See* FINDING FAMILIES, *supra* note 83, at 14; Guggenheim, *supra* note 99, at 1727.

102. FINDING FAMILIES, *supra* note 83, at 14.

C. *The Multiethnic Placement Act: Rhetoric and Reality*

In 1994, in the wake of a high-profile case of a black child placed with and later killed by his same-race adoptive parents, Senator Howard Metzenbaum introduced the Multiethnic Placement Act (“MEPA”),<sup>103</sup> a bill that prohibited delay or denial of a foster or adoptive placement based solely on a child or adoptive family’s race.<sup>104</sup> A group of scholars and adoption advocates coalesced around the concept that race-matching policies were preventing the adoption of black children from foster care,<sup>105</sup> and the bill was signed into law.<sup>106</sup> After lobbying by the Congressional Black Caucus, language was inserted that required state agencies to make efforts to increase the number of foster and adoptive parents from racial and ethnic backgrounds of the children in foster care, although the law does not require or allocate funding for such efforts.<sup>107</sup> Two years later, in response to criticism that race matching was occurring in spite of MEPA,<sup>108</sup> Congress passed the Interethnic Adoption Provisions of 1996 (“IEP”),<sup>109</sup> which made it unlawful for agencies receiving federal funds to consider race in any way in making placement decisions.<sup>110</sup>

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103. Multiethnic Placement Act of 1994, Pub. L. No. 103-382, § 551, 108 Stat. 3518, 4056 (codified as amended at 42 U.S.C. §§ 1996b, 5115a (2006), *repealed in part* by Small Business Job Protections Act of 1996, Pub. L. No. 104-188, § 1808(d), 110 Stat. 1755, 1904 (codified at 42 U.S.C. § 1996b (2006)).

104. McRoy et al., *supra* note 87, at 50.

105. *Id.* at 54–55.

106. Multiethnic Placement Act § 551, 108 Stat. at 4056.

107. Patricia K. Jennings, *The Trouble with the Multiethnic Placement Act: An Empirical Look at Transracial Adoption*, 49 SOC. PERSP. 559, 562 (2006) (noting that MEPA-IEP does not mandate federal or state funding for communities of color); McRoy et al., *supra* note 87, at 55.

108. See generally Randall Kennedy, *Is the Multiethnic Placement Act Flawed? Yes: Race-Matching Is Horrendous*, A.B.A. J., Spring 1995, at 44, 44 (criticizing MEPA for allowing consideration of race).

109. Small Business Job Protection Act of 1996 (Removal of Barriers to Interethnic Adoption Provision (“IEP”)), Pub. L. No. 104-188, § 1808, 110 Stat. 1755, 1903 (codified at 42 U.S.C. § 1996b (2006)).

110. § 1808(c), 110 Stat. at 1904; see Admin. for Children & Families, U.S. Dep’t of Health & Human Servs., A Guide to the Multiethnic Placement Act of 1996 as Amended by the Interethnic Adoption Provisions of 1996, Chapter 1: Introduction, <http://www.acf.hhs.gov/programs/cb/pubs/mepa94/mepachp1.htm> (last visited Jan. 31, 2010). Section 1808(d) of the IEP repealed section 553 of MEPA, which allowed federally-funded adoption agencies to “consider the cultural, ethnic, or racial background of the child and the capacity of the prospective foster or adoptive parents to meet the needs of a child of such background as one of a number of factors used to determine the best interests of a child.” In 1997, Congress passed the Adoption and Safe Families Act of 1997 (“ASFA”). Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.). ASFA mandated an increased focus on reducing the length of foster care

MEPA-IEP does not apply to Native American children, whose adoptions are regulated by the Indian Child Welfare Act of 1978 (“ICWA”).<sup>111</sup> The IEP amendments created a private cause of action against public agencies that consider race in the placement decision.<sup>112</sup> MEPA-IEP represents a triumph of the notion that adoptions should be colorblind.<sup>113</sup>

Notwithstanding the passage of MEPA-IEP, the problem of disproportionate representation of black children in foster care persists. As of 2006, there were 510,000 children in foster care.<sup>114</sup> Of those children, black children constituted one-third;<sup>115</sup> the most recent census data available indicate that that number is disproportionate to the percentage of the U.S. child population that black children comprise (fifteen percent as of 2000).<sup>116</sup> While studies have documented small increases in the percentage of African American children being adopted transracially, researchers note that these children generally have been very young (under four) while the majority of black children awaiting placement—in other words, the children MEPA was designed to assist—were at least eight years old.<sup>117</sup> Some adoption professionals argue that even this modest increase is not attributable to MEPA but to other laws that provide incentives for states to move children from foster care to adoption.<sup>118</sup>

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placements and encouraging adoption of children in foster care who had been in foster care beyond a designated length of time. *See* Guggenheim, *supra* note 100, at 144.

111. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901–1963 (2006)). Adoptions are specifically regulated by section 1915 of the Act. *Id.* § 1915. The text of MEPA explicitly states that it is to have no effect on the Indian Child Welfare Act of 1978. 42 U.S.C. § 1996b(3) (2006).

112. 42 U.S.C. § 1996b(2) (2006) (establishing consideration of color in violation of MEPA to be a violation of the Civil Rights Act of 1964); 42 U.S.C. §§ 2000d, 2000d-7 (2006) (prohibiting racial discrimination under any federally funded program and providing for private right of action in case of such a violation).

113. *See* Maldonado, *supra* note 56, at 1457. *See generally* Laura Briggs, *Somebody's Children*, 2009 UTAH L. REV. 421, 453 (describing role of “liberal discourse of ‘color-blindness’” in MEPA debates).

114. CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVS., FOSTER CARE STATISTICS 1, 3 exhibit 1 (2009) [hereinafter FOSTER CARE STATISTICS], <http://www.childwelfare.gov/pubs/factsheets/foster.pdf>.

115. *See id.* at 8 (thirty-two percent); RACIAL EQUITY IN WELFARE SYSTEM, *supra* note 2, at 15 (thirty-six percent).

116. FINDING FAMILIES, *supra* note 83, at 11; RACIAL EQUITY IN WELFARE SYSTEM, *supra* note 2, at 15.

117. FINDING FAMILIES, *supra* note 83, at 33–34; *see also* McRoy et al., *supra* note 87, at 53–55 (noting that the adoption process is slower for black children than for white, notwithstanding federal legislation).

118. FINDING FAMILIES, *supra* note 83, at 34 (arguing that increases are due to AFSA rather than MEPA).

In addition to having little if any impact on the problem of black children in foster care waiting excessive lengths of time for permanent homes, MEPA has done nothing to regulate the race-based pricing that has arisen in the private system to accommodate white parents' same-race preferences. This is true for several reasons. MEPA only regulates the behavior of state governments and the agencies that contract with them. It does not purport to control or influence the decision making of adoptive parents about the race of the children they will adopt; and, as described in Part I.B., any such regulation would likely be deemed unconstitutional due to the protections afforded private choices regarding families. The provisions of MEPA also do not apply to private agencies that do not receive federal funds.<sup>119</sup> MEPA has simply moved the question of race in adoption policy out of the realm of legal regulation and into the realm of private choice.

In spite of the fact that MEPA does not by its terms regulate racial decision making by parents in private adoption, the debates surrounding its passage on the question of the desirability of transracial adoption do shed light on the issue of whether race-based pricing is a policy tool that serves black, adopted children well. Those debates are thus worthy of consideration here.

Scholars who support MEPA have criticized the NABSW for its pro-race-matching stance.<sup>120</sup> Elizabeth Bartholet, for example, has noted that black people who are adopted transracially have been shown in some studies to be more open to and positive about relationships with whites and more interested in living racially integrated lives.<sup>121</sup> Randall Kennedy has argued that white parents are uniquely positioned to teach black children "knowledge gleaned from their experience on the white side of the racial divide."<sup>122</sup> Black transracial adoptees in some studies have indicated that they are less likely to describe themselves with a racial descriptor, preferring to

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119. CHILD WELFARE INFO. GATEWAY, *supra* note 23, at 10.

120. Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1246 (1991) (describing race-matching policies as representing a "coming together of white segregationists with black nationalists and the merger of their racial separatist ideologies with "biologism"); Kennedy, *supra* note 108, at 44 (arguing that racial matching is not justified and suggesting that its supporters, such as the NABSW, are motivated by bigotry and paranoia); *see also* BARTHOLET, *supra* note 49, at 99-101 (describing the connection between these policies and the "delays and denial of placement that minority children face").

121. Bartholet, *supra* note 120, at 1218 (citing studies by Simon and Altstein).

122. KENNEDY, *supra* note 97, at 408.

identify as “human” rather than “black.”<sup>123</sup> Commentators also argue that concrete economic privileges enjoyed by white people can be shared with their black children in a way that redounds to their benefit.<sup>124</sup> Bartholet and Kennedy are what might be considered MEPA-IEP “purists”; that is, they do not believe that a racially matched adoptive placement has any advantages over a transracial one worthy of legal protection.<sup>125</sup> They also do not appear to believe that the state should take any special precautions when placing black children with white families to ensure that those families are equipped to address the challenges faced by black children or to contend with the practical difficulties of being a multiracial family.<sup>126</sup>

Many child-welfare experts argue that MEPA’s promotion of colorblindness does not serve the best interests of transracially adopted children.<sup>127</sup> They point to studies conducted by prominent adoption organizations suggesting that children of color adopted by white families may experience discomfort and a sense of alienation as they age, struggling to feel a sense of belonging within their cultures of origin.<sup>128</sup> These studies provide a counterweight to earlier studies

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123. Bartholet, *supra* note 120, at 1218. Professor Richard Banks suggests that not having a strongly defined racial identity might in fact expand life possibilities for a black child adopted by a white family. See Jeninne Lee-St. John, *Should Race Be a Factor in Adoptions?* TIME, May 27, 2008, <http://www.time.com/time/health/article/0,8599,1809722,00.html> (last visited Feb. 14, 2010) (quoting Banks).

124. Bartholet, *supra* note 120, at 1222 (“Indeed, it seems clear that for black children growing up in a white-dominated world, there would be a range of material advantages associated with having white parents and living in the largely white and relatively privileged world that such parents tend to frequent.”); see also Kim Forde-Mazrui, Note, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 951–52 (1994) (arguing that exposure to white adults in a family setting increases the likelihood that a black child will strive for and achieve academic, career, and monetary success).

125. See, e.g., BARTHOLET, *supra* note 49, at 114–15 (concluding that even mild race-matching preference is unwise social polity); Kennedy, *supra* note 108, at 44 (arguing that “no credible empirical support . . . substantiates” the notion that “all things equal, adults of the same race as a child will be better able to raise that child than adults of a different race.”).

126. See KENNEDY, *supra* note 97, at 467; David Crary, *Major Changes Urged in Transracial Adoption*, BOSTON.COM, May 26, 2008, [http://www.boston.com/news/nation/articles/2008/05/26/major\\_changes\\_urged\\_in\\_transracial\\_adoption/?page=2](http://www.boston.com/news/nation/articles/2008/05/26/major_changes_urged_in_transracial_adoption/?page=2) (quoting Bartholet arguing against any specific screening for parents seeking to adopt transracially on the grounds that social workers administering such screening will manipulate results in favor of a racially matched placement).

127. See, e.g., FINDING FAMILIES, *supra* note 83, at 43.

128. See EVAN B. DONALDSON ADOPTION INST., BEYOND CULTURE CAMP: PROMOTING HEALTH IDENTITY INFORMATION IN ADOPTION 9 (2009), [http://www.adoptioninstitute.org/publications/2009\\_11\\_BeyondCultureCamp.pdf](http://www.adoptioninstitute.org/publications/2009_11_BeyondCultureCamp.pdf); FINDING FAMILIES, *supra* note 83, at 22–23 (examining studies of transracial adoptees and advocating race-conscious adoption policies).

consistently cited by Bartholet and other race-matching opponents, which reported nearly “without exception . . . no significant difference in overall well-being between inracially and transracially adopted children.”<sup>129</sup> Proponents of these studies—who might be considered MEPA-IEP “realists”—argue in favor of a “race-conscious” adoption policy, in which transracial adoptions occur only where child-welfare officials have assessed a particular family’s ability to attend to the realities and potential challenges of parenting a child of a different race, provided training, and offered post-placement support.<sup>130</sup> This view is also supported by personal accounts of transracially adopted adults who attest to the pain and struggles growing up in white families that were so committed to the norm of colorblindness that they refused to acknowledge or address racial differences or racism.<sup>131</sup>

The purpose here is not to rehash debates over whether transracial adoption is a viable solution to the problem of the large and disproportionate numbers of black children in foster care awaiting adoption; nor is it to establish support for the notion that transracial adoption is, in its own right, a normatively desirable family formation. Rather, this Part has simply noted recent empirical and anecdotal support for the idea that adopted families formed through transracial adoption face unique social challenges such that these parents would benefit from training and support in advance of, and after, adoption. Some private agencies offer, even mandate, such training.<sup>132</sup> As will be developed further in Part III, rather than actively recruit black adults or require white adults to receive such training, some agencies rely on race-based “discounts” to encourage

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129. Mark E. Courtney, *The Politics and Realities of Transracial Adoption*, 76 CHILD WELFARE 749, 752–53 (1997) (criticizing earlier studies for lack of “methodological rigor,” including too-small sample sizes, bias in sample selection, and weaknesses in the longitudinal analysis).

130. FINDING FAMILIES, *supra* note 83, at 43; see ROTHMAN, *supra* note 11, at 232–34.

131. See, e.g., Jeni C. Wright, *Love Is Colorblind: Reflections of a Mixed Girl, in OUTSIDERS WITHIN: WRITING ON TRANSRACIAL ADOPTION* 27, 28–29 (2006) (“My wish is that instead [my mother] had given me the gift of a simple acknowledgement: that our home may be colorblind but outside sometimes wasn’t.”).

132. See, e.g., ADOPTION-LINK, FAMILY SELF-ASSESSMENT FOR TRANSRACIAL ADOPTION 1–2 (2010) (requiring families adopting transracially to complete self-assessment on racial attitudes and personal experiences with multiculturalism) (on file with the North Carolina Law Review); PACT, BUILDING COMMUNITIES ACROSS CULTURES 1 (2010) (requiring parents adopting transracially to participate in a Pact program on transracial families as well as an all day workshop) (on file with the North Carolina Law Review); PACT, REQUIRED READING FOR PACT PARENTS 1 (2010) (requiring transracially adopting parents to read materials on the topic) (on file with the North Carolina Law Review).

the white adults who dominate the private adoption system to adopt black children.

### III. THE HIGH COST OF RACE-BASED FEE STRUCTURES

The practice of charging individuals and couples more for a white baby may make sense for an agency from a profit-maximizing perspective.<sup>133</sup> In the absence of a regulatory scheme that does anything other than set broad parameters within which agencies may set their fees, agencies can hardly be faulted for obtaining from adoptive parents what they are willing to pay. And some agencies maintain that facilitating adoptions of white infants in fact costs more than other adoptions because they are forced to advertise more widely and for longer due to the relatively low number of white mothers wishing to place their babies for adoption.<sup>134</sup> Where agencies use profits realized through the adoption of white babies to subsidize adoption of children of color or to cover the costs of counseling birth mothers who ultimately decide to parent their babies, then such practice may appear to make a certain amount of child-welfare sense as well.<sup>135</sup>

Agencies that employ race-based pricing structures typically defend lower fees for black babies as necessary financial incentives to encourage families to adopt children they would otherwise not consider. A representative of the Mississippi Children's Home Service explains:

We provide a different fee scale for minority children because so many families want to adopt Caucasian infants and there are not many families available to adopt minority children. There are more birth mothers of minority children and we don't have as many families waiting for African American children. We

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133. See Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 344 (1978) ("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.")

134. Schabner, *supra* note 77 ("The difference between the costs for black and non-black babies is explained by the 'subsidies to help offset the costs of these adoptions' and because more advertising is needed to find non-black babies."). *But see* Goodwin, *supra* note 4, at 67 (arguing that because white children are so quickly adopted, parents should pay *lower* fees to adopt them if the fees accurately reflected agency costs).

135. QUIROZ, *supra* note 6, at 82 (reasoning that fees for adoptions of white children subsidize fees for other children); FREUNDLICH, *supra* note 48, at 18 (noting that agencies expend resources counseling pregnant women about adoption possibilities who ultimately decide not to place their children for adoption); *cf.* Schabner, *supra* note 77 (citing an adoption professional rejecting the notion that charging higher fees for white children allows them to charge less for adoptions of nonwhite children).



leave it to the birth mother to select the family, and birth mothers usually prefer adoptive parents of the same race. But we can't hold the child up in order to wait on a family. For a little while we switched to having one fee scale for all infants, but families, including those from different states and up north, complained that since the need is so great, why didn't we offer this incentive? We just want to get them placed, and if that means having a lower fee, then that's what we do.<sup>136</sup>

It may be that agencies—particularly those in areas with large majorities of white people—find it administratively easier to reduce fees to incentivize white families to adopt black children than to do the difficult work of recruiting black families. They likely are emboldened by MEPA, which, while it does not explicitly regulate private agencies, stands for the proposition that facilitating transracial adoption of black children by white families is responsible child-welfare practice.

Yet no data or anecdotal evidence support the notion that race-based pricing is essential to keep black infants from the foster care system and to ensure them timely adoptions.<sup>137</sup> In fact, the attempt by agencies to “incentivize” the adoption of black infants through lower, race-based fees is equally likely to repel those adoptive parents who specifically *want* to adopt a black child. The executive director of Pact, an Oakland, California, organization that facilitates adoptive placements only for children of color, has noted that black adoptive parents do not trust and thus decline to work with agencies that employ race-based pricing—whether or not they could save money by doing so—because these parents view the practice as racist.<sup>138</sup>

Experts argue that black adoptive families could be found—without having to employ race-based discounts—if only agencies

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136. Telephone Interview by Brandi Jones of Jerri Strickland, Mississippi Children's Home, in Jackson, Miss. (Oct. 5, 2009) (on file with the North Carolina Law Review); see also Rhodes, *supra* note 62 (discussing a view of adoption agency professionals that assigning a lower fee to a black child is essential to ensuring her adoptive placement).

137. Some child-welfare professionals believe that healthy babies of any race will always be adopted. See, e.g., Rhodes, *supra* note 62 (quoting Illinois adoption coordinator to the effect that adoptive families are always available for healthy babies).

138. Telephone Interview with Beth Hall, Co-founding Director, Pact, An Adoption Alliance (Feb. 23, 2010) (on file with the North Carolina Law Review); cf. Martha Satz & Lori Askeland, *Civil Rights, Adoption Rights: Domestic Adoption and Foster Care, 1970 to the Present*, in CHILDREN AND YOUTH IN ADOPTION, ORPHANAGES, AND FOSTER CARE: A HISTORICAL HANDBOOK AND GUIDE, *supra* note 79, at 55 (describing that for black adults, assigning any fees to the adoption of a child uncomfortably evokes images of slavery).

would make the effort to look.<sup>139</sup> Pact places eighty percent of its children in same-race placements.<sup>140</sup> The agency offers an income-based sliding scale for all adoptive parents, regardless of the race of the child.<sup>141</sup> Its director attributes its high rate of same-race placements to the fact that the agency actively recruits adoptive families of color as well as to the existence of racial diversity within its staff and board of directors.<sup>142</sup> Agencies that do not employ race-based pricing have found it unnecessary to ensure appropriate adoptive placement, whether by black adoptive parents or parents of other races.<sup>143</sup>

It is worth considering the appropriateness in the first instance of incentivizing through lower fees the adoption of black children by white adults. Given the special challenges that research shows are posed by transracial parenting,<sup>144</sup> many child-welfare professionals urge parents to think carefully and critically about whether they are adequately prepared to assume such a role.<sup>145</sup> As such, the use of financial incentives to induce white parents to undertake transracial parenting gives at least one child-welfare professional pause.<sup>146</sup> Randie Bencannen, a California adoption professional, explained, “We would never want money to be any kind of incentive for a Caucasian family to adopt an African American child. We want the

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139. See Satz & Askeland, *supra* note 138, at 55; see also Ruth-Anne Howe, *Redefining the Transracial Adoption Controversy*, 2 DUKE J. GENDER L. & POL’Y 131, 149 (1995) (“ ‘African-American families throughout the country are waiting to adopt infants . . . [and they] adopt at a rate of 4.5 times greater than European-American or Hispanic families.’ ” (quoting Judith K. McKenzie, *Adoption of Children with Special Needs*, FUTURE OF CHILDREN, Spring 1993, at 62, 72)).

140. Telephone Interview with Beth Hall, *supra* note 138.

141. See Pact, An Adoption Alliance, Pact’s Fee Structure, <http://www.pactadopt.org/adoptive/ap-fee.html> (last visited Mar. 16, 2010) (noting that adoptive parents pay between \$1,000 and \$10,000, depending on income).

142. Telephone Interview with Beth Hall, *supra* note 138.

143. See Rhodes, *supra* note 62 (noting that Adoption Services, a Texas agency, and Buckner Foster Care abandoned the practice of race-based pricing in 2000); Adoption-Link, Domestic Adoption Program, <http://www.adoption-link.org/african-american-program.aspx> (last visited Feb. 18, 2010) (noting flat-rate fees); Buckner Foster Care and Adoption Servs., <http://www.beafamily.org/adoption-dinfant-fee.shtml> (last visited Feb. 18, 2010) (noting sliding-scale fee system based on income).

144. See *supra* notes 127–31 and accompanying text.

145. See, e.g., Pact, *supra* note 141 (encouraging adoptive parents to realistically assess whether they are prepared to parent a child of another race).

146. Telephone Interview with Randie Bencannen, Co-Director, Domestic Adoption Program, Adoption Connection, in S.F., Cal. (Oct. 1, 2009) (on file with the North Carolina Law Review). Bencannen describes policies of offering lower fees for adopting black children as “misguided.” *Id.*

adoptive family to be completely comfortable and not have cost be a factor.”<sup>147</sup>

Some additional ethical concerns are raised by race-based pricing. First, given that market values pervade domestic infant adoption, those agencies that set lower fees for black children than for white ones send a message that black children are less valuable than white.<sup>148</sup> Irrespective of the question of whether or not staff in these agencies have racial animus, and whether or not children adopted pursuant to such pricing structures experience negative outcomes as a result, the message itself constitutes a form of discriminatory expression that does harm to racial-equality norms.<sup>149</sup> Second, while babies, even under race-based pricing structures, are not technically sold by the birth parents, they are nevertheless transferred to adoptive parents in exchange for a price that varies based on the possession—or lack—of certain desired traits.<sup>150</sup> As such, the baby himself, through no act of his own, has become commodified. Commodification critics point out that once some babies are permitted to be conceptualized based on their actual or perceived economic value, it can become impossible to maintain a “non-monetized” concept of the worth of all babies.<sup>151</sup> In this view, the market in adoption, in which race-based pricing has become a central part, harms personhood.<sup>152</sup>

Third, the concept that someone *should* be permitted to pay an exorbitant fee—relative to that assigned to black babies—to obtain a white baby reinforces the notion of whiteness as a property *right*.<sup>153</sup> It

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147. *Id.*

148. WILLIAMS, *supra* note 1, at 223 (“Although . . . this system [of offering lower fees for black children] was devised to provide ‘economic incentives’ for the adoption of ‘less requested’ children, in our shopping-mall world it had all the earmarks of a two-for-one sale.”).

149. Cf. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1538–40 (2000) (arguing that the expressive function of a law—apart from the law’s purposes or effects—should trigger constitutional analysis); Dov Fox, *Racial Classification in Assisted Reproduction*, 118 YALE L.J. 1844, 1893 (2009) (applying discriminatory expression analysis to sperm donor catalogs that highlight the race of sperm donors and arguing that such catalogs transmit racially discriminatory values).

150. See, e.g., Ertman, *supra* note 55, at 10 (noting that the differential between children of color and other children derives from supply and demand rather than from agency costs). For a discussion of agencies that practice race-based pricing, see *supra* notes 60–66 and accompanying text.

151. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1927 (1987).

152. *Id.* at 1927–28.

153. Professor Cheryl Harris writes:

is morally problematic, even if not unlawful,<sup>154</sup> for not-for-profit agencies to be able to profit from charging enormous fees to adoptive parents desperate for, and insistent on, a white baby. Parents who pay exorbitant fees to obtain children may inappropriately expect these children to be perfect—worth the money spent.<sup>155</sup> Finally, the high fees that can be collected in conjunction with the adoptions of white infants create an incentive for independent facilitators to pressure poor, pregnant white women to part with their babies in the expectation of financial compensation.<sup>156</sup>

The potentially negative impact of race-based pricing on the welfare of black children and racial equality goals counsels that adoption agencies would do well to consider abandoning these fee structures. The existence of agencies that successfully place black children into adoptive homes without using race-based pricing suggests that less stigmatizing methods such as income-based sliding scales can function appropriately. To the extent that agencies find that they cannot locate permanent homes for black children absent a policy of assessing lower fees for them, this eventuality does not lead to a conclusion that race-based pricing is necessary. Agencies faced

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In a society structured on racial subordination, white privilege became an expectation and . . . whiteness became the quintessential property for personhood. The law constructed “whiteness” as an objective fact, although in reality it is an ideological proposition imposed through subordination. . . . Because the law recognized and protected expectations grounded in white privilege (albeit not explicitly in all instances), these expectations became tantamount to property that could not permissibly be intruded upon without consent. . . . [T]he dominant and subordinate positions within the racial hierarchy [became] reified in law.

Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1730–31 (1993).

154. The public policy doctrine authorizes the revocation of a tax exemption where a private, nonprofit organization violates fundamental public policy. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 598 (1983) (revoking tax-exempt status from racially discriminatory private university). However, as described previously, see *supra* note 67 and accompanying text, the right to discriminate in matters of intimate association is firmly established.

155. Schabner, *supra* note 77; cf. NANCY C. BAKER, *BABY SELLING: THE SCANDAL OF BLACK-MARKET ADOPTION* 126 (1978) (explaining that parents actively adopting through the black market “are often misled about the baby’s health and heredity”). Cindy Friedmutter told Dean Schabner of ABC News, “‘The thing that is scary to me is that children aren’t perfect . . . . People who are willing to pay high fees for healthy kids don’t always get perfect children. If you pay \$50,000, it doesn’t mean that child is going to be healthy, gorgeous and smart.’” Schabner, *supra* note 77. Cindy Friedmutter was formerly of the Evan B. Donaldson Adoption Institute. 147 CONG. REC. 20,975 (2001).

156. Schabner, *supra* note 77; BAKER, *supra* note 155, at 126 (describing psychological pressure placed on pregnant women by independent adoption facilitators). See generally VIVIANA A. ZELIZER, *PRICING THE PRICELESS CHILD* 189–207 (1985) (describing the history of commercialized adoption).

with a birth mother seeking to place a black child could simply refer her to one of the many agencies that do not use race-based pricing and yet are able to find permanent adoptive homes.<sup>157</sup>

### CONCLUSION

Race-based pricing deeply troubles child-welfare professionals and implicates racial-equality norms. Given the existence of agencies that function without such pricing structures, it is incumbent on agencies to seriously consider abandoning them.

Even if adoption agencies did abandon race-based pricing, however, the practice of setting fees based on the child's race and its perceived desirability could continue in the realm of independent adoptions because of the absence of legislation that sets meaningful limits on what adoptive parents would be permitted to pay. As long as infant adoptions are permitted to be facilitated privately, and in the absence of uniform and stringent price regulation, market values—with their attendant risks of financial coercion<sup>158</sup>—will continue to play a prominent role in the adoption of children. For now, scholars seem resigned to the domination of infant adoption by market values.<sup>159</sup> Similarly, legislators and policy makers have focused on finding ways to subsidize, rather than to limit, the costs of adoption.<sup>160</sup> However, as this exploration of race-based pricing has shown, the existence of a market system in adoption can lay waste to a central tenet of adoption policy; namely, that placements should be made in a manner that serves a child's best interest.<sup>161</sup> As such, a candid reappraisal of the position of the market in adoptions is in order.

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157. Telephone Interview with Beth Hall, *supra* note 138 (noting that her agency routinely receives calls from agencies in other states looking for adoptive homes for children of color).

158. See Mirah Riben, *Adoption Fees: Ethical Considerations for All the Parties in Adoption Placements*, 220 PLI/CRIM 371, 378 (2009) (“[P]rospective adopters receive online instructions about how to use financial incentives to persuade ambivalent pregnant women to relinquish their children. Accepting such payments risks a contested adoption and potentially puts a mother in legal jeopardy of baby selling.” (internal quotations omitted)).

159. See, e.g., Goodwin, *supra* note 4, at 76–78 (proposing price caps, taxation, and information as methods of counteracting some of the harmful effects of free-market forces in adoption); Krawiec, *supra* note 4, at 255–57 (arguing for acceptance of domination of surrogacy, egg donation, and adoption by market norms and proposing that bans on baby selling be lifted).

160. FREUNDLICH, *supra* note 48, at 20 (noting tax credits and insurance as favored policy proposals).

161. See *supra* note 13 and accompanying text.