

2011

Re-Regulating the Baby Market: A Call for a Ban on Payment of Birth Mother Living Expenses

Andrea B. Carroll

Louisiana State University Law Center, acarro6@lsu.edu

Follow this and additional works at: https://digitalcommons.law.lsu.edu/faculty_scholarship



Part of the Family Law Commons

Repository Citation

Carroll, Andrea B., "Re-Regulating the Baby Market: A Call for a Ban on Payment of Birth Mother Living Expenses" (2011). *Journal Articles*. 165.

https://digitalcommons.law.lsu.edu/faculty_scholarship/165

This Article is brought to you for free and open access by the Faculty Scholarship at LSU Law Digital Commons. It has been accepted for inclusion in Journal Articles by an authorized administrator of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

***Re-Regulating the Baby Market:
A Call for a Ban on Payment of Birth Mother Living Expenses***

Andrea B. Carroll*

About the laudability of a general scheme of domestic adoption, few would disagree. Adoption provides a means of building families, hope for children in need, and a stabilizing influence for a society searching for aid in caring for its most helpless citizens.¹ Still, one need not look far to find that the United States' domestic adoption system is broken.² Evidence pointing toward such a conclusion abounds. More than half a million children cycle through the American foster care system annually, many with little chance of being either reunified with their birth families or placed in a permanent adoptive home.³ Even outside the sphere of state-run care, this country's domestic adoption scheme fails many of the players involved. Adoptive parents, in particular, often become victims of the flawed scheme of private and agency adoption.⁴ And though it may seem at first blush as though adoptive parents are the member of the adoption triad⁵ least deserving of sympathy, the result of a legal scheme that disfavors adoptive parents so substantially is quite troubling. In 2009 alone, nearly 13,000 children were

* C.E. Laborde, Jr. Professor of Law, Louisiana State University, Paul M. Hebert Law Center. I thank Lucy McGough, Shaun Shaughnessy, and the participants at the 2009 Washington and Lee University School of Law Children and the Law Workshop for the opportunity to present and receive valuable feedback on an earlier draft of this piece. I am also grateful to the LSU Law Center for its generous research support. Casey Faucon and Irina Fox (LSU Law Center Class of 2010) provided excellent research assistance.

¹ See Karen March, *Perception of Adoption as Social Stigma: Motivation for Search and Reunion*, 57 J. MARR. & FAM. 653, 654 (2005).

² See Erika Lynn Kleiman, *Caring for Our Own: Why American Adoption Law and Policy Must Change*, 30 COLUM. J. L. & SOC. PROBS. 327 (1997); Lynn D. Wardle, *Parentlessness: Adoption Problems, Paradigms, Policies, and Parameters*, 4 WHITTIER J. CHILD. & FAM. ADVOC. 323, 352 (2005); Candice M. Zierdt, *Compensation for Birth Mothers: A Challenge to the Adoption Laws*, 23 LOY. U. CHI. L. J. 25, 36 (1991).

³ Joan R. Rycraft, *How to Improve the Likelihood of Successful Family Reunification*, in ADOPTION FACTBOOK IV: THE MOST COMPREHENSIVE SOURCE FOR ADOPTION STATISTICS NATIONWIDE 351–52 (2007).

⁴ See *Sale of Children in Interstate and Foreign Commerce: Hearings Before the Subcomm. on Criminal Justice of the Comm. On the Judiciary House of Representatives*, 95th Cong., 1st Sess. 1, 4 (1977) [hereinafter *Hearings*]; Thomas Jacobs, *Rights and Obligations*, in 1 CHILDREN & THE LAW § 4.25 (2009) (adoptive family generally assumes the financial risks in a domestic adoption); John R. Maley, *Wrongful Adoption: Monetary Damages as a Superior Remedy to Annulment for Adoptive Parents Victimized by Adoption Fraud*, 20 IND. L. REV. 709 (1987).

⁵ See Zierdt, *supra* note 2, at 26 (describing the “adoption triad” as that involving adoptive parents, birth parents, and the children to be adopted).

adopted from countries outside the United States, the vast majority of those children infants.⁶ And while there is every reason to believe that wonderful families were created in these matches, the choice of so many American families to avoid domestic adoption is a significant one, because it tends to negatively impact the fate of American children in need of adoption.

Even a glance at state law on infant adoption quickly illuminates the rationale of adoptive parents' decision to adopt internationally. Planned domestic adoptions of newborns fail at an alarming rate.⁷ Perhaps more importantly, when such failures occur, adoptive parents find themselves out more than just emotion. Significant monies are nearly always at stake as well.⁸

In 1978, renowned law and economics scholar and jurist Richard Posner published an article in which he described child adoption as a market activity, essentially a sale or trade "realized by a process of voluntary transaction."⁹ He went on to catalogue the substantial disparity between supply and demand in the adoption context, largely created by government prevention of the operation of a legal market for babies.¹⁰ Posner opined that this model of adoption regulation has led to a black market for babies, and concluded that an experimental move toward a free market in adoption may solve the supply and demand mismatch plaguing the

⁶ See *Intercountry Adoption: Office of Children's Issues, United States Department of State*, http://adoption.state.gov/news/total_chart.html (last visited Feb. 15, 2010).

⁷ As I intend the phrase here, the failure of a planned adoption includes both a decision by birth parents not to place the child with adoptive parents as previously planned, and removal of the child from the adoptive home after placement but before the adoption is finalized. See Katherine Q. Seelye, *Specialists Report Rise in Adoptions that Fail*, N.Y. TIMES, Mar. 24, 1998, at A14 (stating that there are no exact national statistics available on failed adoptions); Susan Scherreik, *Adoption: Now There's the Cyber-Stork*, BUSINESS WEEK, Aug. 14, 2000, at Lifestyle (estimating a failure rate of between twenty-five and fifty percent); Dan Gearino, *Money, Hope Lost in Failed Adoptions*, QUAD-CITY TIMES, Feb. 21, 2006, available at http://www.qctimes.com/news/local/article_4fd32e38-7947-5759-9d40-8c6f2948e2cc.html (survey conducted by Adopted Families magazine found that twenty-nine percent of readers had a failed adoption). But see Alfred Kadushin & Frederick W. Seidl, *Adoption Failure: A Social Work Postmortem*, in 16 SOCIAL WORK 32, 34 (1971) (arguing that the agency adoption failure rate is extremely low).

⁸ The total cost of a domestic adoption is frequently as much as \$40,000, depending on the circumstances and the state of adoption. Child Welfare Information Gateway, *Costs of Adopting*, http://www.childwelfare.gov/pubs/s_cost/s_costb.cfm (last visited Feb. 16, 2010).

⁹ Elisabeth M. Landes & Richard Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 324 (1978).

¹⁰ *Id.*

system.¹¹ Specifically, Posner suggested that adoption agencies take a fee surplus they could generate by charging wealthy couples comparatively more for their services and use those profits to pay pregnant women considering terminating their pregnancies through abortion to incentivize them to instead carry the baby to term and relinquish it for adoption.¹² The value of the experiment, Posner suggested, would be the creation of data that could help to remedy the supply and demand disparity, including figures as to what adoptive parents would be willing to pay for a child and just how much money pregnant women would require to carry a baby to term and subsequently execute a surrender of parental rights.¹³

Posner's article was exceptionally controversial,¹⁴ so much so that pundits speculated it may be one of the most significant reasons he could never be successfully nominated to serve as a justice of the United States Supreme Court.¹⁵ Posner himself felt compelled to defend the article even twenty-five years later, noting that he never "advocated 'baby selling,'" but rather argued that state law of the 1970s, which capped the sums which could be paid in connection with child adoption at a nominal amount, might be modified experimentally to determine whether it would increase the baby supply.¹⁶

Thirty years later, Posner has come startlingly close to getting his wish. Baby selling is still uniformly illegal in the United States,¹⁷ but our system of domestic infant adoption is an

¹¹ *Id.* at 334–46.

¹² *Id.* at 347–48.

¹³ *Id.* at 348.

¹⁴ See Ronald A. Cass, *Coping with Life, Law, and Markets: A Comment on Posner and the Law-and-Economics Debate*, 67 B.U. L. REV. 73 (1978); Jane M. Cohen, *Posnerism, Pluralism, Pessimism*, 67 B.U. L. REV. 105 (1987).

¹⁵ Robert S. Boynton, *Sounding Off: A Review of Richard Posner's "Public Intellectuals,"* THE WASHINGTON POST BOOK WORLD, Jan. 20, 2002, available at http://www.robertboynton.com/articleDisplay.php?article_id=75.

¹⁶ Howard Bashman, *How Appealing*, http://howappealing.law.com/20q/2003_12_01_20q-appellateblog_archive.html#107025481874565902 (last visited Feb. 16, 2010).

¹⁷ See ARIZ. REV. STAT. ANN. § 8-114(C) (West 2007); COLO. REV. STAT. ANN. § 19-5-213(1)(a) (West 2005 & Supp. 2008); DEL. CODE ANN. tit. 13, § 928(a) (2006); IOWA CODE ANN. § 600.9(1) (West 2001 & Supp. 2008); KAN. STAT. ANN. § 59-2121(a) (2005); KY. REV. STAT. ANN. § 199.590(2) (West 2006); LA. REV. STAT. ANN. § 14:286 (West 2004); MICH. COMP. LAWS ANN. § 710.54 (West 1995); MISS. CODE ANN. § 43-15-23 (West 2008); NEV. REV. STAT. ANN. § 127.287(1) (West 2008); N.H. REV. STAT. ANN. § 170-B:13(II) (2002 & Supp. 2008); N.Y.

exceptionally expensive transaction which comes rather close.¹⁸ The typical domestic adoption costs roughly \$40,000, a substantial sum even when one considers the fees of the agents and lawyers involved.¹⁹ One of the most significant of the expenses surrounding the domestic adoption of a newborn comes not from any of these professional fees,²⁰ however, but rather from the payment of living expenses to the expectant mother.²¹ Adoptive parents typically front these monies, under the sanction of state law authorizing such expenditures.²²

This scheme, under which substantial living expenses are paid to a prospective birth mother,²³ who makes the ultimate choice to parent her child the vast majority of the time,²⁴ is fraught with problems. Comparisons between baby selling and a scheme allowing for the

SOC. SERV. LAW § 374(6) (McKinney 2003 & Supp. 2009); N.C. GEN. STAT. ANN. § 48-10-102(a) (West 2000); OHIO REV. CODE ANN. § 3107.055(C) (West 2005 & Supp. 2008); OR. REV. STAT. ANN. § 109.311(3) (West 2003 & Supp. 2008); S.C. CODE ANN. § 63-9-310(F) (1987 & Supp. 2007); VT. STAT. ANN. tit. 15A, §7-105 (2007); VA. CODE ANN. § 63.2-1218 (West 2002); WASH. REV. CODE ANN. § 9A.64.030(1) (West 2000 & Supp. 2008) (biological parent shall not receive anything of value as a result of adoption unless statute so provides). *See also* W. MEEZAN, S. KATZ & E. RUSSO, ADOPTIONS WITHOUT AGENCIES: A STUDY OF INDEPENDENT ADOPTIONS 182–98 (1978); Vanessa S. Browne-Barbour, *Bartering for Babies: Are Preconception Agreements in the Best Interests of Children?*, 26 WHITTIER L. REV. 429, 473 (2004) (arguing that preconception agreements also constitute baby selling and are void and unenforceable).

¹⁸ *See* Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 71 (1987) (legal scheme allowing the payment of substantial sums to birth mothers is really a sale in disguise). *But see* Zierdt, *supra* note 2, at 44 (compensating birth mothers is not baby selling).

¹⁹ Child Welfare Information Gateway, Costs of Adopting, http://www.childwelfare.gov/pubs/s_cost/s_costb.cfm (last visited Feb. 16, 2010). It is not at all uncommon for complicated domestic adoptions to approach \$100,000. Laura Mansnerus, *Market Puts Price Tags on the Priceless: How Bundles of Joy Not for Sale are Sold*, N.Y. TIMES, Oct. 28, 1998 at A1.

²⁰ The professional fees for adoption are typically limited to a single day in court and a single day of lawyer resources. Thomas Jacobs, *Adoption: Fees and Expenses*, 1 CHILDREN & THE LAW: RIGHTS AND OBLIGATIONS § 4:26 (2009).

²¹ *See generally* Gearino, *supra* note 7; Melinda Lucas, *Adoption: Distinguishing Between Gray Market and Black Market Activities*, 34 FAM. L.Q. 553, 556 (2000); Ryan Mills, *Woman Fakes Pregnancy in Adoption Scam*, SCRIPPSNEWS, Aug. 1, 2008, available at <http://www.scrippsnews.com/node/35187/12187>.

²² *See, e.g.*, FLA. STAT. ANN. § 63.212(1)(d) (West 2005 & Supp. 2009); TENN. CODE ANN. § 36-1-135 (West 1984); UTAH CODE ANN. § 76-7-203 (West 1990).

²³ Some have argued against the use of terms such as “birth family,” “birth parent,” and “birth mother,” arguing that they are imbued with negative connotations. *See* John Lawrence Hill, *What Does It Mean to Be a “Parent?” The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 357 (1991). Nonetheless, this author uses these terms to describe the biological parents of the adopted child as the phrases are still the most well-recognized and accepted labels for these groups.

²⁴ It is estimated that as many as eighty percent of pregnant women who work with adoption agencies and attorneys to select a placement for their unborn child decide to parent the child instead of going through with the adoptive placement. Laura Mansnerus, *Market Puts Price Tags on the Priceless: How Bundles of Joy Not for Sale are Sold*, N.Y. TIMES, Oct. 28, 1998 at A1.

payment of substantial sums for housing or other expenses of daily life are almost inescapable.²⁵ Questions about the voluntariness of a birth mother's surrender arise in connection with the payment of living expenses and are more weighty than the concerns present for any other type of adoption-related expense.²⁶ Moreover, birth mothers often actually profit from the payment of their living expenses, necessarily raising the same concerns which have been used to justify a ban on baby selling.²⁷ Perhaps worst is that because not all birth mothers are similarly valued, allowing prospective adoptive parents to pay birth mother living expenses serves to injure society as a whole by striating race and class divisions.

Part I of this article describes the varying approaches states have taken to regulation of housing payments and other similar expenses in connection with child adoption. State laws allowing virtually unfettered payment of actual living expenses and state bans on all such payments, along with solutions on the continuum between these two, are explored. Part II details the harms of existing state rules sanctioning the payment of birth mother living expenses by prospective adoptive parents, including a discussion of the slippery slope that separates the

²⁵ "Baby selling" is generally statutorily defined as the giving or receiving of anything of value in exchange for the consent to or placement of a child for adoption. *See e.g.*, CAL. PENAL CODE § 273(a) (West 2008) ("It is a misdemeanor for any person or agency to pay, offer to pay, or to receive money or anything of value for the placement for adoption or for the consent to an adoption of a child."). Certainly, housing payments would be construed as a "thing of value."

²⁶ *See Hearings, supra* note 4, at 13; Katy Ruth Klinke, *The Baby M Controversy: A Class Distinction*, 18 OKLA. CITY U. L. REV. 113, 118–19 (1993). *See generally* Jonathan M. Purver, *Undue Influence in Obtaining Parent's Consent to Adoption of Child*, 8 AM. JUR. PROOF OF FACTS 2d 481 (2009) (describing public policies implicated by the use of coercion in obtaining consent to relinquish a child).

²⁷ Baby selling is against public policy because it preys on a financially subordinate birth mother, providing monetary incentive to relinquish her parenting rights. *See* Matthew H. Baughman, *In Search of Common Ground: One Pragmatist Perspective on the Debate Over Contract Surrogacy*, 10 COLUM. J. GENDER & L. 263, 271–72 (2001) ("when poor people try to sell their organs or poor women sell their bodies for sex, they may be engaging in the transaction out of brute necessity, and not because they have made a rational choice from a position of equal bargaining power"); Daniel J.H. Greenwood, *Beyond the Counter-Majoritarian Difficulty: Judicial Decision-Making in a Polynomic World*, 53 RUTGERS L. REV. 781, 820 (2001) ("baby-selling . . . [is] not permitted in decent market societies perhaps because it seems hard to believe that any normal person would sell their baby . . . except under duress, that is, when faced with a set of choices that no one should have to face"). Allowing the payment birth mother living expenses raises the same concerns – the payments incentivize a birth mother to relinquish her parental rights in exchange for a more comfortable standard of living. *See also* Joan Heifetz Hollinger, *Adoption Law, in 3 THE FUTURE OF CHILDREN: ADOPTION* 49 (1993) (characterizing adoption as a donative transaction which is not supposed to generate financial gain).

payment of expenses from baby selling, the potential for serious questions regarding the voluntariness of the birth mother's surrender of her child, the likely discouragement of prospective adoptive parents from pursuing domestic adoption, and the misplacement of the burden of supporting society's most needy citizens. Part III concludes by calling for a change from prevalent models of regulation to an outright ban on the payment of living expenses. Such a change is important, even necessary, because it is not merely the financial fate of adoptive parents at stake. Rather, the future of American children, and ultimately, the welfare of our society, could be affected significantly by improvement of our domestic adoption scheme.

I. STATE LAW ALTERNATIVES TO REGULATION OF LIVING EXPENSE PAYMENTS

At least one thing regarding the financial implications of child adoption is clear. The American states, along with their international counterparts,²⁸ uniformly prohibit—even criminalize—the practice of baby selling.²⁹ Express prohibitions, typically found in the form of criminal statutes, exist in thirty-two states,³⁰ and at least fourteen states have jurisprudence

²⁸ See Hague Conference on Private International Law: Final Act of the Seventeenth Session, Including the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, May 29, 1993, http://www.hcch.net/index_en.php?act=conventions.text&cid=69 (last visited Feb. 23, 2010) [hereinafter Hague Conference] (articulating an international policy for the protection of children during inter-country adoption).

²⁹ See MEEZAN, KATZ & RUSSO, *supra* note 17, at 182; Browne-Barbour, *supra* note 17, at 473.

³⁰ See ALA. CODE § 26-10A-34 (1992); CAL. PENAL CODE § 273(a) (West 2008); COLO. REV. STAT. ANN. § 19-5-213(2) (West 2005 & Supp. 2008); FLA. STAT. ANN. § 63.212(1)(c) (West 2005 & Supp. 2009); GA. CODE ANN. § 19-8-24 (West 2003 & Supp. 2008); IDAHO CODE ANN. § 18-1511 (2006); IND. CODE ANN. § 35-46-1-9(a) (West 2004 & Supp. 2008); IOWA CODE ANN. § 600.9(1)(c) (West 2001 & Supp. 2008); KY. REV. STAT. ANN. § 199.493(2) (West 2006); LA. REV. STAT. ANN. § 14:286 (West 2004); MD. CODE ANN., CRIM. LAW § 3-603(a) (West 2002); MASS. GEN. LAWS ANN. ch. 210, § 11(A) (West 2007); MICH. COMP. LAWS ANN. § 710.54(1) (West 1995); MINN. STAT. ANN. § 259.55 (West 2007); MISS. CODE ANN. § 43-15-23(5) (West 2008); MO. ANN. STAT. § 568.175(1) (West 1999); MONT. CODE ANN. § 42-7-105(3) (2007); NEV. REV. STAT. ANN. § 127.288(2) (West 2008); N.J. STAT. ANN. § 9:3-39.1(d) (West 2002 & Supp. 2008); N.Y. SOC. SERV. LAW § 389(2) (McKinney 2003); N.C. GEN. STAT. ANN. § 48-10-102(b) (West 2000); N.D. CENT. CODE § 12.1-31-05 (1997 & Supp. 2005); OKLA. STAT. ANN. tit. 21, § 866 (West 2002 & Supp. 2008); 18 PA. CONS. STAT. ANN. § 4305 (West 1983); S.C. CODE ANN. § 16-3-1060 (1987 & Supp. 2007); S.D. CODIFIED LAWS § 25-6-4.1 (2004); TENN. CODE ANN. § 36-1-109 (West 2002 & Supp. 2008); TEX. PENAL CODE ANN. § 25.08(b) (Vernon 2003 & Supp. 2008); UTAH CODE ANN. § 76-7-203 (West 2004 & Supp. 2008); VA. CODE ANN. § 63.2-1218 (West 2002); WASH. REV. CODE ANN. § 9A.64.030(3) (West 2000 & Supp. 2008); W. VA. CODE ANN. § 48-22-803 (West 2002); WIS. STAT. ANN. § 948.24 (West 2008 & Supp. 2008).

decrying the practice.³¹ For more than fifty years, the practice of baby selling has been rather strongly and uniformly disapproved in this country.³²

Yet it's no secret that money changes hands in child adoption.³³ In fact, the cost of infant and toddler adoption outside the state-run foster care system is staggering, with a number of players taking a cut.³⁴ Lawyers are paid handsomely to serve as baby brokers; agencies facilitate adoptions for handsome sums.³⁵ And despite the prohibition on baby selling, state laws

³¹ See *People v. Daniel*, 241 Cal. Rptr. 3 (Cal. App. 3d 1987) (defendant convicted of "sale of a person" for demanding \$90,000 in exchange for consent to the adoption of his seventeen-month-old daughter); *Adoption House, Inc. v. P.M.*, 2003 WL 23354141 (Del. Fam. Ct. 2003) (improper payment of living expenses in connection with adoption); *Douglas v. State*, 438 S.E.2d 361 (Ga. 1994) (offer of automobile in exchange for the biological mother's consent to adoption violated statute making it unlawful to induce parents to part with their children); *In re Kindgren*, 540 N.E.2d 485 (Ill. App. 1989) (consent fraudulently obtained where adoptive parents paid birth mother \$10,000 to cover medical expenses without being aware of what the expenses were); *In re Adoption of Baby Boy M.*, 18 P.3d 304 (Kan. Ct. App. 2001) (trial court erred in ordering adoptive parents to reimburse Medicaid for payments for birth mother's expenses where no law requires them to do so); *State v. Roberts*, 471 So. 2d 900 (La. App. 2d Cir. 1985) (biological mother violated statute by traveling to Texas to relinquish her son for sum of \$3,000); *State v. Runkles*, 605 A. 2d 111 (Md. 1992) (mother persuaded by her boyfriend to relinquish child to boyfriend's father for \$4,000 did not violate statute as mother did not know of payment); *Doe v. Kelly*, 307 N.W.2d 438 (Mich. Ct. App. 1981); *Balouch v. State*, 938 So. 2d 253 (Miss. 2006) (defendant violated statute by offering to relinquish her child for \$5,000); *State v. Daugherty*, 744 S.W.2d 849 (Mo. Ct. App. 1988) (defendant guilty of trafficking of children for offering to pay \$1,000 for the purposes of adoption of a child); *Gray v. Maxwell*, 293 N.W.2d 90 (Neb. 1980) (relinquishment of a child done in consideration of promise to pay a sum of money in excess of legitimate expenses against public policy); *Matter of Adoption of Stephen*, 645 N.Y.S.2d 1012 (N.Y. Fam. Ct. 1996) (living expenses paid to birth mother and rent by adoption agency violated statute); *In re Adoption of Baby Boy P.*, 700 N.Y.S.2d 792 (N.Y. Fam. Ct. 1999) (reducing excessive agency fees and disallowing both attorney fees for services provided to the natural father and car maintenance expenses); *Matter of Adoption of Alyssa, L.B.*, 501 N.Y.S.2d 595 (N.Y. Sur. 1986) (expenses limited to those incidental to birth and care of adoptive child, pregnancy or care of adoptive child's mother, or placement of child, not including automobile for birth mother); *In re Adoption of P.E.P.*, 407 S.E.2d 505 (N.C. 1991) (payment of fees including travel expenses, medical expenses of the parent, six month lease of an apartment, weekly stipend for three months, and attorney fees violated statute); *In re Baby Girl D.*, 517 A.2d 925 (Pa. 1986) (allowing adoptive parents to pay only expenses related to care of child); *DeJesus v. State*, 889 S.W.2d 373 (Tex. App. 1994) (defendant convicted of the sale of a child because over \$10,000 in payments were made outside of the confines of the statute); *Thacker v. State*, 889 S.W.2d 380 (Tex. Ct. App. 1994) (mother and attorney violated statute when attorney paid mother a total of \$12,000 for her five children).

³² See, e.g., *New York ex rel. Anonymous v. Anonymous*, 195 N.Y.S.2d 1009 (N.Y. Sup. Ct. 1959); *Hearings*, *supra* note 4.

³³ See Maggie Jackson, *Aspiring Adoptive Parents Face Greed, Competition, Exploitation Society*, L.A. TIMES, Apr. 23, 1995, at A1.

³⁴ See Child Welfare Information Gateway, *Costs of Adopting*, http://www.childwelfare.gov/pubs/s_cost/s_costb.cfm (last visited Feb. 16, 2010).

³⁵ State laws generally permit agencies to charge service fees for each adoption they facilitate. See ALA. CODE § 26-10-4.1 (1992); DEL. CODE ANN. tit. 13 § 928(b) (2006); D.C. CODE ANN. § 4-1410 (2008); 720 ILL. COMP. STAT. ANN. 525/1 (West 2003 & Supp. 2009); KAN. STAT. ANN. § 59-2121(a) (2005); KY. REV. STAT. ANN. § 199.590(2) (West 2006); LA. CH. CODE ANN. art. 1200(B) (West 2004); MD. CODE ANN., FAM. LAW § 5-362(b) (West 2006); MONT. CODE ANN. § 452-7-101(1) (2007); NEV. REV. STAT. ANN. § 127.275 (West 2008); N.H. REV. STAT. ANN. § 170-B:13(1) (2002 & Supp. 2008); N.J. STAT. ANN. § 9:3-39.1(e) (West 2002 & Supp. 2008); N.M. STAT. ANN. §

generally sanction the payment of a rather broad variety of fees in connection with an adoptive placement.³⁶

Among those approved payments are agency or lawyer fees for making the match between the prospective adoptive parents and the birth family and otherwise facilitating the adoption,³⁷ medical expenses associated with the pregnancy and birth of the child³⁸ as well as

32A-5-34(B) (West 2003 & Supp. 2008); N.Y. SOC. SERV. LAW § 374(6) (McKinney 2003 & Supp. 2009); N.C. GEN. STAT. ANN. § 48-10-103(e) (West 2000 & Supp. 2008); OHIO REV. CODE ANN. § 3107.055(C) (West 2005 & Supp. 2008); OKLA. STAT. ANN. tit. 10, § 7505-3-2 (West 2007); 23 PA. CONS. STAT. ANN. § 2533(d) (West 2001); S.C. CODE ANN. § 63-9-310(F) (1987 & Supp. 2007); VT. STAT. ANN. tit. 15A, § 7-104 (2007); VA. CODE ANN. § 63.2-1218 (West 2002); W. VA. CODE ANN. § 48-22-803 (West 2002). An attorney may be paid additional fees by the adoptive family for services in connection with an adoption. *See* ARIZ. REV. STAT. ANN. § 8-114(D) (2007); COLO. REV. STAT. ANN. § 19-5-213(1)(a) (West 2005 & Supp. 2008); FLA. STAT. ANN. § 63.097(2) (West 2005); LA. CH. CODE ANN. art. 1200(B) (West 2004); MISS. CODE ANN. § 43-15-23(4) (West 2008); N.H. REV. STAT. ANN. § 170-B:13(1) (2002 & Supp. 2008); N.C. GEN. STAT. ANN. § 48-10-103(a) (West 2000 & Supp. 2008); N.D. CENT. CODE § 14-15-10(1) (2004); OHIO REV. CODE ANN. § 3107.055(C) (West 2005 & Supp. 2008); 23 PA. CONS. STAT. ANN. § 2533(d) (West 2001); S.C. CODE ANN. § 63-9-310(F) (1987 & Supp. 2007); TENN. CODE ANN. § 36-1-109 (West 2002 & Supp. 2008); UTAH CODE ANN. § 76-7-203 (West 2004 & Supp. 2008); W. VA. CODE ANN. § 48-22-803 (West 2002); WIS. STAT. ANN. § 48.913(1) (West 2008 & Supp. 2008).

³⁶ In many states, it is permissible for adoptive parents to pay for medical expenses, hospital expenses, maternity clothing, legal fees, prenatal care, counseling and mental examinations, placement fees, and any court costs relating to the birth of the child they intend to adopt. *See, e.g.*, ALA. CODE § 26-10-4.1 (1992); ARIZ. REV. STAT. ANN. § 8-114(A) (2007); CONN. GEN. STAT. ANN. § 45a-728c (West 2004).

³⁷ *See, e.g.*, DEL. CODE ANN. tit. 13, § 928(b) (2006) (service fee may be charged by an adoption agency “for each adoption in an amount not exceeding the cost of services rendered, to be paid by the adopting parent or parents”); KAN. STAT. ANN. § 59-2121(a) (2005) (“Except as otherwise authorized by law, no person shall request, receive, give or offer to give any consideration in connection with an adoption, or a placement for adoption, other than (1) reasonable fees for legal and other professional services rendered in connection with the placement or adoption not to exceed customary fees for similar services by professionals of equivalent experience and reputation where the services are performed . . . (2) reasonable fees in the state of Kansas of a licensed child-placing agency”).

³⁸ *See* ALA. CODE § 26-10-4.1 (1992); ARIZ. REV. STAT. ANN. § 8-114(A) (2007); ARK. CODE ANN. § 9-9-221(a) (West 2002); CAL. FAM. CODE § 8610(a) (West 2004); FLA. STAT. ANN. § 63.097(2) (West 2005); GA. CODE ANN. § 19-8-13(c) (West 2003); IDAHO CODE ANN. § 18-1511 (2006); 720 ILL. COMP. STAT. ANN. 525/4 (West 2003 & Supp. 2009); IND. CODE ANN. § 35-46-1-9(b) (West 2004 & Supp. 2008); KAN. STAT. ANN. § 59-2121(a) (2005); LA. CH. CODE ANN. art. 1200(B) (West 2004); ME. REV. STAT. ANN. tit. 18, §9-306(a) (1998); MD. CODE ANN., FAM. LAW § 5-362(b) (West 2006); MICH. COMP. LAWS ANN. § 710.54(5) (West 1995); MINN. STAT. ANN. § 259.55 (West 2007); MISS. CODE ANN. § 43-15-23(4) (West 2008); MO. ANN. STAT. § 453.075(1) (West 2003); MONT. CODE ANN. § 42-7-101(1) (2007); NEV. REV. STAT. ANN. § 127.287(3) (West 2008); N.H. REV. STAT. ANN. § 170-B:13(1) (2002 & Supp. 2008); N.J. STAT. ANN. § 9:3-39.1(e) (West 2002 & Supp. 2008); N.M. STAT. ANN. § 32A-5-34(B) (West 2003 & Supp. 2008); N.Y. SOC. SERV. LAW § 374(6) (McKinney 2003 & Supp. 2009); N.C. GEN. STAT. ANN. § 48-10-103(e) (West 2000 & Supp. 2008); N.D. CENT. CODE § 14-15-10(1) (2004); OHIO REV. CODE ANN. § 3107.055(C) (West 2005 & Supp. 2008); OKLA. STAT. ANN. tit. 10, § 7505-3.2 (West 2007); OR. REV. STAT. ANN. § 109.311(1) (West 2003 & Supp. 2008); 23 PA. CONS. STAT. ANN. § 2533(d) (West 2001); S.C. CODE ANN. § 63-9-310(F) (1987 & Supp. 2007); TENN. CODE ANN. § 36-1-109 (West 2002 & Supp. 2008); TEX. PENAL CODE ANN. § 25.08(b) (Vernon 2003 & Supp. 2008); UTAH CODE ANN. § 76-7-203 (West 2004 & Supp. 2008); VT. STAT. ANN. tit. 15A, § 7-103(a) (2007); VA. CODE ANN. § 63.2-1218 (West 2002); WASH. REV. CODE ANN. § 9A.64.030(2) (West 2000 & Supp. 2008); W. VA. CODE ANN. § 48-22-803(e) (West 2002); WIS. STAT. ANN. § 48.913(1) (West 2008 & Supp. 2008).

expenses associated with procuring the required mental health counseling for relinquishing birth mothers,³⁹ legal fees for completing the adoption paperwork and judicial proceedings,⁴⁰ and expenses for care of the child between birth and placement.⁴¹ Such fees are routinely accepted as permissible, even in states prohibiting the payment of “anything of value” in connection with the placement of a child for adoption.⁴² The central idea behind the allowance of such expenses,

³⁹ See ARIZ. REV. STAT. ANN. § 8-114(A) (2007); CONN. GEN. STAT. ANN. § 45a-728 (West 2004); IND. CODE ANN. § 35-46-1-9(b) (West 2004 & Supp. 2008); LA. CH. CODE ANN. art. 1200(B) (West 2004); ME. REV. STAT. ANN. tit. 18-A, § 9-306(a) (1998); MICH. COMP. LAWS ANN. § 710.54(5) (West 1995); MINN. STAT. ANN. § 259.55 (West 2007); MISS. CODE ANN. § 43-15-117(4) (West 2008); MO. ANN. STAT. § 453.075(1) (West 2003); MONT. CODE ANN. § 42-7-101(1) (2007); N.H. REV. STAT. ANN. § 170-B:13(1) (2002 & Supp. 2008); N.J. STAT. ANN. § 9:3-39.1(e) (West 2002 & Supp. 2008); N.M. STAT. ANN. § 32A-5-34(B) (West 2003 & Supp. 2008); N.C. GEN. STAT. ANN. § 48-10-103(e) (West 2000 & Supp. 2008); OKLA. STAT. ANN. tit. 10, § 7505-3.2 (West 2007); 23 PA. CONS. STAT. ANN. § 2533(d) (West 2001); TENN. CODE ANN. § 36-1-109 (West 2002 & Supp. 2008); TEX. PENAL CODE ANN. § 25.08(b) (Vernon 2003 & Supp. 2008); UTAH CODE ANN. § 76-7-203 (West 2004 & Supp. 2008); VT. STAT. ANN. tit. 15A, § 7-103(a) (2007); VA. CODE ANN. § 63.2-1218 (West 2002); WIS. STAT. ANN. § 48.913(1) (West 2008 & Supp. 2008).

⁴⁰ See ALA. CODE § 26-10-4.1 (1992); ARIZ. REV. STAT. ANN. § 8-114(A) (2007); ARK. CODE ANN. § 9-9-221(a) (West 2002); COLO. REV. STAT. ANN. § 19-5-213(1)(a) (West 2005 & Supp. 2008); DEL. CODE ANN. tit. 13, § 928(b) (2006); FLA. STAT. ANN. § 63.097(2) (West 2005); IDAHO CODE ANN. § 16-1515(1) (2006); 720 ILL. COMP. STAT. ANN. 525/4.1(g) (West 2003 & Supp. 2009); KAN. STAT. ANN. § 59-2121(a) (2005); KY. REV. STAT. ANN. § 199.590(6) (West 2006); LA. CH. CODE ANN. art. 1200(B) (West 2004); ME. REV. STAT. ANN. tit. 18-A, § 9-306(a) (1998); MD. CODE ANN., FAM. LAW § 5-362(b) (West 2006); MICH. COMP. LAWS ANN. § 710.54(5) (West 1995); MINN. STAT. ANN. § 259.55 (West 2007); MISS. CODE ANN. § 43-15-117(4) (West 2008); MO. ANN. STAT. § 453.075(1) (West 2003); MONT. CODE ANN. § 42-7-101(1) (2007); N.H. REV. STAT. ANN. § 170-B:13(1) (2002 & Supp. 2008); N.J. STAT. ANN. § 9:3-39.1(e) (West 2002 & Supp. 2008); N.M. STAT. ANN. § 32A-5-34(B) (West 2003 & Supp. 2008); N.Y. SOC. SERV. LAW § 374(6) (McKinney 2003 & Supp. 2009); N.C. GEN. STAT. ANN. § 48-10-103(e) (West 2000 & Supp. 2008); N.D. CENT. CODE § 14-15-10(1) (2004); OHIO REV. CODE ANN. § 3107.055(C) (West 2005 & Supp. 2008); OKLA. STAT. ANN. tit. 10, § 7505-3.2 (West 2007); 23 PA. CONS. STAT. ANN. § 2533(d) (West 2001); S.C. CODE ANN. § 63-9-310(F) (1987 & Supp. 2007); TENN. CODE ANN. § 36-1-109 (West 2002 & Supp. 2008); TEX. PENAL CODE ANN. § 25.08(b) (Vernon 2003 & Supp. 2008); UTAH CODE ANN. § 76-7-203 (West 2004 & Supp. 2008); VT. STAT. ANN. tit. 15A, § 7-103(a) (2007); VA. CODE ANN. § 63.2-1218 (West 2002); WASH. REV. CODE ANN. § 9A.64.030(2) (West 2000 & Supp. 2008); W. VA. CODE ANN. § 48-22-803(e) (West 2002); WIS. STAT. ANN. § 48.913(1) (West 2008 & Supp. 2008).

⁴¹ See ALASKA STAT. § 25.23.090(a) (2007); ARIZ. REV. STAT. ANN. § 8-133 (2007); ARK. CODE ANN. § 9-9-221(a) (West 2002); CAL. FAM. CODE § 8610(a) (West 2004); FLA. STAT. ANN. § 63.097(2) (West 2005); GA. CODE ANN. § 19-8-13(c) (West 2003); 720 ILL. COMP. STAT. ANN. 525/1 (West 2003 & Supp. 2009); IOWA CODE ANN. § 600.9(2) (West 2001 & Supp. 2008); KAN. STAT. ANN. § 59-2121(a) (2005); KY. REV. STAT. ANN. § 199.590(6) (West 2006); LA. CH. CODE ANN. art. 1200(B) (West 2004); ME. REV. STAT. ANN. tit. 18-A, § 9-306(a) (1998); MINN. STAT. ANN. § 259.55 (West 2007); MONT. CODE ANN. § 42-7-101(1) (2007); N.H. REV. STAT. ANN. § 170-B:13(1) (2002 & Supp. 2008); N.M. STAT. ANN. § 32A-5-34(B) (West 2003 & Supp. 2008); N.C. GEN. STAT. ANN. § 48-10-103(e) (West 2000 & Supp. 2008); N.D. CENT. CODE § 14-15-10(1) (2004); OHIO REV. CODE ANN. § 3107.055(C) (West 2005 & Supp. 2008); OKLA. STAT. ANN. tit. 10, § 7505-3.2 (West 2007); 23 PA. CONS. STAT. ANN. § 2533(d) (West 2001); S.C. CODE ANN. § 63-9-310(F) (1987 & Supp. 2007); TEX. PENAL CODE ANN. § 25.08(b) (Vernon 2003 & Supp. 2008); VT. STAT. ANN. tit. 15A, § 7-103(a) (2007); VA. CODE ANN. § 63.2-1218 (West 2002); W. VA. CODE ANN. § 48-22-803(e) (West 2002).

⁴² See, e.g., ARIZ. REV. STAT. ANN. § 8-114(G) (2007) (prohibiting compensation for consenting to place a child for adoption). *But see* ARIZ. REV. STAT. ANN. § 9-114(A) (2007) (allowing a court to approve any reasonable and necessary expenses incurred in connection with the adoption, including costs for medical and hospital care and

even in view of a widespread prohibition on baby selling, is that these expenses are necessary and direct consequences of the birth and placement of the child,⁴³ which should be a financially neutral transaction for any birth parent willing to make the difficult choice of concluding a pregnancy by placing the child for adoption.⁴⁴

One possible payment stands out from these others, however, as more controversial and worthy of additional scrutiny—namely, the payment of birth parent living expenses during the period of pregnancy and perhaps even for some period after the birth of the child. The vast majority of states allow prospective adoptive parents, and the agencies and lawyers with whom they work to facilitate adoptions, to pay the rent, utilities, and other housing-related expenses of birth parents.⁴⁵ Indeed, only five states forbid—either legislatively or judicially—all such

examinations for the mother and child, counseling fees, legal fees, agency fees, living expenses, and any other costs the court finds reasonable and necessary). *See also* IND. CODE ANN. § 35-46-1-9(a) (West 2004 & Supp. 2008) (establishing the transfer of property for consent to adoption as a Class D felony). *But see* IND. CODE ANN. § 35-46-1-9(b) (West 2004 & Supp. 2008) (allowing payment for attorney’s fees, hospital and medical, agency fees, birth parent counseling, costs of housing, utilities, phone service, or any additional itemized necessary living expense for birth mother during the second or third trimester of pregnancy and not more than six weeks after birth, maternity clothing, travel expenses that relate to the pregnancy or adoption, and actual wages lost).

⁴³ Douglas H. Reiniger, *Ethical Considerations in Representing Birth Parents: Regulation of Adoption Expenses*, 211 PLI/Crim 183, 185 (2007).

⁴⁴ *See* Academy of California Adoption Lawyers, <http://www.acal.org/> (last visited Feb. 22, 2010). The Academy of California Adoption Lawyers describes payments from adoptive parents to birth parents as for the purpose of making adoption a “financially neutral option for the birth mother,” rather than a money-making opportunity. *See also* Jennifer L. Watson, *Growing a Baby for Sale or Merely Renting a Womb: Should Surrogate Mothers be Compensated for Their Services?*, 6 WHITTIER J. CHILD. & FAM. ADVOC. 529, 539 (2007); *Hearings, supra* note 4, at 17–18 (testimony of William Acosta); Zierdt, *supra* note 2, at 62.

⁴⁵ *See* ALA. CODE § 26-10-4.1 (1992); ARIZ. REV. STAT. ANN. § 8-114(A) (2007); CAL. PENAL CODE § 273(b) (West 2008); CONN. GEN. STAT. ANN. § 45a-728c (West 2004); FLA. STAT. ANN. § 63.097(2) (West 2005); IDAHO CODE ANN. § 16-1515(1) (2006); 720 ILL. COMP. STAT. ANN. 525/4.1(a) (West 2003 & Supp. 2009); IND. CODE ANN. § 35-46-1-9(b) (West 2004 & Supp. 2008); IOWA CODE ANN. § 600.9(2) (West 2001 & Supp. 2008); KAN. STAT. ANN. § 59-2121(a) (2005); LA. CH. CODE ANN. art. 1200(B) (West 2004); ME. REV. STAT. ANN. tit. 18-A, § 9-306(a) (1998); MICH. COMP. LAWS ANN. § 710.54(3) (West 1995); MINN. STAT. ANN. § 259.55 (West 2007); MISS. CODE ANN. § 43-15-117(4) (West 2008); MO. ANN. STAT. § 453.075(1) (West 2003); MONT. CODE ANN. § 42-7-101(1) (2007); NEV. REV. STAT. ANN. § 127.287(3) (West 2008); N.H. REV. STAT. ANN. § 170-B:13(1) (2002 & Supp. 2008); N.J. STAT. ANN. § 9:3-39.1 (West 2002 & Supp. 2008); N.M. STAT. ANN. § 32A-5-34(B) (West 2003 & Supp. 2008); N.Y. SOC. SERV. LAW § 374(6) (McKinney 2003 & Supp. 2009); N.C. GEN. STAT. ANN. § 48-10-103(a) (West 2000 & Supp. 2008); N.D. CENT. CODE § 14-15-10(1) (2004); OHIO REV. CODE ANN. § 3107.055 (West 2005 & Supp. 2008); OKLA. STAT. ANN. tit. 10, § 7505-3.2 (West 2007); 23 PA. CONS. STAT. ANN. § 2533(d) (West 2001); S.C. CODE ANN. § 63-9-310(F) (1987 & Supp. 2007); TENN. CODE ANN. § 36-1-109 (West 2002 & Supp. 2008); UTAH CODE ANN. § 76-7-203 (West 2004 & Supp. 2008); VT. STAT. ANN. tit. 15A, § 7-103(a) (2007); VA. CODE ANN. § 63.2-1218 (West 2002); WIS. STAT. ANN. § 48.913(1) (West 2008 & Supp. 2008).

payments.⁴⁶ Still, state law varies rather significantly when it comes to precisely what living expenses can permissibly be covered by adoptive parents without crossing the line into an illegal child sale. Models of state regulation vary from allowance of these payments without restriction to a complete ban, but tend to center around more moderate schemes, including sanctioning only the payment of “reasonable” living expenses, capping these expenses at a specific dollar amount, or providing numerically unlimited payments, but only for a very short window of time surrounding the birth of the child.⁴⁷

⁴⁶ See COLO. REV. STAT. ANN. § 19-5-213(1)(a) (West 2005 & Supp. 2008); DEL. CODE ANN. tit. 13, § 928(a) (2006); MD. CODE ANN., FAM. LAW § 5-362(a) (West 2006); DeJesus v. State of Texas, 889 S.W.2d 373 (Tex. App. 1994); Thacker v. State of Texas, 889 S.W.2d 380 (Tex. App. 1994); In re Baby Girl D., 517 A. 2d 925 (Pa. 1986).

⁴⁷ See CONN. GEN. STAT. ANN. § 45a-728c (West 2004) (living expenses allowed up to \$1,500); FLA. STAT. ANN. § 63.097(2) (West 2005) (reasonable living expenses allowed for up to six weeks post-partum); IDAHO CODE ANN. § 18-1511 (West 2010) (living expenses allowed during pregnancy and for period not to exceed six weeks post-partum); 720 ILL. COMP. STAT. ANN. 525/4.1(a) (West 2003 & Supp. 2009) (reasonable living expenses allowed for no more than 120 days prior to birth mother’s expected date of delivery and for no more than sixty days after birth of child); IND. CODE ANN. § 35-46-1-9(b) (West 2004 & Supp. 2008) (living expenses allowed during second or third trimester of pregnancy and not more than six weeks after childbirth, not to exceed \$1000); IOWA CODE ANN. § 600.9(2) (West 2001 & Supp. 2008) (living expenses allowed for no longer than thirty days after birth); KAN. STAT. ANN. § 59-2121(a) (2005) (reasonable living expenses allowed if incurred as a result of the pregnancy); LA. CH. CODE ANN. art. 1200(B) (West 2004) (living expenses allowed for a reasonable time before birth and for no more than forty-five days after birth); ME. REV. STAT. ANN. tit. 18-A, § 9-306(a) (1998) (living expenses for biological mother and father allowed); MICH. COMP. LAWS ANN. § 710.54(3) (West 1995) (living expenses allowed for birth mother before birth and for no more than six weeks after birth); MINN. STAT. ANN. § 259.55 (West 2007) (reasonable living expenses allowed if needed to maintain an adequate standard of living that birth mother is unable to otherwise maintain); MISS. CODE ANN. § 43-15-117(4) (West 2008) (mother’s reasonable living expenses allowed); MO. ANN. STAT. § 453.075(1) (West 2003) (living expenses allowed if within the norms of the community in which the birth mother resides); MONT. CODE ANN. § 42-7-101(1) (2007) (temporary living costs for birth mother allowed); NEV. REV. STAT. ANN. § 127.287(3) (West 2008) (necessary living expenses related to birth of the child allowed); N.H. REV. STAT. ANN. § 170-B:13(1) (2002 & Supp. 2008) (living expenses allowed if necessary to maintain an adequate standard of living that birth mother is otherwise unable to maintain); N.J. STAT. ANN. § 9:3-39.1(e) (West 2002 & Supp. 2008) (living expenses of birth mother allowed during period of pregnancy and for period not to exceed four weeks after termination of pregnancy); N.M. STAT. ANN. § 32A-5-34(B) (West 2009) (living expenses of birth mother and dependent children allowed for a reasonable time before birth or placement of the adoptee and for no more than six weeks after birth or placement of the adoptee); N.Y. SOC. SERV. LAW § 374(6) (McKinney 2009) (reasonable and actual expenses for housing allowed for a reasonable time not to exceed sixty days prior to birth and latter of thirty days after birth or thirty days after parental consent to adoption); N.C. GEN. STAT. ANN. § 48-10-103(a) (West 2000 & Supp. 2008) (ordinary living expenses of birth mother allowed during pregnancy and for no more than six weeks after birth); N.D. CENT. CODE § 14-15-10(1) (2004) (living expenses allowed if needed to maintain an adequate standard of living that birth mother is unable to otherwise maintain); OHIO REV. CODE ANN. § 3107.055(C) (West 2005 & Supp. 2008) (living expenses of birth mother allowed not to exceed \$3,000 incurred during pregnancy through the sixtieth day after minor’s birth); OKLA. STAT. ANN. tit. 10, § 7505-3.2 (West 2007) (reasonable living expenses allowed if incurred during adoption planning process or during pregnancy not to exceed two months after birth of minor or after consent of birth mother); 23 PA. CONS. STAT. ANN. § 2533(d) (West 2001) (living expenses of birth mother allowed for reasonable time before birth and for no more than six weeks after birth); S.C. CODE ANN. §63-9-310(F) (1987 & Supp. 2007) (reasonable living expenses allowed for a reasonable period of

A. *The Gold Card: Expenses without Limitation*

In view of the general state law prohibition on baby selling, no state's statute sanctions the payment of birth parent living expenses and expressly describes those permissible expenses as unlimited. Rather, states sanctioning adoptive parent payment of birth parent living expenses often describe permissible payments in very general terms, such as those "related to the placement of the child."⁴⁸ Even when living expenses are expressly mentioned by statute, the trend is to stop at saying simply that such expenses may be paid to birth parents without running afoul of state law criminalizing sales the object of which is a human being.⁴⁹ Still, jurisprudence in a number of states indicates that courts are often willing to allow substantial, even unfettered, expenditures for living, so long as the expenses were actually incurred by the birth family.⁵⁰

B. *"Reasonableness" and "Necessity" Limitations*

Far more common than statutes without any express boundaries for the payment of living expenses are state statutes which specifically sanction prospective adoptive parents' payment of

time); TENN. CODE ANN. § 36-1-109 (West 2002 & Supp. 2008) (reasonable and actual expenses allowed for housing for a reasonable period not to exceed ninety days prior to or forty-five days after birth or surrender or parental consent to adoption); UTAH CODE ANN. § 76-7-203 (West 2004 & Supp. 2008) (temporary living expenses during pregnancy or confinement allowed); VT. STAT. ANN. tit. 15A, § 7-103(a) (2007) (living expenses of mother allowed for reasonable time before birth and for no more than six weeks after birth); VA. CODE ANN. § 63.2-1218 (West 2002) (reasonable and necessary expenses for shelter allowed when birth mother unable to support herself); WIS. STAT. ANN. § 48.913(1) (West 2008 & Supp. 2008) (living expenses of birth mother allowed, not to exceed \$5,000, only to protect welfare of birth mother or fetus).

⁴⁸ See e.g., ALASKA STAT. § 25.23.090(a) (2007) (adoptive parents must file report showing any expenses incurred in connection with the birth of the minor, placement of the minor with petitioner, medical or hospital care received by the mother or by the minor during the mother's prenatal care and confinement, and services relating to the adoption or to the placement of the minor for adoption that were received by or on behalf of the petitioner, either natural parent of the minor, or any other person); ARK. CODE ANN. § 9-9-211(a) (West 2002) (petitioner in a proceeding for adoption shall file a full accounting showing any expenses in connection with the birth of the child and placement for adoption); KY. REV. STAT. ANN. § 199.590(6) (West 2006) (a listing of expenses of the biological parent or parents for any purpose related to the adoption allowed may be submitted for the court's approval or modification).

⁴⁹ See ME. REV. STAT. ANN. tit. 18-A, § 9-306(a) (1998) (living expenses for the biological mother and child and for the biological father allowed); MISS. CODE ANN. § 43-15-117(4) (West 2008) (nothing precluding the payment of mother's living expenses); OR. REV. STAT. ANN. § 109.311(1) (West 2003 & Supp. 2008) (living expenses related to the adoption).

⁵⁰ See *Brod v. Matter of an Adoption*, 522 So. 2d 973 (Fla. Dist. Ct. App. 1988) (intermediary may properly pay on behalf of adoptive parents the documented living expenses of a birth mother). See generally JACOBS, *supra* note 4, § 4.25 (describing state law as generally allowing for the payment of living expenses).

birth parent living expenses only when such expenses are “reasonable” or “necessary.” At least twenty-one states adopt such a rule.⁵¹ State law varies widely on the issue of what is reasonable and necessary, with some states providing no statutory guidance as to the meaning of the terms in this context.⁵² Moreover, the timing of the reasonableness determination has a significant impact on the effectiveness of the rule in weeding out baby sales. Ironically, most states adopting a reasonableness or necessity test to review the propriety of expense payments select the time at which rational decisions about expense propriety are least likely to be made—namely, at finalization hearings.⁵³ Other states provide for a determination of reasonableness or necessity at some earlier time.⁵⁴

1. The Meat of the Rule: What Expenses Are Reasonable or Necessary?

Arizona gives what perhaps is the best guidance as to the substantive limitations of reasonableness or necessity rules. State statutes there specifically provide that in assessing living

⁵¹ See ALA. CODE § 26-10-4.1 (1992); ARIZ. REV. STAT. ANN. § 8-114(A) (2007); CAL. PENAL CODE § 273(b) (West 2008); FLA. STAT. ANN. § 63.097(2) (West 2005); IDAHO CODE ANN. § 16-1515(1) (2006); 720 ILL. COMP. STAT. ANN. 525/4.1(a) (West 2003 & Supp. 2009); IND. CODE ANN. § 35-46-1-9(b) (West 2004 & Supp. 2008); KAN. STAT. ANN. § 59-2121(a) (2005); MICH. COMP. LAWS ANN. § 710.54(3) (West 1995); MINN. STAT. ANN. § 259.55 (West 2007); MISS. CODE ANN. § 43-15-117(4) (West 2008); MONT. CODE ANN. § 42-7-101(1) (2007); NEV. REV. STAT. ANN. § 127.287(3) (West 2008); N.H. REV. STAT. ANN. § 170-B:13(1) (2002 & Supp. 2008); N.M. STAT. ANN. § 32A-5-34(B) (West 2003 & Supp. 2008); OKLA. STAT. ANN. tit. 10, § 7505-3.2 (West 2007); S.C. CODE ANN. § 63-9-310(F) (1987 & Supp. 2007); TENN. CODE ANN. § 36-1-109 (West 2002 & Supp. 2008); UTAH CODE ANN. § 76-7-203 (West 2004 & Supp. 2008); VT. STAT. ANN. tit. 15A, § 7-103(a) (2007); VA. CODE ANN. § 63.2-1218 (West 2002).

⁵² See ARIZ. REV. STAT. ANN. § 8-114(A) (2007); CAL. PENAL CODE § 273(b) (West 2008); KAN. STAT. ANN. § 59-2121(a) (2005); ME. REV. STAT. ANN. tit. 18-A, § 9-306(a) (1998); MICH. COMP. LAWS ANN. § 710.54(3) (West 1995); MONT. CODE ANN. § 42-7-101(1) (2007); NEV. REV. STAT. ANN. § 127.287(3) (West 2008); S.C. CODE ANN. § 63-9-310(F) (1987 & Supp. 2007); UTAH CODE ANN. § 76-7-203 (West 2004 & Supp. 2008); VT. STAT. ANN. tit. 15A, § 7-103(a) (2007).

⁵³ See ARIZ. REV. STAT. ANN. § 8-114(B) (2007); CAL. FAM. CODE § 8610(a) (West 2004); FLA. STAT. ANN. § 63.132 (West 2005 & Supp. 2009); IDAHO CODE ANN. § 16-1515 (2006); MICH. COMP. LAWS ANN. § 710.54(7) (West 1995); MONT. CODE ANN. § 453.075(1) (2007); N.H. REV. STAT. ANN. § 170-B:19(V) (2002); N.M. STAT. ANN. § 32A-5-34(A) (West 2003 & Supp. 2008); OKLA. STAT. ANN. tit. 10, § 7505-3.2(A) (West 2007); S.C. CODE ANN. § 63-9-740 (1987 & Supp. 2007); TENN. CODE ANN. § 36-1-116(b) (West 2002 & Supp. 2008); UTAH CODE ANN. § 78B-6-140 (West 2004 & Supp. 2008); VT. STAT. ANN. tit. 15A, § 3-702 (2007).

⁵⁴ See e.g., ALA. CODE § 26-10A-23(a) (1992) (prior to paying, adoptive parents must submit to the court a full accounting of all charges for expenses); ARIZ. REV. STAT. ANN. § 8-114(B) (2007) (if living expenses exceed \$1000, the adoptive parents must obtain court approval prior to payment); 720 ILL. COMP. STAT. ANN. 525/4.1(e) (West 2003 & Supp. 2009) (within fourteen days of the payment of living expenses, the adoptive parents must file a financial accounting report with the court).

expense payments, courts are to consider “the current standard of living of the birth parent, the standard of living necessary to preserve the health and welfare of the birth parent and the unborn child, and the existence of alternative financial resources for the birth parent.”⁵⁵

New Hampshire and Minnesota get at similar issues, but describe permissible living expense payments in terms of loss of the birth parent’s ability to be fully employed for some period of the pregnancy.⁵⁶ Both states’ statutes define necessary expenses as those required to maintain the birth mother in the standard of living to which she is accustomed, but is unable to maintain because of loss of income or other support resulting from her pregnancy. The reasonableness and necessity inquiry in these states, then, is strongly tied to lost wages. Living expenses are essentially intended as a substitute for the lost wages, which come about as a result of the birth mother’s decision to carry the baby to term.⁵⁷

2. *Procedural Hindrances: When is Reasonableness and Necessity Determined?*

Even setting aside state law variations as to the meaning of reasonable or necessary in the living expenses context, there are substantially divergent applications of these rules as a result of procedural considerations. Essentially, the question is one of the timing of a reasonableness or necessity finding.

If the purpose of imposing a limitation on permissible living expense payments is to shield adoptions from perceived impropriety—essentially to persuasively rebuff serious charges of baby selling while still fostering the practice of adoption—then one might expect the determination of reasonableness or necessity to be made early on. Ideally, all parties involved in

⁵⁵ ARIZ. REV. STAT. ANN. § 8-114(B) (2007).

⁵⁶ N.H. REV. STAT. ANN. § 170-B:13(I) (2002 & Supp. 2008) (“living expenses of the birth mother which are necessary to maintain an adequate standard of living, which the birth mother is unable to otherwise maintain because of loss of income or other support resulting from the pregnancy and lost wages resulting from the pregnancy or delivery”); MINN. STAT. ANN. § 259.55 (West 2007) (“reasonable living expenses of the birth mother which are needed to maintain an adequate standard of living which the birth mother is unable to otherwise maintain because of loss of income or other support relating from the pregnancy”).

⁵⁷ Douglas R. Donnelly, *Family Law*, in CALIFORNIA TRANSACTION FORMS § 6:20 (2003).

the triad, most particularly the potential adoptive parents, need to know what monies can permissibly change hands before any payments are made. Indeed, one New York court advised attorneys involved in child adoptions to obtain court approval before making expenditures related to birth mothers' pregnancies.⁵⁸ Unfortunately, such a solution is impracticable. Courts are not generally permitted to issue advisory opinions,⁵⁹ and at the stage when a prospective adoptive parent would need approval of living expenses yet to be paid, there would be no court proceeding.⁶⁰ A judicial proceeding related to an adoption is begun only by petition⁶¹ after the birth and consent of the birth parents to the adoption.⁶² Thus, no case or controversy exists before the birth of the child—when a prospective adoptive parent truly needs a judicial determination of reasonableness or necessity.⁶³

The importance of this procedural posture for determining whether living expenses are reasonable is significant because it serves to undermine the effectiveness of the reasonableness rule in preserving the integrity of adoptions as a financially neutral transaction.⁶⁴ The rules on advisory opinions, which prohibit judges from granting advance authorization for adoption-related payments, essentially place the question of propriety before the judge for the first time at the finalization hearing—when the child has likely already lived with the potential adoptive parents for a period of six months or a year.⁶⁵ Clearly, the judges' options are limited in such

⁵⁸ *In the Matter of Adoption of Baby Boy M.G.*, 515 N.Y.S.2d 198 (N.Y. Sur. Ct. 1987).

⁵⁹ For a discussion of the federal doctrine prohibiting advisory opinions, and state law exceptions to it, see Note, Jonathan D. Persky, "Ghosts that Slay": *A Contemporary Look at State Advisory Opinions*, 37 CONN. L. REV. 1155 (2005).

⁶⁰ *See In the Matter of Adoption of Stephen, a minor*, 645 N.Y.S.2d 1012 (N.Y. Fam. Ct. 1996).

⁶¹ *See e.g.*, KAN. STAT. ANN. § 59-2128 (2005).

⁶² *Id.*, at (a)(3) (2005); KAN. STAT. ANN. § 59-2128(f) (2005).

⁶³ *See generally* Lucas, *supra* note 21, at 559 (arguing for earlier judicial determination of permissible living expense payments).

⁶⁴ *See* Academy of California Lawyers, *supra* note 44 (payments from adoptive parents to birth parents are to make adoption a financially neutral option for the birth mother rather than a money-making opportunity).

⁶⁵ *See* ARIZ. REV. STAT. ANN. § 8-114(B) (2007); CAL. FAM. CODE § 8610(a) (West 2004); FLA. STAT. ANN. § 63.132 (West 2005 & Supp. 2009); IDAHO CODE ANN. § 16-1515 (2006); MICH. COMP. LAWS ANN. § 710.54(7) (West 1995); MONT. CODE ANN. § 453.075(1) (2007); N.H. REV. STAT. ANN. § 170-B:19(V) (2002); N.M. STAT. ANN. §

scenarios. Refusing to grant the petition to finalize the adoption would be almost unconscionable,⁶⁶ yet state law limiting a court's ability to order a birth parent to reimburse excessive fees may provide a judge no other "sanction" for the payment of living expenses that are not reasonable or necessary.⁶⁷ The trend, then, is that the inquiry conducted at this stage is not truly a serious one,⁶⁸ which undermines the structure of the rule itself as a means of ensuring that adoption does not become baby selling.

32A-5-34(A) (West 2003 & Supp. 2008); OKLA. STAT. ANN. tit. 10, § 7505-3.2(A) (West 2007); S.C. CODE ANN. § 63-9-740 (1987 & Supp. 2007); TENN. CODE ANN. § 36-1-116(b) (West 2002 & Supp. 2008); UTAH CODE ANN. § 78B-6-140 (West 2004 & Supp. 2008); VT. STAT. ANN. tit. 15A, § 3-702 (2007) (accounting must be filed prior to the date set for the hearing on the adoption petition). *See also* ARK. CODE ANN. § 9-9-213 (West 2002) (final decree of adoption may not be issued until the minor has lived in the petitioner's home for at least six months); Nev. REV. STAT. ANN. § 127.127 (West 2008) (adoptive parents must file an accounting report within fifteen days after the petition for adoption is filed or *within five months after the child begins to live in their home*) (emphasis added).

⁶⁶ *See* Matter of the Adoption of Male Infant A., 578 N.Y.S.2d 988, 994 (N.Y. Fam. Ct. 1991) ("In denying an adoption for violation of the adoption laws, a child may be deprived of the only home he or she has ever known and returned to a natural parent marginally capable of providing care for the child or placed into foster care."). Courts are reluctant to deny finalization of adoptions due to violations of the adoption laws regarding payment of expenses. *See In re Welfare of K.T.*, 327 N.W.2d 13, 18 (Minn. 1982); Matter of Tersigni by Carballo, 521 N.Y.S.2d 375 (N.Y. Fam. Ct. 1987); Matter of Juan P.H.C., 496 N.Y.S.2d 630 (N.Y. Sur. Ct. 1985).

⁶⁷ *See* MINN. STAT. ANN. § 259.55(2) (West 2007) ("A contract purporting to require a birth parent to reimburse a prospective adoptive parent for [living expenses] under any circumstances . . . is void as against public policy."); MO. ANN. STAT. § 453.075(2) (West 2003) (the court's only option if it finds that any payments were unreasonable is to decline to issue the decree of adoption); MONT. CODE ANN. § 42-7-105(4) (2007) ("It is illegal to require repayment or reimbursement of anything provided to a birth parent."); N.H. REV. STAT. ANN. § 170-B:13(II) (2002 & Supp. 2008) ("A contract purporting to require a birth parent to reimburse an intended adoptive parent for [living expense] payments under any circumstances . . . is void as against public policy."); N.J. STAT. ANN. § 9:3-39.1(e) (West 2002 & Supp. 2008) (payments by adoptive parents are non-refundable); WIS. STAT. ANN. § 48.837(6)(b) (West 2008 & Supp. 2008) (court's only option is to dismiss the adoption petition). *But see* MICH. COMP. LAWS ANN. § 710.54(11) (West 1995) (acceptance or retention of amounts in excess of those approved of by the court constitutes a misdemeanor punishable by imprisonment for not more than ninety days or a fine or not more than \$100, or both, for the first violation, and a felony punishable by imprisonment for not more than four years or a fine of not more than \$2,000, or both, for each subsequent violation); N.M. STAT. ANN. § 32A-5-34(D) (West 2003 & Supp. 2008) (any person who makes payments that are not permitted is in violation of the Adoption Act and subject to penalties); OHIO REV. CODE ANN. § 3107.055(D) (West 2005 & Supp. 2008) (the court may reduce the amount if it is unreasonable, or if disallowed, . . . the court may order that it be refunded); OKLA. STAT. ANN. tit. 10, § 7505-3.2(A) (West 2007) (if some fees or charges are unlawful or unreasonable, the court may order reimbursement; persons wishing to pay birth mother living expenses must first obtain court authorization); S.C. CODE ANN. § 63-9-310(F) (1987 & Supp. 2007) (the court may approve an adoption while not approving unreasonable fees and costs); VT. STAT. ANN. tit. 15A, § 3-703(a)(8) (2007) (prior to granting an adoption, the court must deny, modify, or order reimbursement of any unauthorized payment or unreasonable or unnecessary payments).

⁶⁸ *See In re Adoption of Child by I.T.*, 397 A.2d 341 (N.J. Sup. Ct. 1978) (court refused to dismiss adoption petition despite statutory violations because best interests of child outweighed any wrongdoing); *In Matter of Anonymous*, 16 Fam. L. Rep. (BNA) 1165 (N.Y. 1990) (adoption approved despite excessive and unlawful fees). *But see* ALA. CODE § 26-10A-23(b) (1992) (prior to payment, adoptive parents must file an accounting of all expenses, and payment may be made only with court approval or payments may be placed in escrow until court approval); 720 ILL. COMP. STAT. ANN. 525/4.1(e) (West 2003 & Supp. 2009) (within fourteen days of payment of living expenses, the

C. *Specific Monetary Caps*

Three states attempt to curb blurring of the lines between allowing payments of birth parent living expenses and baby selling by imposing specific dollar limitations on living expense payments that adoptive parents are permitted to make.⁶⁹ For instance, Connecticut allows total birth parent living expenses of no more than \$1,500 to be paid in connection with the placement of a child.⁷⁰ Wisconsin caps living expenses at a more generous \$5,000, but requires that such payments be “necessary to protect the health and welfare of the birth mother or the fetus;” precisely what qualifies as necessary under that statutory language has not yet been considered by Wisconsin’s courts.⁷¹

Perhaps the most instructive body of state law on imposing particular caps as a means of controlling the payment of birth parent living expenses in connection with adoptive placements is that in Ohio. Before late 2008, Ohio was one of just a handful of states altogether disallowing the payment of birth parent living expenses in connection with the adoption of a child.⁷² Before 2008, Ohio law allowed prospective adoptive parents to pay medical expenses incurred around the time of the child’s birth and legal expenses associated with the surrender and placement of the child,⁷³ but all other payments to birth parents were prohibited as a violation of Ohio’s baby selling statute,⁷⁴ which prohibits “any disbursements in connection with [a] minor’s permanent

adoptive parents must file a financial accounting report with the court); MICH. COMP. LAWS. ANN. § 710.54(10) (West 1995) (court will evaluate all fees and expenses and may disapprove of some if unreasonable);

⁶⁹ See CONN. GEN. STAT. ANN. § 45a-728c (West 2004); OHIO REV. CODE ANN. § 3107.055(C) (West 2005 & Supp. 2008); WIS. STAT. ANN. § 48.913(1) (West 2008 & Supp. 2008).

⁷⁰ CONN. GEN. STAT. ANN. § 45a-728c (West 2004).

⁷¹ WIS. STAT. ANN. § 48.913(1) (West 2008 & Supp. 2008).

⁷² See OHIO REV. CODE ANN. § 3107.055(C) (West 2005 & Supp. 2008) (“No . . . person . . . shall make or agree to make any disbursements in connection with the minor’s permanent surrender, placement, or adoption other than those specifically authorized by the statute.”). The statute did not specifically authorize birth parent living expenses, and these expenses were, therefore, not permissibly covered by adoptive parents. See *id.*

⁷³ *Id.*

⁷⁴ See *id.*

surrender, placement, or adoption. . . .”⁷⁵ In December 2008, however, the Ohio legislature lifted its ban on the payment of living expenses to allow prospective adoptive parents, through agencies or attorneys only, to pay birth mother living expenses not to exceed the sum of \$3,000.⁷⁶ Ohio adoption lawyers contend that the change is a positive one for Ohio, as Ohio couples were “losing babies” as Ohio birth mothers traveled out of state to give birth to and place their children in states that did allow some expenditures for housing.⁷⁷ Ohio’s new law aligns it with that of Connecticut and Wisconsin, then, in attempting to strike a balance on the living expense issue. Indeed, advocates of the new Ohio law specifically described it as a means of “help[ing] birth mothers and still maintain[ing] enough oversight to prevent adoptions from becoming sales. . . .”⁷⁸

D. Limitation to the “Period of Confinement”

A number of states limit the payment of birth parent living expenses, not with a reasonableness requirement or with a cap on permissible expenditures, but rather, by limiting the period of time for which such expenses may be covered by potential adoptive parents.⁷⁹ Indiana, Illinois, New York, and Tennessee all regulate the payment of living expenses in this manner, allowing only the payment of rent, housing expenses, and the like within a specific, delineated period that ranges from the shortest of sixty days in New York⁸⁰ to perhaps as long as six months

⁷⁵ *Id.*

⁷⁶ *Id.* at § 3107.055(C)(9).

⁷⁷ Rita Price, *Birth Moms Could Get Aid Under Bill: Ohio Loses Out on Adoptions over Living-Expenses Ban, Some Say*, THE COLUMBUS DISPATCH, May 25, 2008, available at <http://www.dispatchpolitics.com>.

⁷⁸ *Id.*

⁷⁹ See IND. CODE ANN. § 35-46-1-9(b) (West 2004 & Supp. 2008); 720 ILL. COMP. STAT. ANN. 525/4.1(a) (West 2003 & Supp. 2009); N.Y. SOC. SERV. LAW § 374(6) (McKinney 2003 & Supp. 2009); TENN. CODE ANN. § 36-1-109 (West 2002 & Supp. 2008).

⁸⁰ N.Y. SOC. SERV. LAW § 374(6) (McKinney 2003 & Supp. 2009) (“reasonable and actual expenses for housing, maternity clothing, clothing for the child and transportation for a reasonable period not to exceed 60 days prior to the birth and the later of 30 days after the birth or 30 days after the parental consent to the adoption”).

in Indiana.⁸¹ Still other states—including Pennsylvania, South Carolina and Vermont—allow the payment of living expenses for a “reasonable time” only,⁸² with state courts left to define the precise meaning of the phrase in this context only under the press of actual litigation.⁸³

The idea behind these limitations based on an expense’s proximity to the birth may not be immediately obvious. A glance at legislative history in the aforementioned states, however, indicates that states choosing this manner of regulating living expense payments to birth mothers are trying to maintain the economic neutrality of the adoption transaction for birth mothers whose employment abilities may be diminished for a portion of the pregnancy.⁸⁴ In keeping with this goal, at least one scholar has articulated that rules setting forth short windows for the payment of birth parent living expenses should strive to closely track the “period of confinement” associated with pregnancy.⁸⁵ Whether that is done by setting out a period of days or by designating that expenses may be paid only for a reasonable time, the purpose of the rule is to serve as a sort of substitute for wages or other sources of income the birth mother may not now receive because of the confinement associated with the pregnancy.⁸⁶ To the extent a birth mother is unable to work during the final period of her pregnancy, the states allowing these

⁸¹ IND. CODE ANN. § 35-46-1-9(b) (West 2004 & Supp. 2008). The Indiana statute speaks in terms of trimesters and allows the payment of birth mother living expenses only in the second and third trimesters of pregnancy. *Id.* Furthermore, Indiana’s statutes limit the living expenses paid to a total of \$1,000. *Id.*

Illinois allows the payment of such expenses for up to 120 days before the birth mother’s expected due date and Tennessee allows the expenditures for a maximum of a ninety day period during the pregnancy. 720 ILL. COMP. STAT. ANN. 525/4.1(a) (West 2003 & Supp. 2009); TENN. CODE ANN. § 36-1-109 (West 2002 & Supp. 2008).

⁸² 23 PA. CONS. STAT. ANN. § 2533(d) (West 2001); S.C. CODE ANN. § 63-9-310(F) (1987 & Supp. 2007); VT. STAT. ANN. tit. 15A, § 7-103(a) (2007).

⁸³ See generally Lucas, *supra* note 21, at 561–62 (stating that there are only a few reported cases regarding the permissibility of living expenses to provide guidance for adoptive parents and attorneys).

⁸⁴ Donnelly, *supra* note 57, § 6:20 (stating that no California court has ever defined “confinement” but that the apparent legislative intent is to refer to the period of time during which the birth mother is disabled or unemployable due to pregnancy).

⁸⁵ JOAN HEIFETZ HOLLINGER ET AL., ADOPTION LAW AND PRACTICE § 5.09 (1994).

⁸⁶ Donnelly, *supra* note 57, § 6:20 (stating that under California’s statute, the adoptive parents may pay the “expenses” of the birth mother, and, although lost income is not technically an expense, the payment of living expenses is meant to be a substitute for income during the period of confinement).

expenses during a short window essentially allow her to maintain housing even without a traditional source of income.⁸⁷

Virginia has taken very seriously the notion of living expenses as a substitute for wages that can no longer be earned due to the demands of pregnancy.⁸⁸ But instead of relying on a sixty or ninety-day period before the birth of the child to appropriately limit these expenses, the Virginia legislature has expressly allowed adoptive parents to pay reasonable and necessary expenses for shelter, food, clothing and the like only on proof of the “written advice of her physician, [that] the birth mother is unable to work or otherwise support herself due to medical reasons or complications associated with the pregnancy or birth of the child.”⁸⁹ Because not all pregnancies leave birth mothers unable to work for any significant period,⁹⁰ the Virginia rule is more tailored to addressing the concerns that lead states to limit living expense payments temporally in the first place.

New Hampshire and Minnesota are somewhat similar. Both states’ statutes expressly provide for the payment of only necessary living expenses and do not delineate any particular window for the permissibility of these payments before the birth.⁹¹ At first glance, then, it would seem these two states should be categorized as those limiting the payment of living expenses by a determination of reasonableness or necessity rather than those employing a short window of time to impose a limitation. In reality, however, perhaps these two states are best described as a hybrid of the two models. Both New Hampshire and Minnesota allow only the payment of necessary expenses, but necessity in those statutes is defined in terms of maintaining a standard

⁸⁷ *Id.*

⁸⁸ V.A. CODE ANN. § 63.2-1218 (West 2002).

⁸⁹ *Id.*

⁹⁰ See BabyCenter Medical Advisor Board, Being Pregnant at Work (reviewed by Vicki Lee Edge), http://www.babycenter.com/0_being-pregnant-at-work_490.bc (last visited Feb. 22, 2010) (stating that if birth mother is a healthy woman having a normal pregnancy and working in a safe environment, she may be able to continue working until the day of delivery or close to it).

⁹¹ MINN. STAT. ANN. § 259.55 (West 2007).

of living for the birth mother that is adequate when she is unable to maintain such a standard herself because of lost wages or income.⁹² Of course, it is likely in states regulating solely with a time period that the same expenses would be covered under each formulation of the rule. After all, the demands of pregnancy for the vast majority of women typically only render a woman unable to be employed toward the tail end of the pregnancy.⁹³ Both articulations of the rule, then, strive to rebuff charges of baby selling by limiting the permissibility of such payments to the “period of confinement.” State statutes focusing on lost income rather than a specific number of days before birth are just more likely to match the period of confinement precisely.

E. Outright Bans

Finally, a very small number of states prohibit prospective adoptive parents from paying the housing costs of the birth mothers whose children they intend to parent altogether.⁹⁴ With Ohio defecting in 2008 to a cap system,⁹⁵ only five states today disallow the payment of living expenses entirely.⁹⁶

Texas law provides an instructive example of such a ban. A criminal statute in Texas defines the offense of “sale or purchase of [a] child” as offering to accept, agreeing to accept, or accepting “a thing of value for the delivery of the child to another or for the possession of the child by another for purposes of adoption. . . .”⁹⁷ The statute goes on to list exceptions to “a thing of value” as that phrase is used here, including agency fees, medical expenses, legal expenses,

⁹² MINN. STAT. ANN. § 259.55 (West 2007); N.H. REV. STAT. ANN. § 170-B:13(I) (2002 & Supp. 2008) (authorizing the payment of “reasonable living expenses . . . which are needed to maintain” the birth mother’s standard of living).

⁹³ See Donnelly, *supra* note 57, § 6:20 (typically contemplates the last trimester of pregnancy and sometimes into the six weeks postpartum).

⁹⁴ COLO. REV. STAT. ANN. § 19-5-213(1)(a) (West 2005 & Supp. 2008); DEL. CODE ANN. tit. 13, § 928(a) (2006); MD. CODE ANN., FAM. LAW § 5-362(b) (West 2006); DeJesus v. State of Texas, 889 S.W.2d 373 (Tex. App. 1994); Thacker v. State of Texas, 889 S.W.2d 380 (Tex. App. 1994).

⁹⁵ See OHIO REV. CODE ANN. § 3107.055(C) (West 2005 & Supp. 2008).

⁹⁶ COLO. REV. STAT. ANN. § 19-5-213(1)(a) (West 2005 & Supp. 2008); DEL. CODE ANN. tit. 13, § 928(a) (2006); MD. CODE ANN., FAM. LAW § 5-362(b) (West 2006); DeJesus v. State of Texas, 889 S.W.2d 373 (Tex. App. 1994); Thacker v. State of Texas, 889 S.W.2d 380 (Tex. App. 1994); *In re Baby Girl D.*, 517 A. 2d 925 (Pa. 1986).

⁹⁷ TEX. PENAL CODE ANN. § 25.08 (2003).

and even “necessary” pregnancy-related expenses (which may be read to including living expenses) but only if such expenses are “paid by a child-placing agency.” Thus, birth mother living expenses may be paid in Texas agency adoptions, though not in private adoptions. There is no exception to the Texas baby selling statute which would permit the payment of living expenses directly from a prospective adoptive parent to a birthparent, even using an attorney as intermediary.

In *DeJesus v. State of Texas*, the defendant birth mother was convicted of violating the Texas Penal Code for selling her child to her attorney, Thacker, the defendant in the sister case of *Thacker v. State of Texas*.⁹⁸ The evidence showed that Thacker paid DeJesus \$12,000 for a relinquishment of parental rights for five of her children aged newborn to four years old. DeJesus asked for a jury instruction that she should be found not guilty if the jury found that she received the money as a reimbursement for living expenses, including housing, food, and clothing, the trial court denied the jury instruction. The appellate court held that the trial court properly denied the instruction, as the payment of living expenses are not express statutory exceptions to the ban on “baby selling.” The Texas appellate court upheld the defendant’s conviction.

In Pennsylvania, adoptive parents sought reimbursement of “unusual” fees paid to their intermediary agency after completion of an adoption.⁹⁹ Those fees included \$50 per week in birth mother housing expenses, paid not for the housing of the woman whose child they planned to adopt—for that would clearly violate Pennsylvania’s baby selling statute—but rather for

⁹⁸ At the time *DeJesus* was decided, the Texas statute criminalizing baby selling did not allow for the payment of “necessary pregnancy-related expenses.” Rather, exceptional payments were limited to agency, legal, and medical fees. The pregnancy-related expense provision was added in 2001. TEX. PENAL CODE ANN. § 25.08 (2003). Still, this exception extends only to pregnancy-related expenses covered by a licensed adoption agency. Thus, the payments from prospective adoptive parents’ attorney to birth mother in *DeJesus* would violate even the current Texas statute. TEX. PENAL CODE ANN. § 25.08 (2003).

⁹⁹ *In re Baby Girl D.*, 517 A. 2d 925 (Pa. 1986).

another pregnant woman planning to relinquish her child for adoption through the same agency.¹⁰⁰ The Court of Appeals upheld the trial court's order that the adoptive parents be reimbursed for these housing expenses, calling the arrangement an "attempted subterfuge" that would permit a birth parent to profit impermissibly from an adoption.¹⁰¹

II. THE FAILURE OF EXISTING SOLUTIONS TO THE LIVING EXPENSES PROBLEM

The nearly overwhelming predilection of states to allow prospective adoptive parents to pay some birth mother living expenses is disturbing when one begins to seriously analyze both the impression these rules create and their real-world pragmatic effects. The rules regarding birth mother living expenses help none of the players involved in domestic adoption. Payments for housing and other related expenses send the wrong message about adoption, fostering an all too easy analogy to baby selling, and possibly even causing long-term damage to society in the form of exacerbating existing class and race divisions. Birth parents, ironically, may also suffer from receipt of these payments, as they tend to interfere with the voluntariness of surrenders. The impact on prospective adoptive parents of the allowance of such payments is demonstrably significant and negative. And because living expense rules make prospective adoptive parents less likely to pursue domestic adoption, they harm children as well.

A. *The Thin Line Between Child Sales and Housing Payments*

One significant problem with a scheme of rules that generally allows the payment of birth mother living expenses is that the payment of these sums tends to obfuscate the already thin line between mere assistance and baby selling.¹⁰² Unlike other adoption-related expenses, allowing prospective adoptive parents to pay birth mother living expenses actually allows the birth mother to profit from the adoption transaction. And while such profit may seem acceptable when the

¹⁰⁰ *Id.* at 928.

¹⁰¹ *Id.*

¹⁰² *See generally End Baby Commerce*, Commentary, *GAMBIT WEEKLY*, June 10, 1999, at 7.

child is successfully placed and all members of the triad are pleased with the outcome, there are in fact, serious societal harms, most particularly along lines of race and class.

1. Living Expenses as Gray Market Activities

To prohibit child trafficking, state statutes generally speak in terms of prohibiting persons from giving or receiving “money or other consideration or thing[s] of value”¹⁰³ in connection with the adoption of a child.¹⁰⁴ Medical expenses, legal expenses, and even living expenses incurred during the period of pregnancy and for a short time after the adoption are clearly covered, and thus prohibited, under the plain language of state baby selling statutes. But these expenses are generally viewed as exempt from the ambit of baby selling prohibitions because of the need to protect the economic neutrality of the adoption transaction.¹⁰⁵ The gist of this view is that a birth mother should not be placed in a better position by a pregnancy and match with an adoptive family with whom she has discussed relinquishing her child.¹⁰⁶ At the same time, concerns about whether a birth mother would choose adoption were she to emerge from a pregnancy and adoptive placement worse off financially, particularly given the availability of

¹⁰³ See, e.g., COLO. REV. STAT. ANN. § 19-5-213(1)(a) (West 2005 & Supp. 2008) (“No person shall offer, give, charge, or receive any money or other consideration or thing of value in connection with the relinquishment and adoption. . .”).

¹⁰⁴ See, e.g., MO. ANN. STAT. § 568.175(1) (West 1999) (“The crime of trafficking in children is committed when one offers, gives, receives or solicits any money for the delivery or offer of delivery of a child to another person, institution, or other organization for purposes of adoption.”); IOWA CODE ANN. § 600.9(1) (West 2001 & Supp. 2008) (“A biological parent may not receive anything of value as a result of adoption. . . .”); LA. REV. STAT. ANN. § 14:286 (West 2004) (“It is unlawful to sell or surrender a minor child to another person for money or anything of value, or to receive a minor child for such payment of money or anything of value.”); MD. CODE ANN., CRIM. LAW § 603(a) (West 2002) (“A person may not sell, barter, or trade, or offer to sell, barter, or trade, a minor for money, property, or anything else of value.”).

¹⁰⁵ See Academy of California Adoption Lawyers, *supra* note 44. The Academy of California Adoption Lawyers states that payments from adoptive parents to birth parents are for the purpose of making adoption a “financially neutral option for the birth mother,” rather than a money-making opportunity. See also Watson, *supra* note 44, at 539.

¹⁰⁶ See Academy of California Adoption Lawyers, *supra* note 44. See also Donnelly, *supra* note 57, § 6:20.

abortion as an alternative,¹⁰⁷ have led state legislators to err on the side of striving for economic neutrality.¹⁰⁸

A further justification often espoused for allowing prospective adoptive parents to cover some birth parent living expenses during the period leading up to the birth and adoption is that prospective adoptive parents have a strong interest in adopting a healthy child.¹⁰⁹ Ensuring that the birth mother is well cared for is the best way to promote the birth of a healthy baby.¹¹⁰ When it comes to medical expenses, for instance, this line of thinking is rather easily supported. A birth mother who receives adequate prenatal care and competent medical assistance during the birth of the child is more likely to deliver a healthy newborn.¹¹¹ Viewed through this lens, the payment of some pregnancy-related expenses by adoptive parents serves only to promote the health and safety of the birth mother, and by extension, the baby she carries. Payments made solely to safeguard health and promote welfare of the birth mother and child do not often raise red flags. Most would not argue that a prospective adoptive parent's payment of the birth mother's \$5,000 hospital bill for the child's delivery would even come close to baby selling.¹¹² Expenses related to health and safety are simply not often negatively perceived, likely because of adherence to the goal of financial neutrality for the birth mother in the adoption transaction.

¹⁰⁷ *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973).

¹⁰⁸ *See Donnelly*, *supra* note 57, § 6:20.

¹⁰⁹ *See Hendrix v. Hunter*, 110 S.E.2d 35, 38 (Ga. App. 1959); *Barwin v. Reidy*, 307 P.2d 175, 184 (N.M. 1957). *See also* 720 ILL. COMP. STAT. ANN. 525/4.1(c) (West 2003 & Supp. 2009) (living expenses permitted only in those circumstances where there is a demonstrated need for the payment of such expenses to protect the health of the biological parents or the health of the child to be adopted).

¹¹⁰ *See Barwin v. Reidy*, 307 P.2d 175, 184 (N.M. 1957) (reasoning that it is productive of the welfare of the child that the child and mother have adequate medical attention). For a discussion of the health risks of pregnancy, *see Klinke*, *supra* note 26, at 143–45.

¹¹¹ *See Donald A. Rea*, *Family Law—Adoption: Do Laws Prohibiting Reimbursement to a Natural Mother for Reasonable Expenses Incurred During Pregnancy Truly Serve the Best Interests of the Child?* In re Adoption No. 9979, 323 Md. 39, 591 A.2d 468 (1991), 22 U. BALT. L. REV. 133, 138 (1992) (stating that the medical expense exception is permitted because it is deemed to directly benefit the child's best interests).

¹¹² *See generally Barwin v. Reidy*, 307 P.2d 175, 184 (N.M. 1957) (reasoning that there is nothing inimical to public policy in allowing adoptive parents to pay the medical expenses of the birth mother).

These legislative goals of economic neutrality and narrowing permissible adoption-related expenses to those which affect the health or safety of the birth mother are nicely achieved when one considers medical, and even legal, expenses incurred in connection with adoption. These expenses can be definitively and demonstrably tied to the pregnancy, birth, and placement of the child.¹¹³ They are direct expenses connected solely with the birth and adoption. Hospital fees associated with the child's birth, for instance, would not be incurred absent the birth mother's pregnancy and her decision to carry the baby to term.¹¹⁴ Legal fees associated with the placement of the child and finalization of the adoption would not be incurred absent the birth mother's implementation of her adoption plan.¹¹⁵ These fees truly require expenditures which would not be made but for the continued pregnancy, birth, and subsequent adoption. Allowing prospective adoptive parents to cover these expenses, then, truly does maintain the birth mother in a position such that she neither profits nor suffers economically as a result of the choices she makes.¹¹⁶

With living expenses, however, the same rationale is unpersuasive. Those advocating the permissibility of living expense payments in connection with domestic adoption uniformly proffer the justification of creating financial neutrality for the birth mother in the adoptive placement.¹¹⁷ But such arguments consistently ignore the fact that prospective adoptive parents' payment of the birth mother's housing expenses almost certainly provides an advantage that the birth mother would not have absent the pregnancy. Unlike medical expenses relating to birth, or legal expenses relating to the execution of a surrender, living expenses—particularly housing costs—are not expenses with any causal connection either to pregnancy or to adoptive

¹¹³ See Rea, *supra* note 111, at 138.

¹¹⁴ See generally *In re Adoption No. 9979*, 591 A.2d 468, 473 (M.D. App. 1991).

¹¹⁵ *Id.*

¹¹⁶ See Academy of California Adoption Lawyers, *supra* note 44.

¹¹⁷ *Id.* See also *Watson*, *supra* note 44, at 539.

placement. Whether they are pregnant or not, whether they have created an adoption plan or not, and regardless of personal circumstances, all persons endure the hardship of either paying for adequate housing or relying on the charity of friends or social welfare programs. Pregnancy does not transform that responsibility, because the responsibility is not one related to the birth or adoption plan of the birth mother, except perhaps during a short, and perhaps even rarely occurring,¹¹⁸ window during which a birth mother's pregnancy-related health complications preclude her from working to earn income necessary to pay for housing.¹¹⁹ For the vast majority of pregnancies, the ability of a birth mother to charge prospective adoptive parents for the costs of living she would have otherwise had to bear makes for an anything but neutral transaction. Particularly in states without any dollar cap or time limit imposed on living expenses, prospective birth parents stand to reap relatively substantial financial gain through the deflection of financial responsibility for their housing needs.¹²⁰ The gain may not come in the form of a cash infusion directly to the birth mother, but the financial gain is no less substantial when it is achieved through the birth mother's indirect enjoyment of cost-free living, often limited only by a requirement that prospective adoptive parents cover only living expenses actually incurred.¹²¹ With the rationale of fiscal neutrality gone, it is difficult to draw any meaningful line between the conduct of providing a housing benefit to a birth mother and simply giving her a cash payment of the same amount to use in any manner she wishes.

Moreover, the desire to protect the health and safety of the birth mother, and thereby her unborn child, is an equally weak argument in favor of allowing such a clear economic boon to

¹¹⁸ See *Being Pregnant at Work*, *supra* note 90 (if birth mother is a healthy woman with a typical pregnancy and working in a safe environment, she may be able to continue working until the day of delivery or close to it).

¹¹⁹ See *Donnelly*, *supra* note 57, § 6:20.

¹²⁰ See ALASKA STAT. § 26-10-4.1 (2007); ARK. CODE ANN. § 9-9-211(a) (West 2002); KY. REV. STAT. ANN. § 199.590(6) (West 2006); ME. REV. STAT. ANN. tit. 18-A, § 9-306(a) (1998); MISS. CODE ANN. § 43-15-117(4) (West 2008); OR. REV. STAT. ANN. § 109.311(1) (West 2003 & Supp. 2008).

¹²¹ See ALASKA STAT. § 26-10-4.1 (2007); KY. REV. STAT. ANN. § 199.560(6) (West 2006).

birth mothers. Living expenses simply are not like medical expenses insofar as they cannot so clearly be cabined as impacting the health of the child to be adopted.¹²² Those who would permit the payment of living expenses argue that “the public policy behind permitting [living] expenses is the assumption that a pregnant mother who is housed and fed will give birth to a healthier baby than a mother who is not.”¹²³ This assumes that the only possibilities are homelessness or a home provided by prospective adoptive parents, starvation or food provided by prospective adoptive parents. Reality is likely to provide a much less stark contrast between alternatives. And given that reality, a problem of line-drawing becomes obvious rather quickly. A whole panoply of needs may be viewed—albeit with a liberal lens—to affect the health and welfare of the birth mother, and therefore the fetus she carries. Clothing, for instance, has been likened to shelter insofar as both may be viewed as impacting the health and welfare of the birth mother.¹²⁴

Are we then to sanction provision by adoptive parents of a halcyon environment and delectable foods for expectant mothers on the grounds these are beneficial to the child? If medical science were to determine that stress during pregnancy was inimical to the fetus, and an expectant mother’s employment were causing her stress, would prospective adoptors be expected to employ an agency to find the mother a happier work environment, or perhaps simply support the mother during her pregnancy lest the added stress inhibit the baby’s development or effect his insufferable disposition?¹²⁵

The slippery slope from living expenses down to outright baby selling is indeed a steep one, and when such expenses are allowed based on a thin health or welfare justification, it is difficult to imagine why similar arguments could not be made just as persuasively for a host of disturbing

¹²² See *In re Adoption No. 9979*, 591 A.2d 468, 473 (Md. App. 1991).

¹²³ *Adoption House, Inc. v. P.M.*, 2003 WL 23354141, *9 (Del. Fam. Ct. 2003).

¹²⁴ *In re Adoption No. 9979*, 591 A.2d 468 (Md. App. 1991) (lack of clothing could have an adverse effect on the health and welfare of the natural mother and unborn child as well); *Id.* at 481 (Eldridge, J., concurring) (arguing that the legislative history of the prohibition shows that the statute should not be construed to ban a small payment for maternity clothes); *Kingsley v. State*, 744 S.W.2d 191, 193 (Tex. Ct. App. 1987).

¹²⁵ *In re Baby Girl D.*, 517 A.2d 925, 929 (Pa. 1986).

expenses—a large, safe vehicle,¹²⁶ an exercise club membership, and frequent massages.¹²⁷ In short, allowing the payment of living expenses when they are neither but-for expenses of the pregnancy nor expenses that can seriously be said to affect the welfare of the child for whom adoption is considered makes the adoption a veiled transaction which comes alarmingly close to a child sale.

2. *The Harm of the Victimless Crime*

“Philosophically, a lot of people feel that the violation of adoption laws [in the form of impermissible payments to the birth mother, for instance] is a victimless crime. The status of the child is improved. The adoptive parents are getting what they want, and typically the mother who wants to place the child places the child.”¹²⁸ Even if state law creates a situation in which prospective adoptive parents frequently straddle the thin line between merely covering a birth mother’s housing expenses and buying a baby, many would ask, “who cares? What, precisely, is the harm?”

Margaret Jane Radin, in her well-known piece *Market-Inalienability*, persuasively catalogues the potential harm to society as a whole flowing from commodification of infants.¹²⁹ Radin describes a number of harms, all injurious to the very notion of personhood itself. One such harm is that commodifying infants means placing a dollar value on them, and these value determinations will be made in a manner “injurious to their personhood and to the personhood of

¹²⁶ See *Matter of Adoption of Alyssa, L.B.*, 501 N.Y.S.2d 595 (N.Y. Sur. Ct. 1986) (considering adoptive parents’ payment for the purchase of an automobile for birth mother).

¹²⁷ In fact, the Academy of California Adoption Lawyers defined “pregnancy-related living expenses” to include maternity clothing, housing that is consistent with the birth mother’s usually lifestyle, groceries, and transportation payment assistance. Academy of California Adoption Lawyers, *supra* note 44.

¹²⁸ Gabriel Escobar, “*Lawyer’s Kidnap Case Spotlights Louisiana Adoption Laws*” THE WASHINGTON POST, Nov. 16, 1998 at C1.

¹²⁹ Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

those who buy and sell on this basis, exacerbating class, race, and gender divisions.”¹³⁰ Transported to the living expenses context, this theory seems to hold quite strongly. There is already no doubt that birth mothers who will give birth to white infants are more highly sought after in the domestic adoption arena than are pregnant women who will deliver African-American or mixed-race babies.¹³¹ This reality is likely to persist simply because more prospective adoptive families wish to raise white infants, likely owing to the fact that the vast majority of prospective adoptive parents are themselves white.¹³² There is probably little that can be done, at least until society moves further toward a racially neutral view of the family, to modify that demand.

But allowing prospective adoptive parents to pay birth mother living expenses simply further striates existing racial divisions. Because a birth mother’s receipt of living expenses is not a financially neutral transaction, as detailed above,¹³³ white birth mothers are likely to be well-supported during pregnancy and even to financially benefit from cost-free housing during pregnancy—thereby improving their economic positions—while birth mothers in the racial minority are likely to continue unsupported. The message that white infants and white birth mothers are worth more is precisely the type of perceptual injury to personhood that Professor

¹³⁰ *Id.* at 1927. See also Barbara K. Rothman, *Reproductive Technology and the Commodification of Life*, 13 *WOMEN & HEALTH* 95, 96–97 (1988) (arguing that commodification in the surrogacy context affects women’s self-respect and self-worth).

¹³¹ See generally Julie Palermo, *Whose Child is This? A Critical Look at International Adoptions that Fail*, 20 *IMMIGR. & NAT’LITY L. REV.* 713, 716 (1999) (because only a quarter of the children waiting for adoption are labeled as white, it is almost impossible to adopt a white infant domestically without extensive waiting periods). See also *Adoption House, Inc. v. P.M.*, 2003 WL 23354141, at *4 (Del. Fam. Ct. 2003) (prospective adoptive family decided against adoption at the hospital during the child’s birth after learning the child was biracial).

¹³² See Amanda Spake, *Adoption Gridlock*, U.S. NEWS & WORLD REPORT, June 22, 1998, available at 1998 WLNR 7765833 (more Caucasian parents are interested in adoption than minority parents); William Tyree, *The Business of International Adoption*, THE JAPAN TIMES, June 9, 1999, available at <http://search.japantimes.co.jp/cgi-bin/fv19990609a2.html> (fact that Caucasian parents seek to adopt more than minority parents has led to competition in the United States for Caucasian infants and that approximately eighty percent of those seeking to adopt from Russia do so because of their desire for a child from the same race).

¹³³ See *supra* Part II.A.

Radin describes in the context of baby selling.¹³⁴ The risk of the damage caused by the transaction is simply strong enough to break the link between the payment of living expenses and baby selling entirely by prohibiting the payment of housing and other related expenses of the birth mother in connection with adoption.

B. The Infringement on Voluntariness

Even aside from its tie to baby selling, society should be concerned about the payment of birth mother living expenses because of the serious questions state laws on this issue raise with regard to the voluntariness of birth mother consent, and thus, the integrity of the entire adoptive placement.¹³⁵ Just how free is the surrender of a child for adoption given by an emotionally fragile and exceptionally poor woman who sees the possibility of economic reward as a way out of her situation?¹³⁶ Prohibitions on baby selling were adopted years ago “to deter the potentially coercive effect of payments to expectant mothers at a time when the best interests of the child, and for that matter the mother and father, are most likely to be subordinated by greed or ulterior motives.”¹³⁷

Of course, there is not a serious question of voluntariness in every adoption case, and the existence of state law allowing prospective adoptive parents to cover birth parent expenses of any kind does not necessarily create a lack of consent. But the risk of the coercive effects of payments is high, and it necessarily affects poor women disproportionately, as they are both most likely to consider relinquishing their children for adoption, and most likely to need and be

¹³⁴ See Radin, *supra* note 129, at 1932 (arguing that a women’s attributes, such as height, eye color, race, intelligence, and athletic ability, will be monetized and that surrogates with “better” qualities will command higher prices as a result). See also Nancy Gibbs, *Adoption: The Baby Chase*, TIME MAGAZINE, Oct. 9, 1989, at 88 (“adoptive parents won’t blink an eyelash over paying \$20,000 to \$30,000 for a healthy white baby”).

¹³⁵ See *Hearings*, *supra* note 4, at 13 (reporting that girls involved with certain baby brokers who received various forms of compensation were pressured not the change their minds about relinquishing their consent because told they would have to pay thousands of dollars in reimbursement).

¹³⁶ See Lisa Kelly, *West Virginia’s Adoption Statute: The History of a Work in Progress*, 102 W. VA. L.REV. 1, 17 (1999) (birth mothers are often poor, illiterate, and young).

¹³⁷ *Thacker v. State*, 889 S.W.2d 380, 386 (Tex. App. 1994).

influenced by cash payments made to them.¹³⁸ That class effect, in and of itself, should give us pause. Professor Radin argues that the sale of “personal things” by those in poverty should necessarily be presumed to result from a lack of free choice.¹³⁹ And “[t]o protect the integrity of adoption proceedings and to safeguard the best interests of the child,”¹⁴⁰ every possible step should be taken to ensure birth mother voluntariness.

C. *The Discouragement of Quality Adoptive Parents*

One of the most controversial issues surrounding adoption, particularly in the last twenty years, is the growing trend of American parents seeking to adopt internationally rather than pursuing domestic adoption in the United States.¹⁴¹ The problem, as many see it, is that this decision to go abroad to build a family necessarily means that, at least for each child adopted internationally by American parents, a child in need in the United States is left without an adoptive home.¹⁴² This view is supported by recent statistics. In the year 2002 alone, approximately 21,063 children from abroad were adopted into American families, an increase from the 11,303 in 1996.¹⁴³ During that same period, however, domestic infant adoptions declined significantly, with experts estimating that in 2002, approximately 1,246 fewer babies were adopted by American families than in 1996.¹⁴⁴ There are many, often complicated, reasons that prospective adoptive parents have increasingly begun choosing a global route when it comes to adoption.¹⁴⁵ One of those reasons is most certainly the financial drain, and worse, financial

¹³⁸ See Kelly, *supra* note 133, at 17.

¹³⁹ Radin, *supra* note 129, at 1911.

¹⁴⁰ ALA. CODE § 26-10A-34, cmt (1992).

¹⁴¹ See Palermo, *supra* note 131, at 713–14.

¹⁴² See *id.* at 715.

¹⁴³ See *Intercountry Adoption: Office of Children’s Issues, United States Department of State*, http://adoption.state.gov/news/total_chart.html (last visited Feb. 15, 2010).

¹⁴⁴ Paul Placek, *National Adoption Data*, in ADOPTION FACTBOOK IV: THE MOST COMPREHENSIVE SOURCE FOR ADOPTION STATISTICS NATIONWIDE 6 (2007).

¹⁴⁵ See Richard R. Carlson, *Transnational Adoption of Children*, 23 TULSA L. J. 317 (1988) (arguing that the increase in popularity of transnational adoptions is caused by the shortage of healthy, adoptable infants born in the United

uncertainty surrounding domestic infant adoption.¹⁴⁶ There is a strong economic incentive to go international. And because living expenses paid to birth parents are almost always one of the most substantial items of cost in a domestic adoption,¹⁴⁷ reevaluation of the propriety of these payments at a time of rather widespread dissatisfaction with the domestic adoption system seems long overdue.

Far and away the most significant downside of the infant domestic adoption scheme in this country, at least from the prospective adoptive parent perspective, is that the transaction has no guarantee of completion, even once the prospective parents expend large sums of money.¹⁴⁸ Domestic infant adoption these days costs an average of \$40,000.¹⁴⁹ And while the total cost of an international adoption typically comes in at a pricier \$50,000,¹⁵⁰ largely because of travel costs,¹⁵¹ it is still viewed in adoption circles as a more stable financial bet.¹⁵² In the international adoption arena, with very few exceptions, those who enter the process, pay the requisite fees, and are found to be suitable adoptive parents succeed in bringing a child into their families. International adoptions begun are said to complete roughly eighty-six percent of the time.¹⁵³

States); Palermo, *supra* note 131, at 717 (stating that adoption is not a priority of public child welfare agencies, which focus on preserving troubled families and addressing problems in the foster care system); Tyree, *supra* note 132 (stating that some prospective parents turn to intercountry adoption because it is quicker than domestic adoption). *See generally* Placek, *supra* note 144, at 5.

¹⁴⁶ *See generally* Lucas, *supra* note 21, at 555–56.

¹⁴⁷ *See id.* at 556; Gearino, *supra* note 7.

¹⁴⁸ *See* Hollinger, *supra* note 27, at 49.

¹⁴⁹ Child Welfare Information Gateway, Costs of Adopting, http://www.childwelfare.gov/pubs/s_cost/s_costb.cfm (last visited Feb. 16, 2010).

¹⁵⁰ *See generally* AdoptiveParents.ca, International or Intercountry Adoption, http://www.adoptiveparents.ca/on_intadoption.shtml (last visited March 1, 2010).

¹⁵¹ *See* RICHARD MINTZER, YES, YOU CAN ADOPT!: A COMPREHENSIVE GUIDE TO ADOPTION 23–24 (2003).

¹⁵² *Id.* at 23.

¹⁵³ *See* AdoptiveFamilies.com, Cost of Adoption Update, <http://www.adoptivefamilies.com/articles.php?aid=1685> (last visited March 1, 2010). *See also* MARY ANN LAMANNA & AGNES RIEDMANN, MARRIAGES AND FAMILIES: MAKING CHOICES IN A DIVERSE SOCIETY 260 (Thomson Wadsworth 2009).

Intercountry politics plays a huge role in international adoptions, and there is always the risk for prospective adoptive parents that the country from which they choose to adopt will close for foreign adoptions after their adoption process has begun. That risk can be substantially minimized, however, if prospective adoptive parents select a long-running program with current political support in the country of origin. China and Russia, for instance, have long been perceived as such programs. *See* MINTZER, *supra* note 151, at 27.

There are never any guarantees surrounding the availability of a particular child for whom prospective adoptive parents begin the adoption process. But even if that particular child is determined to be unavailable for adoption, another adoptable child is typically identified,¹⁵⁴ and prospective adoptive parents generally pay a previously agreed-upon agency fee for a near certainty that they will return with a new member of the family.¹⁵⁵

Domestic adoption, on the other hand, is fraught with uncertainty.¹⁵⁶ And while the cost may appear lower,¹⁵⁷ that apparent financial incentive to adopt domestically is almost entirely neutralized by evidence of final placement rates.¹⁵⁸ Because adoption agencies are not compelled to report, and no government agency compiles statistics on failed adoptions,¹⁵⁹ there is no perfect data detailing domestic adoption failure rates.¹⁶⁰ Nonetheless, industry experts estimate that roughly half of prospective adoptive families experience at least one failed match before finalizing an adoption.¹⁶¹ Birth mothers who create adoption plans with prospective adoptive families or adoption agencies later decide to parent their children themselves nearly eighty percent of the time.¹⁶² And lest one assume that the ultimate fulfillment of a birth mother's adoption plan is completely unrelated to the payment of her living expenses, "[l]ong and often bitter experience has repeatedly demonstrated that the birth mother who is most

¹⁵⁴ *Id.* at 28.

¹⁵⁵ *Id.*

¹⁵⁶ *See* Mansnerus, *supra* note 24, at A1.

¹⁵⁷ *See supra* notes 150 and 151.

¹⁵⁸ *See* MINTZER, *supra* note 151, at 28.

¹⁵⁹ *See* Seelye, *supra* note 7, at A14. *See, supra*, note 7 for a definition of "failed adoption" for purposes of this discussion.

¹⁶⁰ Indeed, adoption agencies have no incentive to disclose statistics regarding failed adoptions to prospective adoptive parents or the public in general, as widespread knowledge of the information would likely make the services they offer appear less attractive.

¹⁶¹ *See* Gearino, *supra* note 7; *See* Scherreik, *supra* note 7.

¹⁶² *See* Mansnerus, *supra* note 24, at A1. *See also* Steven Pressman, *The Baby Brokers*, CALIFORNIA LAWYER, July 1991, at 30, 34–105.

financially demanding is also the birth mother who is most likely to fail to complete the adoption plan.”¹⁶³

A birth parent change of heart is no doubt an emotionally devastating decision for prospective adoptive parents. Unfortunately, it may be financially devastating as well. The vast majority of expenses paid by prospective adoptive parents in connection with a domestic adoption—particularly birth mother living expenses—are paid before the birth of the child.¹⁶⁴ But a birth mother may not execute a surrender of parental rights or consent to an adoption until some period *after* the child is born.¹⁶⁵ Thus, in almost all cases, when a birth mother changes her mind and decides to parent the child herself, living expenses have already been paid by the prospective adoptive parents, who now find themselves without the child they hoped to parent.¹⁶⁶ Still worse, distraught adoptive parents are almost always held to have no means of recovering the expenses they paid, either from the adoption agency involved or from the birth mother who has decided to parent.¹⁶⁷ The financial risk of domestic adoption is simply too great for many

¹⁶³ Donnelly, *supra* note 57, § 6:20. *See generally* New York *ex rel.* Anonymous v. Anonymous, 195 N.Y.S.2d 1009 (N.Y. Sup. Ct. 1959) (birth mother refused to carry out adoption plan after receiving funds from the adoptive parents for months prior to the birth).

¹⁶⁴ *See* ARIZ. REV. STAT. ANN. § 8-114(B) (2007); CAL. FAM. CODE § 8610(a) (West 2004); FLA. STAT. ANN. § 63.132 (West 2005 & Supp. 2009); IDAHO CODE ANN. § 16-1515 (2006); MICH. COMP. LAWS ANN. § 710.54(7) (West 1995); MO. ANN. STAT. § 453.075(1) (West 2003); N.H. REV. STAT. ANN. § 170-B:19(V) (2002); N.M. STAT. ANN. § 32A-5-34(A) (West 2003 & Supp. 2008); OKLA. STAT. ANN. tit. 10, § 7505-3.2(A) (West 2007); S.C. CODE ANN. § 63-9-740 (1987 & Supp. 2007); TENN. CODE ANN. § 36-1-116(b) (West 2002 & Supp. 2008); UTAH CODE ANN. § 78B-6-140 (West 2004 & Supp. 2008); VT. STAT. ANN. tit. 15A, § 3-702 (2007) (describing the process for reporting expenses, most of which are paid before the birth of the child).

¹⁶⁵ *See e.g.*, KAN. STAT. ANN. § 59-2116 (2005) (consent or relinquishment may not be given or accepted until twelve hours after the birth of a child).

¹⁶⁶ *See* Pressman, *supra* note 162, at 34–105.

¹⁶⁷ *See* MINN. STAT. ANN. § 259.55(2) (West 2007) (“A contract purporting to require a birth parent to reimburse a prospective adoptive parent for [living expenses] under any circumstances . . . is void as against public policy.”); MO. ANN. STAT. § 453.075(2) (West 2003) (the court’s only option if it finds that any payments were unreasonable is to decline to issue the decree of adoption); MONT. CODE ANN. § 42-7-105(4) (2007) (“It is illegal to require repayment or reimbursement of anything provided to a birth parent.”); N.H. REV. STAT. ANN. § 170-B:13(II) (2002 & Supp. 2008) (“A contract purporting to require a birth parent to reimburse an intended adoptive parent for [living expense] payments under any circumstances . . . is void as against public policy.”); N.J. STAT. ANN. § 9:3-39.1(e) (West 2002 & Supp. 2008) (payments by adoptive parents are non-refundable); WIS. STAT. ANN. § 48.837(6)(b) (West 2008 & Supp. 2008) (court’s only option is to dismiss the petition). *See also* Hollinger, *supra* note 27, at 49.

qualified prospective adoptive families to bear, and thus, they turn away from domestic adoption and toward other countries to build their families.

Perhaps an even graver concern than the potential loss of adoptive parents to intercountry adoption, however, is the very real possibility that the cost of domestic adoption may lead to the loss of many quality adoptive families altogether. In essence, the high cost of infant adoption in the United States may price many families out of the market for a child.¹⁶⁸

1. *Paid Today, Gone Tomorrow*

The bulk of the financial uncertainty surrounding living expense payments made in connection with domestic adoption flows from the notion that they are paid in advance of the birth and generally not returned to the prospective adoptive parents under any circumstances. State law supports the payment of birth mother living expenses and provides prospective adoptive parents no means of recovering the monies they pay regardless of whether the birthmother ultimately places her child for adoption.

If a birth mother perpetrates a fraud on a prospective adoptive family in order to reap financial reward, never intending to go through with the placement agreement she perfected or otherwise misrepresenting her status or intentions in a way that is designed to unjustly enrich her to the prospective adoptive parents' detriment, state law uniformly permits the prospective adoptive parents to file suit against the birth mother for fraud.¹⁶⁹ Where this cause of action

¹⁶⁸ See generally Klinker, *supra* note 26, at 148 (arguing that if the price for a surrogate mother fee is too high, some caring couples will not be able to afford it).

¹⁶⁹ See e.g., CAL. PENAL CODE § 273 (West 2008) (misdemeanor for any parent to obtain financial benefit with the intent either not to complete the adoption or to consent to the adoption); 720 ILL. COMP. STAT. ANN. 525/4.1 (West 2003 & Supp. 2009) (reimbursement allowed where natural parent either knew that she was not pregnant or accepted payments from more than one adoptive family); IND. CODE ANN. § 35-46-1-9.5 (West 2004 & Supp. 2008) (birth mother commits adoption deception if she knowingly or intentionally benefits from expenses when she knows or should have know she is not pregnant, when the first adoptive parent is not aware that another adoptive parent is also paying expenses in an effort to adopt the same child, or when the mother does not intend to make an adoptive placement); NEV. REV. STAT. ANN. § 127.287(2) (West 2008) (unlawful for any person to receive payment for medical and other necessary expenses related to the birth of a child from a prospective adoptive parent with the

could be proven, the defrauded prospective adoptive parents would at least recover damages for the loss they sustained, including all sums paid to and on behalf of the birth mother, and likely other damages, including those for emotional distress.¹⁷⁰

In one particularly well-publicized case, Maya-Anne Mays worked with an adoption agency to be matched with prospective adoptive parents who might provide a loving home for the child she claimed to be carrying, a child whose soldier father she said was killed in Iraq.¹⁷¹ Ms. Mays took money from three couples who desired to adopt her baby—\$250 from one couple for unspecified expenses, \$1,050 from another couple for rent, and nearly \$12,000 for two months from a third couple.¹⁷² None of those families succeeded in adopting Mays' baby. In fact, it's unclear whether there was any baby at all. Mays contends that she delivered a baby stillborn, dropped it outside an Oregon hospital, and did not seek medical attention during or after the birth.¹⁷³ Oregon officials did not believe her story; they prosecuted Mays for hatching a scheme to defraud area couples by faking pregnancy to induce payments of substantial living expenses.¹⁷⁴ After Mays' lawyer failed to present any evidence substantiating her pregnancy at trial, Mays was convicted and sentenced to a three-year prison term.¹⁷⁵ Whether the couples who

intent of not consenting to or completing the adoption of the child); N.C. GEN. STAT. ANN. § 48-101-03(d) (West 2000 & Supp. 2008) (prospective adoptive parent may seek to recover a payment if the parent or other person receives or accepts it with the fraudulent intent to prevent the proposed adoption from being completed).

¹⁷⁰ See *Burr v. Board of County Com'rs of Stark County*, 491 N.E.2d 1101, 1108 (Ohio 1986). See generally Steven J. Gaynors, Annotation, *Fraud Actions, Right to Recovery for Mental or Emotional Distress*, 11 A.L.R. 5th 88 (1993) (damages for emotional distress may be recovered in fraud cases where the defendant should have been aware that his conduct involved an unreasonable risk of causing emotional distress).

¹⁷¹ *Calif. Woman on Trial for Adoption Scam*, ASSOCIATED PRESS, MSNBC WIRE SERVICES, Sept. 16, 2004, available at <http://www.msnbc.msn.com/id/6022964>.

¹⁷² Demian Bulwa, *Woman Convicted of Adoption Fraud Insists She's Pregnant Now*, SAN FRANCISCO CHRONICLE, SFGATE, Oct. 25, 2007, at B-1. To the extent these payments were for Ms. Mays' pregnancy-related living expenses, they were permissible expenditures under Oregon law. OR. REV. STAT. ANN. § 109.311(1) (West 2003 & Supp. 2008).

¹⁷³ *Calif. Woman on Trial for Adoption Scam*, *supra* note 171.

¹⁷⁴ *Id.* That a person could profit from one of these schemes at all shows rather handily that allowable payments in connection with domestic adoption are not merely those directly related to the birth, but are essentially cash payments akin to those which would be paid for purchase of a commodity.

¹⁷⁵ Bulwa, *supra* note 172.

provided Mays with monies for living expenses ever recovered the funds of which they were deprived is unclear, but each of these couples could likely have pursued a civil suit against Mays had they desired to pursue such a course of action.¹⁷⁶ Cases like that involving Maya-Anne Mays¹⁷⁷ are certainly troubling, but in the end, prospective adoptive parents are well-protected by state laws on fraud.¹⁷⁸

The real difficulty in this area is in establishing fraud in connection with the adoption plan a birth mother makes for her child.¹⁷⁹ Making out such a claim requires proof of fraudulent intent.¹⁸⁰ And while that intent may be proved by circumstantial evidence,¹⁸¹ it is rather difficult to come by. Unless the alleged birth mother is not pregnant at all when she develops an adoption plan and accepts payments of living and other expenses from prospective adoptive parents, she is likely to have second thoughts and, in fact, to vacillate frequently in her decision-making regarding her unborn child.¹⁸² Indeed, most mental health professionals agree that while a birth mother may perfect an adoption plan and fully intend to stick with and place her child as the plan describes, the decision must be made all over again once the child is born.¹⁸³ Under the circumstances that necessarily surround domestic adoptions, then, one would *expect* to see evidence of vacillation, doubt, and uncertainty as to a birth parent's decision to relinquish a child

¹⁷⁶ For the elements of fraud under Oregon law, *see* *Riley Hill General Contractor, Inc. v. Tandy Corp.*, 737 P.2d 595 (Or. 1987).

¹⁷⁷ For a more recent, but strikingly similar story, *see* *Mills*, *supra* note 21.

¹⁷⁸ Of course, there are significant limitations to pursuing a fraud claim against birth mothers, who are typically poor and likely judgment proof. *See* *Kelly*, *supra* note 136, at 17 (birth mothers are often poor, illiterate, and young).

¹⁷⁹ *See* John R. Maley, *Wrongful Adoption: Monetary Damages as a Superior Remedy to Annulment for Adoptive Parents Victimized by Adoption Fraud*, 20 Ind. L. Rev. 709, 709 (1987) (describing the difficulties faced by adoptive parents in recovering when birth parents act fraudulently).

¹⁸⁰ 37 AM. JUR. 2D *Fraud and Deceit* § 23 (2001).

¹⁸¹ 37 AM. JUR. 2D *Fraud and Deceit* § 496 (2001).

¹⁸² *See generally* Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 441–43 (1996).

¹⁸³ *See* Susan Ayres, *Kairos and Safe Havens: The Timing and Calamity of Unwanted Birth*, 15 WM. & MARY J. WOMEN & L. 227, 279 (2009) (early decisions to make an adoption plan are often made, but until the point of delivery, there is typically no real emotional commitment to those decisions). *See also* HOLLINGER ET AL., *supra* note 85, § 2.11[1][a] (stating that the hormonal and other physiological changes that occur may render the birth mother unusually susceptible to external pressures to retain her child).

for adoption. As a result, any circumstantial evidence of fraud should be viewed skeptically, and proof of fraudulent intent ought to be more strongly demonstrated in the adoption context than it must be in the typical fraud case. Furthermore, proof issues aside, most pregnant women perfecting an adoption plan are *not* acting with intent to defraud prospective adoptive parents in making the plan; they simply want the best for their babies and believe they are moving toward a positive future both for themselves and the children to whom they will give birth.¹⁸⁴ That these women may later change their minds and choose to parent does not mean they ever possessed a fraudulent intent. In short, it is the very rare domestic adoption case in which fraud is committed. Cases like that involving Maya-Anne Mays do arise, but thankfully, rather infrequently.

In the garden-variety domestic adoption failure, then, there is no fraud, but simply a change of heart. And in these cases, adoptive parents almost always find themselves with no child and no means of recouping the often substantial sums of money they have already expended, particularly when it comes to housing payments made on behalf of the birth mother during pregnancy. Adoption agencies are generally well-insulated from the claims of disappointed prospective adoptive parents,¹⁸⁵ largely because agency-drafted contracts expressly state that all fees paid to the agency in connection with an adoption are non-refundable under any and all circumstances.¹⁸⁶ Moreover, many expenses paid by prospective adoptive parents are

¹⁸⁴ See Ayres, *supra* note 181, at 279-80 (discussing difficulty of birth parent decision to relinquish); *Hearings, supra* note 4, at 17 (testimony of William Acosta) (testifying that birth mothers are often told that if they change their minds and choose to parent, they will be depriving “the child of a lifestyle that [they] could not hope to provide”).

¹⁸⁵ Kurt Mundorff, *Children as Chattel: Invoking the Thirteenth Amendment to Reform Child Welfare*, 1 CARDOZO PUB. L. POL’Y & ETHICS 131, 133 (2003)

¹⁸⁶ See *e.g.*, Adoption Associates, Inc., *Agency Policies*, http://www.adoptassoc.com/about/agency_policies/, (last visited Feb. 25, 2010).

paid directly to third-party service providers.¹⁸⁷ Housing may well be one such expense;¹⁸⁸ in fact, it may be more logical in some cases for prospective adoptive parents to arrange to make, for instance, rental payments on behalf of a birth mother directly to the landlord, in part to ensure that only actual expenses are being covered.¹⁸⁹ In these cases, the agency has no role in the payment of sums directly from the prospective adoptive parents to a third-party housing provider, and the agency cannot be called upon to refund living expenses paid if the adoption fails.¹⁹⁰ Likewise, the third-party housing provider owes no duty to prospective adoptive parents with whom he has no contractual relationship; he has provided the service for which he was paid.¹⁹¹

If anyone owes a duty of reimbursement to prospective adoptive parents, it is the birth mother who received cost-free housing and chose not to complete her adoption plan. The decision regarding the fate of the child is the birth mother's to make,¹⁹² and almost no one would argue that she lacks the right to make whatever final decision she wishes.¹⁹³ But if the birth mother chooses to parent the child, she has essentially received a huge financial benefit from prospective adoptive parents to whom she provided nothing but heartache in return.¹⁹⁴ From a purely equitable standpoint, the end result of such a failed adoption should be to put the parties

¹⁸⁷ See e.g., GA. CODE ANN. § 19-8-13(c) (West 2003); IOWA CODE ANN. § 600.9(2) (West 2001 & Supp. 2008); MINN. STAT. ANN. § 259.55 (West 2007); N.H. REV. STAT. ANN. § 170-B:13(I) (2002 & Supp. 2008); N.D. CENT. CODE § 14-15-10(1) (2004); OHIO REV. CODE ANN. § 3107.055(C) (West 2005 & Supp. 2008); OKLA. STAT. ANN. tit. 10, § 7505-3.2(B) (West 2007); 23 PA. CONS. STAT. ANN. § 2533(d) (West 2001) (statutes provide the payments which must be reported to the court, which are predominantly to third-party service providers). See also Zierdt, *supra* note 2, at 34.

¹⁸⁸ IOWA CODE ANN. § 600.9(2) (West 2001 & Supp. 2008); MINN. STAT. ANN. § 259.55 (West 2007); N.H. REV. STAT. ANN. § 170-B:13(I) (2002 & Supp. 2008); N.D. CENT. CODE § 14-15-10(1) (2004); OHIO REV. CODE ANN. § 3107.055(C) (West 2005 & Supp. 2008); 23 PA. CONS. STAT. ANN. § 2533(d) (West 2001).

¹⁸⁹ Ralph F. Dubliker, *Ethical Considerations in Adoption Law*, 24985 NBI-CLE 55, 56-7 (2005).

¹⁹⁰ Richard A. Lord, *Warranties: Introduction*, 18 WILLISTON ON CONTRACTS §52:38 (2009).

¹⁹¹ *Id.*

¹⁹² 2 C.J.S. *Adoption of Persons* § 71 (2003).

¹⁹³ See *New York ex rel. Anonymous v. Anonymous*, 195 N.Y.S.2d 1009, 1019 (N.Y. Sup. Ct. 1959); Pressman, *supra* note 162, at 33.

¹⁹⁴ See Klinke, *supra* note 26, at 120–21; Pressman, *supra* note 162, at 34–105.

back into their original positions.¹⁹⁵ This would require a birth mother who received housing payments under an adoption plan she did not fulfill to reimburse prospective adoptive parents in the amount of the benefit she received. Assuming no fraud exists, as is true in the vast majority of cases, a state law cause of action such as unjust enrichment could be used to pursue this recovery, and it may fit the bill quite well.¹⁹⁶ The problem, simply stated, is that courts almost never charge a birth parent in a failed adoption with the duty to repay monies received from prospective adoptive parents who desired to adopt the child.¹⁹⁷

Even for the lucky couple for whom a planned domestic adoption succeeds—with the birth parents executing surrenders in accordance with the adoption plan—prospective adoptive parents have a limited practical ability to have living expenses they paid in connection with the adoption reviewed in any meaningful way for reasonableness, necessity, or any other limiting standard. Most states do require prospective adoptive parents to disclose all fees paid in connection with an adoption when they petition the court for finalization of the adoption.¹⁹⁸ And some state courts have ordered intermediary agencies to reimburse prospective adoptive parents

¹⁹⁵ See, e.g., IDAHO CODE ANN. § 16-1515(2) (2006) (prospective parents to failed adoptions may sue for expense reimbursement and damages).

¹⁹⁶ See Richard A. Lord, *Rescission and Restitution: Quasi-Contractual Recovery*, 26 WILLISTON ON CONTRACTS §68:5 (2009).

¹⁹⁷ See, e.g., *A.L. v. P.A.*, 517 A.2d 494, 498 (N.J. Super. Ct. App. Div. 1986) (holding that adoptive parents cannot recover any out-of-pocket expenses spent on the adoptive child while in the adoptive parents' custody if the birth parents breach the "adoption contract" and regain control of the child).

¹⁹⁸ See ALA. CODE § 26-10A-23(a) (1992); ALASKA STAT. § 25.23.090(a) (2007); ARIZ. REV. STAT. ANN. § 8-114(E) (2007); ARK. CODE ANN. § 9-9-211(a) (West 2002); CAL. FAM. CODE § 8610 (West 2004); FLA. STAT. ANN. § 63.132 (West 2005 & Supp. 2009); GA. CODE ANN. § 19-8-13(c) (West 2003); IDAHO CODE ANN. § 18-1511 (2006); 720 ILL. COMP. STAT. ANN. 525/4.1(e) (West 2003 & Supp. 2009); IOWA CODE ANN. § 600.9(2) (West 2001 & Supp. 2008); KANS. STAT. ANN. § 59-2121(b) (2005); KY. REV. STAT. ANN. § 199.590(6) (West 2006); LA. CH. CODE ANN. art. 1200(A) (West 2004); ME. REV. STAT. ANN. tit. 18-A, § 9-306(b) (1998); MICH. COMP. LAWS ANN. § 710.54(7) (West 1995); MO. ANN. STAT. § 453.075(1) (West 2003); NEV. REV. STAT. ANN. § 127.127 (West 2008); N.H. REV. STAT. ANN. § 170-B:19(V) (2002); N.J. STAT. ANN. § 32A-5-34(A) (West 2002 & Supp. 2008); N.Y. DOM. REL. LAW § 115(8) (McKinney 1999); N.C. GEN. STAT. ANN. § 48-2-602 (West 2000); N.D. CENT. CODE § 14-15-10(1) (2004); OKLA. STAT. ANN. tit. 10, § 7505-3.2(A) (West 2007); OR. REV. STAT. ANN. § 109.311(1) (West 2003 & Supp. 2008); 23 PA. CONS. STAT. ANN. § 2531 (West 2001 & Supp. 2008); S.C. CODE ANN. § 63-9-740 (1987 & Supp. 2007); TENN. CODE ANN. § 36-1-116(b)(16) (West 2002 & Supp. 2008); UTAH CODE ANN. § 78B-6-140 (West 2004 & Supp. 2008); VT. STAT. ANN. tit. 15A, § 3-702 (2007); W. VA. CODE ANN. § 48-22-803(f) (West 2002); WIS. STAT. ANN. § 48.913(6) (West 2008 & Supp. 2008).

for fees paid which were in excess of the state standard.¹⁹⁹ But those cases are exceptionally rare. Courts almost never order expense reimbursement in a successful adoption at the finalization stage.²⁰⁰ The focus of the proceeding at that point simply rests elsewhere. Moreover, as previously discussed, many states find such reimbursement orders a violation of public policy.²⁰¹ And, of course, birth mothers placing their children for adoption are typically poor women against whom any judgment is likely going to be virtually uncollectible.²⁰²

As a result, whether they are successful in adopting the children delivered by the birth mothers with whom they are matched or not, prospective adoptive parents are highly unlikely to see the return of any monies they expend for birth parent living expenses. And if their first attempt at adoption results in failure, which is statistically quite likely, many prospective adoptive parents do not have the financial means to start the adoption process anew after losing tens of thousands of dollars. In the current legal landscape, a failed adoption quite often marks the end of a prospective adoptive parent's journey.

2. *A Skewed Pool of Prospective Adoptive Parents Along Lines of Wealth*

¹⁹⁹ See *In re Baby Girl D.*, 517 A. 2d 925 (Pa. 1986); see also *J.F. v. D.B.*, 848 N.E.2d 873 (Ohio App. 9 Dist. 2006) (ordering biological parents in planned surrogacy to reimburse adoptive parents for monies expended after surrogates chose to parent the child); VT. STAT. ANN. tit. 15A, § 3-703(a)(8) (2007) (prior to issuing the final decree of adoption, the court must conduct an accounting, and must deny, modify, or order reimbursement of any payment or disbursement that is unauthorized by statute or is unreasonable or unnecessary when compared with the expenses customarily incurred in connection with an adoption). See also OHIO REV. CODE ANN. § 3107.055(D) (West 2005 & Supp. 2008) (the court may reduce the amount if it is unreasonable, or if disallowed, . . . the court may order that it be refunded); OKLA. STAT. ANN. tit. 10, § 7505-3.2(A) (West 2007) (if some fees or charges are unlawful or unreasonable, the court may order reimbursement).

²⁰⁰ See *End Baby Commerce*, Commentary, GAMBIT WEEKLY, June 10, 1999, at 7. (“the state exercises very little oversight in determining what is ‘reasonable’”); Gabriel Escobar, “*Lawyer’s Kidnap Case Spotlights Louisiana Adoption Laws*” THE WASHINGTON POST, Nov. 16, 1998 at C1 (“just how carefully expenses are scrutinized [by state district judges] is an open question”).

²⁰¹ See e.g., 720 ILL. COMP. STAT. ANN. 525/4.1(d) (West 2003 & Supp. 2009); MICH. COMP. LAWS ANN. § 710.54(6) (West 1995); MINN. STAT. ANN. § 259.55 (West 2007); MONT. CODE ANN. § 42-7-105(4) (2007); N.H. REV. STAT. ANN. § 170-B:13(II) (2002 & Supp. 2008); N.J. REV. STAT. § 9:3-39.1(e) (West 2002 & Supp. 2008); N.C. GEN. STAT. ANN. § 48-10-103(c) (West 2000 & Supp. 2008).

²⁰² *In re Baby M.*, 537 A.2d 1227, 1238–49 (N.J. 1988).

That domestic adoption is too expensive is a relatively non-controversial assertion. Serious attempts need to be made to balance a free-market approach, under which only the wealthiest of couples will become parents through domestic adoption, with the needs of the hundreds of thousands of children available for adoption each year. Reducing the expense for families pursuing domestic adoption would better serve the needs of our children.

Living expenses of the birth parents are only one of the many expenses that arise in connection with domestic adoption.²⁰³ If any real effort were made to reform American adoption procedure to make it more palatable from a cost perspective, agency and attorney brokerage fees, as significant costs of a domestic adoption,²⁰⁴ must be reviewed as well.²⁰⁵ Nonetheless, birth parent living expenses often make up a very large portion of a domestic adoption budget.²⁰⁶ And as a result, the permissibility of these payments contributes to the size of the pool of prospective adoptive parents who are willing to consider, and can afford, domestic adoption.

Some may argue that prospective adoptive parents unable to afford to pay birth mother living expenses are too poor to adopt anyway, and thus, perhaps it is in the child's best interest that such families are priced out of the adoption market.²⁰⁷ This argument fails to consider,

²⁰³ Lucas, *supra* note 21, at 555–56.

²⁰⁴ See Pressman, *supra* note 162, at 33 (stating that the independent baby broker will offer to represent each prospective adoptive couple for a fee of \$3,000, but the baby broker does not guarantee that the birth mother will choose the couple; the baby broker may send out twenty letters to introduce prospective adoptive couples to the same pregnant woman, and if the baby broker gets five replies, he has made “\$15,000 and hasn’t helped any of these couples”). For a sampling of agency fees in a domestic adoption, see, e.g., PremierAdoption.org, Domestic Program, <http://www.adoptivefamilies.com/articles.php?aid=1685> (last visited March 1, 2010) (listing agency fees as ranging from \$13,500 to \$21,500, depending on adoptive family income).

²⁰⁵ *Id.* See also *Hearings*, *supra* note 4; Klinke, *supra* note 26, at 118–19.

²⁰⁶ See generally Lucas, *supra* note 21, at 555–56; Gearino, *supra* note 7.

²⁰⁷ See Richard B. Wirthlin, *American Public Attitudes Toward Infant Adoptions*, in ADOPTION FACTBOOK IV: THE MOST COMPREHENSIVE SOURCE FOR ADOPTION STATISTICS NATIONWIDE 225 (2007) (fifty-state survey shows that U.S. public thinks that single mothers seeking to adopt who have an average annual income of \$50,000 to \$74,900 will be “good mothers” at a much higher percentage rate than women earning \$35,000 or less per year); *National Commission of Children*, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 64 (1991) (for children to develop fully, their fundamental needs must be met: care and attention from loving parents, an adequate family income, good nutrition and basic healthcare, a quality education, adequate housing, and a safe neighborhood). *But see* D.C. CODE § 4-1410 (2008) (inability of adoptive applicants to pay for all or any part of such costs shall not be a disqualifying factor in determining whether applicants are suitable parents for the child); In re

however, that the average income of a family in this country is a mere \$50,000.²⁰⁸ Reasonable birth mother living expenses of \$1,500 per month for a period of six months, or a total of \$9,000, represents nearly 20% of a typical family's *annual* income, and may be very difficult for prospective adoptive parents to front at the start of an adoption.²⁰⁹ Such difficulties do not mean that these same prospective adoptive parents would be unable to adequately raise the child they adopt. The cost of raising a child is borne slowly over time,²¹⁰ and there are cost efficiencies and economies of scale inherent in adding to an existing family that do not exist when it comes to advancing a non-household member's expenses of life for many months.²¹¹ Moreover, "[m]any homes with scarce financial resources are nevertheless adequate to provide the love, protection and support that children require."²¹²

With the American foster care system in crisis,²¹³ one must also consider whether it may not be a positive development that some families wishing to adopt cannot afford to build families through domestic infant adoption; the hope is that such families will turn to the foster care system and to adopt therefrom at little or no cost.²¹⁴ Unfortunately, the current foster care system is not an attractive alternative for many prospective adoptive parents, regardless of their

Baby M, 537 A.2d 1227, 1249 (N.J. 1988) (American values do not allow the rich to use their money to circumvent the law).

²⁰⁸ Carmen DeNavas-Walt, Bernadette D. Proctor, & Jessica C. Smith, U.S. Census Bureau, Current Population Reports, *Income in the United States*, in INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2007, 5 (2008). See also *Hearings*, *supra* note 4, at 4.

²⁰⁹ See generally Klinke, *supra* note 26, at 148.

²¹⁰ DeNavas-Walt, Proctor, & Smith, *supra* note 208, at 9.

²¹¹ *Id.*

²¹² *In re Baby Girl D.*, 517 A.2d 925, 927 (Pa. 1986). See also *Hearings*, *supra* note 4, at 4–22 (1977) (hearing findings show that adoptive couples are not “rich” but will endure financial sacrifices for the child and are often so desperate that they will pay any price and even commit crimes, including perjury, obstruction of justice, and conspiracy, for the chance to raise a child).

²¹³ The Pew Commission on Children in Foster Care, *Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care*, in ADOPTION FACTBOOK IV: THE MOST COMPREHENSIVE SOURCE FOR ADOPTION STATISTICS NATIONWIDE 279–80 (2007); Rycraft, *supra* note 3, at 351–52 (foster care is not meeting the needs of children, as it fails to provide safe and permanent families).

²¹⁴ Adopting a child out of the U.S. foster care system through a public agency will often come at no cost to the adoptive family. National Adoption Center, Adoption Financing Information: How to Cover the Costs, http://www.adopt.org/assembled/financing_more.html#foster (last visited Feb. 23, 2010). Indeed, foster-adopt parents often receive assistance from the state for the children they take into their care. *Id.*

financial inability to pursue a private or agency adoption. The rather scant possibility that a fostered child will become available for adoption²¹⁵—children in state care are reunified with their natural parents and therefore become unavailable for adoption roughly 50% of the time²¹⁶—the likelihood that the child will suffer long-term effects of abuse and neglect,²¹⁷ and the relative infrequency with which very young children are available for adoption²¹⁸ makes the foster-adopt system an unacceptable alternative for many families.

In short, the risk of allowing birth parent living expenses to be paid in connection with a domestic infant adoption means that birth parents are likely to select adoptive parents who can pay these expenses over those who cannot. Indeed, substantial evidence exists to demonstrate that birth mothers regularly engage in just this type of selective behavior—when they live in states that do not allow prospective adoptive parents to pay birth mother housing benefits, they flock to states more friendly in allowing these payments to give birth to and place their children.²¹⁹ Thus, state law sanctioning payment of living expenses tends to discourage all but the wealthiest of families from pursuing the domestic adoption of an infant, thereby diminishing the pool of prospective adoptive parents and inhibiting the ability of loving and capable families

²¹⁵ See Thomas C. Atwood, Nicole Ficere Callahan, and Virginia C. Ravenel, *Judicial Leadership to Ensure Sound Permanency Decisions for Children in Foster Care: Practical Guidelines for Juvenile and Family Courts*, in ADOPTION FACTBOOK IV: THE MOST COMPREHENSIVE SOURCE FOR ADOPTION STATISTICS NATIONWIDE 291 (2007) (stating that only 20% of all children in the foster care system have case plans aimed toward permanent adoption).

²¹⁶ *Id.*

²¹⁷ See The Pew Commission on Children in Foster Care, *Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care*, in ADOPTION FACTBOOK IV: THE MOST COMPREHENSIVE SOURCE FOR ADOPTION STATISTICS NATIONWIDE 279–80 (2007) (children entering the foster care system at an early age often lack the stability that promotes attachment and early brain development and as a result are more likely to face emotional, behavioral, and academic challenges, and as adults, homelessness and unemployment).

²¹⁸ See Atwood, Callahan, & Ravenel, *supra* note 215, at 295 (stating that it can take up to 12 months from the date the foster child is removed from his or her home before the first permanent placement hearing is held).

²¹⁹ In *Adoption House, Inc. v. P.M.*, 2003 WL 23354141, at *4–*5 (Del. Fam. Ct. 2003), a birth mother refused to agree to adoption in Pennsylvania because, at that time, Pennsylvania law did not permit the payment of birth mother living expenses. She decided instead on a couple from New Jersey, a state in which living expenses were allowed. Two years later, when the same birth mother sought an adopting couple for another child, she decided first on a couple from Louisiana, who later changed their minds at the hospital after learning the child was biracial. The birth mother finally decided on a Delaware couple, as Delaware state law permitted the payment of living expenses. See also Zierdt, *supra* note 2, at 31–32.

to be candidates as adoptive parents through domestic adoption. And while “financial considerations are certainly a factor, placement of children in adoptive homes should not rest solely on the wealth of the adoptors.”²²⁰ Such a result is clearly not in the best interest of the nearly 25,000 children relinquished in infant domestic adoptions each year.²²¹

D. The Misplacement of the Support Burden

One of the most troubling features of state law allowing the prospective adoptive parents of a child to pay birth mother living expenses is that these rules place the burden of caring for a birth mother in necessitous circumstances on the shoulders of a party who, from a logical standpoint, should not be bearing it. One scholar has warned, for instance, that if adoptive parents are not legally free to provide pregnant women with reasonable sums of money during pregnancy, the likely result will be “an epidemic of teen-age mothers necessarily on welfare.”²²² Aside from the fact that there’s no reason to believe the prediction has any merit—indeed, the percentage of persons on welfare in states such as Louisiana and Florida, whose liberal rules allow for the greatest payments of birth mother living expenses, is higher than that in Pennsylvania, a state which prohibits the payment of birth mother living expenses altogether—*shouldn’t* the government bear more of the responsibility for taking care of its citizens than should a prospective adoptive parent who hopes for, but has no guarantee whatsoever of parenting a birth mother’s child? The question of the propriety of the existence of social welfare programs in general is highly controversial, but as long as such programs exist, and their purpose is to protect the interests of the nation and state’s most needy citizens, birth mothers and their unborn fetuses seem to fall squarely within the domain of those eligible for government

²²⁰ *In re Baby Girl D.*, 517 A.2d 925, 927 (Pa. 1986).

²²¹ See Sally Kalson, *International Adoptions by Americans Get Really Tough*, PITTSBURGH POST-GAZETTE, Post-gazette.com, Mar. 15, 2009, available at <http://www.post-gazette.com/pg/09064/955756-82.stm> (last visited Feb. 25, 2010) (American children in need of adoption disadvantaged because more adoptive parents are looking abroad).

²²² Rea, *supra* note 111, at 145.

assistance. In short, states have an interest in protecting their birth mother citizens. Prospective adoptive parents have no such duty. But the very existence of state laws which allow prospective adoptive parents to legally cover birth mother living expenses means that, for all practical purposes, it is adoptive parents who bear the burden of birth mother care that the state or federal government would likely otherwise be bearing.²²³

In the Medicaid context, an evaluation of the proper placement of the burden of caring for needy birth mothers and their fetuses has been made. Because pregnant women considering adoption for their unborn children are often living in poverty, their medical expenses in connection with the pregnancy are typically covered by Medicaid.²²⁴ In the case of *In re Adoption of Baby Boy M.*,²²⁵ the Kansas trial court, at finalization of the adoption proceeding, ordered the adoptive parents to reimburse Medicaid for expenses covered by that program for the birth mother's medical expenses in delivering the child. The appellate court reversed, holding that no law required the adoptive parents to make this reimbursement, and in the absence of any such provision, the adoptive parents held no such duty.²²⁶ Michigan allocates responsibility for a birth mother's medical expenses even more clearly; prospective adoptive parents are only permitted to pay medical expenses incurred by the birth mother in connection with an adoption if those expenses are not covered by Medicaid.²²⁷

In essence, states generally place the burden of caring for the medical needs of the birth mother during pregnancy on the government, rather than on adoptive parents, even in a

²²³ The placement of the support burden on prospective adoptive parents, typically strangers to the birthmother and not predisposed to bestow upon her any gratuity, leads to the nearly inescapable conclusion that the payments made are really made for the child itself.

²²⁴ States which elect to cover the medically needy under their Medicaid plans are required to cover children under age eighteen and pregnant women who, except for income and resources, would be eligible as categorically needy. See U.S. Dept. of Health and Human Services, *Centers of Medicare and Medicaid Services*, http://www.cms.hhs.gov/MedicaidEligibility/01_Overview.asp#TopOfPage, (last visited Feb. 25, 2010)..

²²⁵ *In re Adoption of Baby Boy M.*, 18 P.3d 304 (Kan. App. 2001).

²²⁶ *Id.*

²²⁷ Mi. ST. § 710.54(3)(b) (1995).

successful adoption. To do otherwise in the context of living expenses—where the possibilities may be government assistance with housing through a program of social welfare or private coverage of birth mother living expenses by prospective adoptive parents—is inconsistent with the rules governing Medicaid and difficult to justify.

When the birth mother is married at the time of the adoptive placement (which is not all that rare), there are even more significant questions about the propriety of the placement of the burden of paying her living expenses on the shoulders of prospective adoptive parents. The only rational reason for allowing the birth mother to receive monies on which to live from the prospective adoptive parents—and to allow her to, at the same time, avoid a serious charge of baby selling—is that these monies pay for the birth mother to live during a period for which she is unable to work, typically only a lengthy period if there are complications in the pregnancy. The pregnancy of the birth mother should not interfere with her husband’s ability to work, however. And in every state, spouses have a duty to support each other financially during marriage, a duty which is taken quite seriously and enforced with some regularity even while marriages are ongoing.²²⁸ Thus, a married birth mother is already owed a primary duty of support by her husband. Allowing prospective adoptive parents to pay her living expenses without caveat shifts the primary obligation for the birth mother’s support from her spouse to typically unrelated adoptive parents. Essentially, they allow the husband of a birth mother to profit from the adoptive parents—at least, if he is living in the same home with his wife—while simultaneously abdicating his own responsibility for her support.

III. PROHIBITION: THE ONLY ADOPTION-SAVING ALTERNATIVE

²²⁸ See e.g., LA. CIV. CODE ANN. art. 98 (West 2009) (“Married persons owe each other fidelity, support, and assistance.”); CAL. FAM. CODE § 720 (West 2009) (“Husband and wife contract toward each other obligations of mutual respect, fidelity, and support.”); CONN. GEN. STAT. ANN. §46b-37 (West 2010) (“It shall be the joint duty of each spouse to support his or her family”); DEL. CODE ANN. tit. 13 § 502 (West 2010) (duty to support a spouse rests upon the other spouse); MONT. CODE ANN. §40-2-102 (West 2009).

Domestic adoption is facing a serious crisis.²²⁹ The success rate of planned placements is abysmal. Adoptive parents are defecting to intercountry adoption in masses. And the requirement that prospective adoptive parents pay exorbitant fees to adopt makes domestic adoption impossible for many couples. Indeed, the President of the National Council for Adoption, an agency advocacy group, recently remarked that “you don’t need a lesson in economics” to understand that the adoption marketplace has created perverse consequences, particularly related to race.²³⁰ Indeed, something akin to a price schedule has emerged for white babies, distinct from that applicable to racial minorities.²³¹

The American system of private and agency adoption needs to be reformed dramatically. A modest, yet transformative place to start in re-regulating the baby market²³² is with a ban on prospective adoptive parents’ payment of birth family living expenses.

Time has demonstrated that less conservative reform will be ineffective at solving the problems plaguing domestic adoption. Reasonableness and necessity limitations have not succeeded, nor have small dollar caps on living expenses. “Because less than two percent of unmarried women are placing their babies for adoption, they now have the option to be very, very selective.”²³³ Indeed, they have profited – not merely subsisted – from the existing domestic adoption landscape. Banning the payment of living expenses in connection with adoption would send a strong message distinguishing adoption from baby selling,²³⁴ and would

²²⁹ See Mansnerus, *supra* note 24, at A1.

²³⁰ *Id.*

²³¹ *Id.*

²³² Michele Goodwin, *The Free-Market Approach to Adoption: The Value of a Baby*, 26 B.C. THIRD WORLD L. J. 61 (2006) (describing the current American adoption model as “resembl[ing] an unregulated marketplace in children”).

²³³ Mansnerus, *supra* note 24, at A1.

²³⁴ See generally Andrea B. Carroll, *Incentivizing Divorce*, 30 CARDOZO L. REV. 1925, 1967-73 (2009) (on the expressive function of rules in the family law arena).

increase the likelihood that more prospective adoptive parents would foray into domestic adoption, serving not only those adoptive parents, but also children in need of homes.²³⁵

The black market for babies was gutted nearly fifty years ago by the creation of relatively uniform state law prohibiting baby selling. With domestic adoption currently facing serious challenges, the time has come to eliminate the gray market activities²³⁶—specifically the payment of birth family living expenses—as well.

²³⁵ There is a risk that eliminating the living expense windfall would lead more pregnant women to select abortion. *See generally* STEPHEN COLEMAN, *THE ETHICS OF ARTIFICIAL UTERUSES: IMPLICATIONS FOR REPRODUCTION AND ABORTION* 74 (Ashgate Pub. Ltd. 2004) (describing sociological influences on the decision between adoption and abortion). This risk may be quite real, but it is unquantifiable, and fear of it is no longer a sufficient reason to continue a system demonstrated over time to be seriously flawed.

²³⁶ *See Mansnerus, supra* note 24, at A1.