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The New Baby Mama Drama: Equal Rights to Compensation for Birth Mothers of Adopted Infants as Granted to Egg Donors and Surrogates

Jenny Beecroft

Imagine a number of the common scenarios that take place in the various processes individuals go through in order to have a child. When a woman donates her eggs she is compensated, depending on a number of factors, anywhere from \$5,000 to \$100,000.¹ When a woman is contracted to be a gestational surrogate, where she carries to term, either the couple's egg and sperm, donor egg and sperm, or a combination of both, she is compensated up to \$100,000.² When a woman gives up her baby for adoption, she has in effect donated her egg to the prospective adoptive parents *and* served as a surrogate mother, and yet it is illegal to compensate her for her reproductive donation and service.³

This paper will argue that the inequality present in the right to compensation for providing reproductive material and services should be abolished. Compensation is legal in Artificial Reproductive Technology (hereinafter, "ART") and thus should also be legalized in adoption, because birth mothers who give up their infants for adoption, should not be less compensated when they are arguably giving up the same, if not more. Birth mothers who place their infants for adoption are making comparable sacrifices to women who participate in ART in the sense that they are providing their genetic egg to create the infant, and they are serving as a gestational surrogate since they carry the infant to term. However, birth mothers who place their infants for adoption are arguably giving up *more* as they are sacrificing their fundamental right to parent their child. Birth mothers who place their infants for adoption are providing strikingly

¹ Jennifer Adaeze Anyaegbunam, *Ivy League women get offers for their eggs*, CNN HEALTH (August 12th, 2009), <http://thechart.blogs.cnn.com/2009/08/12/ivy-league-women-get-offers-for-their-eggs/>.

² Stephanie Saul, *Building a Baby, With Few Ground Rules*, THE NEW YORK TIMES, (December 12, 2009), <http://www.nytimes.com/2009/12/13/us/13surrogacy.html?pagewanted=2&ref=assistedreproductivetechnology>.

³ Andrea B. Carroll, [Reregulating the Baby Market: A Call for A Ban on Payment of Birth-Mother Living](#)

Expenses, 59 U. Kan. L. Rev. 285, 287 (2011).

comparable reproductive donations and services as the women who participate in ART and yet are treated unequally under the current law in the United States, where no state allows compensation for adoption.⁴

Many scholars have proffered the viewpoint of “parental rights selling”⁵ instead of “baby selling.” This paper is not proposing that individuals should be compensated for selling their parental rights or for selling their babies. Instead, this paper proposes that birth mothers who place their infants for adoption should be compensated for donating their eggs, as their genetic material was used to create the fetus, and for serving as surrogates by carrying the fetus to term, just as any other egg donor and/or gestational surrogate would be compensated. When birth mothers of adopted infants are arguably giving up so much more than egg donors and gestational surrogates, it is irrational that they should not receive at least an equal benefit for their sacrifice.

This paper will argue that compensating birth mothers is both logical and equitable by examining present methods of compensation under the current legal system, drawing comparisons to ART and “parental rights selling,” and establishing a framework of limitations that will reflect acknowledgment of the inherent risks involved and an effort to eliminate such risks. The first section will illustrate how the exchange of compensation in order to have a child is already taking place. The exchange of compensation occurs illegally in agency adoption and private adoption, and legally in egg and sperm donations, and surrogacy. This is not for the purpose of opposing or condoning any of the current legal processes but to proffer that because compensation for adoption is currently taking place illegally, the cons, risks, and dangers provided by opponents are not entirely relevant to a hypothetical framework where such compensation would be legal and thus regulated with safeguards in place that will prevent many

⁴ Carroll, Reregulating the Baby Market: A Call for A Ban on Payment of Birth-Mother Living Expenses, at 287.

⁵ Richard A. Posner, The Regulation of the Market in Adoptions, 67 B.U. L. Rev. 59, 61 (1987).

of the risks and dangers of the illegal market. This section will also illustrate the harsh inequity in the current ban on compensation for adoption by highlighting the unmistakable comparison of the sacrifice birth mothers of adopted infants endure to the donations and services of women who participate in ART, and legally receive compensation for their donations and services.

The second section analyzes current theories supporting “parental rights selling” and pits these theories against their opponent’s arguments in order to demonstrate the pros and cons of both points of view. This analysis will show how the risks and dangers present in “parental rights selling” far outweigh any benefits that could result, and thus, theories of “parental rights selling” are insufficient to create an effective framework for legalized compensation for adoption. The purpose of this section is to distinguish the proposed framework of compensating birth mothers for their donation and services from “parental rights selling” theories to reveal how the purposed framework will be more feasible. It will demonstrate that the proposed system will not be plagued by the same risks present and inseparable from “parental rights selling,” and yet will still allow for the proffered benefits of “parental rights selling,” such as an increased availability of infants placed for adoption in a market where the demand is currently insurmountably greater than the supply.

The third section suggests a framework for a legalized system for compensating birth mothers of adopted infants for their reproductive donations and services. This section exemplifies how a legalized system of compensations for adoption would extinguish the risks and dangers that are present in the current illegal system, because once legal, it is possible to regulate the exchange of compensation, thus allowing for the placement of necessary safeguards in order to protect all parties involved. These protections include recommendations for strict limitations that will act as necessary safeguards to abolish and prevent the risks and problems

discussed in the context of the current illegal system of compensation for adoption and “parental rights selling” theories.

Such limitations include the requirements that both parties have separate and independent legal counsel, and that the birth mother participate in mandatory counseling by an independent counselor throughout her pregnancy, and at a minimum, weekly during her last trimester. The attorney and counselor for the birth mother must find that the mother has the requisite knowledge of all aspects of her decision and that the decision is completely voluntarily and not due to desperation for monetary compensation. A limitation on the age of the birth mother will not be necessary as the mandatory counseling would provide a sufficient safe guard to counter the risks inherent in immaturity. Eligibility for compensation will only be granted to birth mothers who relinquish their infants before being released from the hospital, because to allow compensation when the child is any older risks crossing the line into selling human beings versus accomplishing the purposed framework’s objective of compensating birth mothers for their reproductive donation and services.

Finally, this paper will conclude that birth mothers of adoptive infants deserve an equal right to compensation as women who participate in ART, while recognizing the risks and problems present in the exchange of compensation for placing a child for adoption. The purposed framework eliminates the risks and dangers proffered by opponents of compensation for adoption by framing and limiting the compensation received to the same donations and services currently legally compensated for in ART, while still retaining the probable benefits realized by proponents of “parental rights selling”. Thus, the purposed framework will rid our legal system of a current prominent inequity, and achieve greater equality by granting women who place their

infants for adoption and women who participate in ART an equal opportunity for compensation for their comparable reproductive donations and services.

Babies for Sale!

Chief Justice Wilentz of the New Jersey Supreme Court famously wrote, “There are, in a civilized society, some things that money cannot buy.”⁶ This is the argument of many opponents of “baby selling”. Margaret Radin, in her article, “What, If Anything, Is Wrong with Baby Selling?” highlights a more specific argument that because society has decided that it is simply not acceptable to sell human beings, it is equally unacceptable to treat babies as commodities and thus it is not acceptable to exchange money in adoption.⁷ In reality, “baby selling” is already taking place, both illegally and legally, in the various processes individuals utilize in order to have children.⁸ It occurs illegally or “quasi-illegally” when adoption agencies and intermediaries participate in black market compensation for adoption, and also in the “gray market” practice of baby brokering.⁹ It also occurs legally through ART, where women are compensated for donating their eggs and for serving as gestational surrogates, and men are compensated for donating their sperm. By acknowledging that compensation is already exchanged in adoption and that the risks and problems exist in an illegal black market, and by comparing the sacrifice of birth mothers to the reproductive donations and services compensated for in ART, it becomes exceedingly clear that birth mothers are being denied an equal opportunity to compensation for providing comparable reproductive materials and services.

⁶ Matter of Baby M, 109 N.J. 396, 537 A.2d 1227, 1249 (1988).

⁷ Margaret Jane Radin, What, If Anything, Is Wrong with Baby Selling?, 26 Pac. L.J. 135, 136 (1995). See also Kimberly D. Krawiec, Altruism and Intermediation in the Market for Babies, 66 Wash. & Lee L. Rev. 203, 204 (2009).

⁸ Krawiec, Altruism and Intermediation in the Market for Babies, at 204.

⁹ *Id.*

Public v. Private Adoption

There are two systems of adoption in the United States: public adoptions and private adoptions. Public adoptions typically occur when the biological parent's parental rights are terminated by a court, most likely due to an initial instance or pattern of abuse and neglect followed by failure to comply with court orders.¹⁰ In such circumstances, the child is usually placed in foster care and remains in the system until the family can be reunited or parental rights are terminated and the child is thus eligible for adoption. Public adoptions often involve older children, minorities and children with special needs.¹¹

Private adoptions are typically conducted through adoption agencies or by private intermediaries, and sometimes through a combination of both. Private adoption is often labeled "gray market" adoption, due to the lack of regulation on the parties involved and the methods and procedures utilized by those parties.¹² In agency-facilitated adoptions, the birth parents relinquish their parental right to the adoption agency who then places the child with a prospective adoptive family.¹³ These agencies are state regulated and must be licensed by the state in order to legally facilitate adoptions.¹⁴ Prospective adoptive parents are screened by the adoption agencies and have to wait, on average, four to six years for a healthy infant to become available for adoption.¹⁵ There is a hierarchy in agency adoptions and prospective adoptive parents who are willing to adopt a child with special needs, a minority, or an older child increase their chances of receiving a child sooner and at a lesser cost.¹⁶

¹⁰ Krawiec, Altruism and Intermediation in the Market for Babies, at 230.

¹¹ *Id.*

¹² Posner, The Regulation of the Market in Adoptions, at 61.

¹³ Jana B. Singer, The Privatization of Family Law, Wis. L. Rev. 1443, 1444, 1478-86 (1992).

¹⁴ *Id.*

¹⁵ Singer, The Privatization of Family Law, at 1444, 1478-86.

¹⁶ Solangel Maldonado, Discouraging Racial Preferences in Adoptions, 39 U.C. Davis L. Rev. 1415, 1427 (2006).

Private adoption conjures up images of the popular 2007 comedy, *Juno*, where a quirky teenage girl finds herself saddled with an unwanted pregnancy and chooses adoptive parents for her unborn child out of a Penny Saver advertisement.¹⁷ This scenario does actually occur in private adoptions, but the process more often involves intermediaries, such as lawyers, doctors, or “baby brokers,” who are essentially individuals or organizations who facilitates private adoptions as a profession.¹⁸ In all private adoptions, the prospective parents are only *legally* allowed to compensate the birth mother for “pregnancy-related expenses.”¹⁹ The line between what qualifies as a pregnancy related expense can be ambiguous, which leads opponents of private adoptions to equate the process to baby-selling.²⁰ Whereas payments for medical expenses, adoption agency fees, and attorney fees are arguably clearly pregnancy-related, the line starts to blur with payments for intermediary fees, living accommodations²¹ and payments to substitute for loss of employment income due to the pregnancy, such as in situations of doctor-ordered bed rest or where the birth mother’s employment is very labor intensive and unsafe for both the birth mother and the fetus.²² Opponents of allowing such fees argue that birth mothers are actually profiting from receiving money for these questionable pregnancy-related expenses, such as living expenses, and thus the concerns of baby selling regarding whether this transaction is truly voluntary and not due to the duress and pressures of financial desperation, are at issue.²³ Therefore, even in the legally condoned exchange of money in the adoption process, birth mothers are arguably currently being compensated for placing their infant for adoption.

¹⁷ *JUNO* (Fox Searchlights Pictures 2007).

¹⁸ Krawiec, *Altruism and Intermediation in the Market for Babies*, at 207.

¹⁹ Singer, *The Privatization of Family Law*, at 1443, 1444, 1478-86.

²⁰ *Id.*

²¹ Carroll, *Reregulating the Baby Market: A Call for A Ban on Payment of Birth-Mother Living Expenses*, at 289.

²² Krawiec, *Altruism and Intermediation in the Market for Babies*, at 235.

²³ Carroll, *Reregulating the Baby Market: A Call for A Ban on Payment of Birth-Mother Living Expenses*, at 289.

The demand for healthy infants leads numerous prospective adoptive parents and intermediaries to continue to blur the line of what constitutes legal pregnancy-related expenses, by doing whatever it takes to secure a child.²⁴ Unscrupulous intermediaries prey on prospective adoptive parent's desperation, enabling them to charge exorbitant fees for their services.²⁵ These services include price setting and negotiation, matching birth parents with prospective adoptive parents based on both party's requests and preferences, and arguably their most valuable function is providing a decrease in the risks inherent in adoption and a guarantee that the transaction will be a success.²⁶ Intermediaries are able to decrease the inherent risks involved with adoption, such as the adoption falling through due to inexperienced price negotiation, because they are unregulated and thus have a monopoly on the expertise of such a transaction.²⁷ Intermediaries lack of regulation also allows them to provide guarantees, such as, in their function of matching parties where they can adhere to specific requests for certain characteristics of prospective adoptive parents, and thus ensure a successful transaction.²⁸ Not so surprisingly, these intermediaries are some of the strongest opponents of legalizing compensation to birth mothers, because once adoption compensation was legal and had appropriate procedures in place, then birth parents and prospective adoptive parents could easily engage in such transactions, either without the assistance of an intermediary, or with such assistance, but at a much lower cost.²⁹ These intermediaries would thus lose their majority stake in the profit.³⁰ Therefore, if compensation for adoption was legalized, birth parents could also partake in the economic

²⁴ Singer, The Privatization of Family Law, at 1443, 1444, 1478-86.

²⁵ Krawiec, Altruism and Intermediation in the Market for Babies, at 235.

²⁶ *Id.* at 235-236.

²⁷ *Id.* at 236.

²⁸ *Id.*

²⁹ Krawiec, Altruism and Intermediation in the Market for Babies, at 249.

³⁰ *Id.*

benefit of the transaction, versus the intermediaries solely receiving the profit, with often nothing but their own interests in mind.

Eggs and Sperm for Sale

As the law stands today in the United States, women and men can exchange their eggs and sperm, the essential ingredients necessary to create a baby, for money. Although men can hypothetically walk into a sperm bank at any time and make “a donation,” woman undergo a much more pervasive process. Egg donation involves daily hormone injections for three to five weeks in order to stimulate the ovaries to produce multiple eggs, followed by minor surgery to extract the eggs.³¹ The American Society for Reproductive Medicine’s (hereinafter, “ASRM”) 2007 Ethics Committee Report disallows greater compensation based on donor characteristics and places limits on the amount of compensation allowed by requiring justification for “total payments to donors in excess of \$5,000” and deems compensation above \$10,000 as inappropriate.³² Numerous fertility websites cite their compliance with the ASRM under the compensation section of their website.³³

Despite these guidelines, many fertility clinics do offer compensation far greater than what the ASRM deems inappropriate, based on a number of factors including donor characteristics. There is a hierarchy of compensation for egg and sperm donations based on these factors and the donor’s characteristics. If a donor has blue eyes, high SAT scores, or graduated

³¹ Reproductive Science Center of New Jersey, (Mar. 26, 2012, 10:00am) <http://www.fertilitynj.com/egg-donor/egg-donor-information.html>; see also Center for Human Reproduction – New York, (Mar. 26, 2012, 10:14am) http://www.centerforhumanreprod.com/egg_donor_faq.html.

³² The Ethics Committee of the American Society for Reproductive Medicine, *Financial Compensation of Oocyte Donors*, ASRM ETHICS COMMITTEE REPORT (2007), http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/financial_incentives.pdf.

³³ Society for Assisted Reproductive Technology, Egg Donor Agencies, (March 29, 2012, 2:05pm) http://www.sart.org/Egg_Donor_Agencies/.

from an Ivy League university, they can receive more money for their eggs or sperm than an individual with brown eyes who went to Rutgers University.³⁴

In 2007, a survey published in the *Fertility and Sterility Journal* documented the average rate of compensation at \$4,217.³⁵ That same year, Elite Donors, a company that specializes in personalized egg donor matching³⁶, placed an advertisement in *The Crimson*, Harvard's campus newspaper, offering \$100,000 for donor eggs from Harvard's female population.³⁷ Elite Donors' website advertises their latest search, conducted in January 2011, which accepted applications from women, "5'8 or taller in height, Caucasian (non Hispanic), naturally beautiful (modeling experience is a plus), 18-30 years old, college student or graduate, athletic (ideally college or professional level experience), and with no genetic medical issues."³⁸ Selected applicants who donated their eggs were compensated \$80,000 based on their innate characteristics.³⁹

Men are also paid more for their sperm based on similar factors. The national average compensation for sperm donations is \$50, but men can be paid as high as \$100 if they have an Ivy League degree.⁴⁰ The "ideal sperm donor" is six feet tall, has blond or brown hair, blue or green eyes and a "medium" complexion.⁴¹

³⁴ Krawiec, *Altruism and Intermediation in the Market for Babies*, at 223.

³⁵ Roni Caryn Rabin, *As Demand for Donor Eggs Soars, High Prices Stir Ethical Concerns*, THE NEW YORK TIMES (May 15, 2007) <http://www.nytimes.com/2007/05/15/health/15cons.html>.

³⁶ Elite Egg Donors, (April 22, 2012, 7:42pm) <http://elitedonors.com/index5.html>.

³⁷ Anyaegbunam, *Ivy League women get offers for their eggs*, <http://thechart.blogs.cnn.com/2009/08/12/ivy-league-women-get-offers-for-their-eggs/>.

³⁸ Elite Egg Donors, (April 22, 2012, 7:49pm) <http://elitedonors.com/index3.html>

³⁹ *Id.*

⁴⁰ Dr. Randi Hutter Epstein, *Ivy League sperm: Do you have it?*, CBS NEWS (Feb. 29, 2012, 7:03am), http://www.cbsnews.com/2300-204_162-10007254.html?tag=page.

⁴¹ *Id.*

Surrogacy Compensation

There are two forms of surrogacy: traditional surrogacy and gestational surrogacy.⁴² In traditional surrogacy, the surrogate mother provides the donor egg as well as serves as the gestational surrogate, whereas with gestational surrogacy, the surrogate mother has no genetic relationship with the fetus and only serves as a gestational surrogate.⁴³ In the famous case, *In Re Baby M.*, the Supreme Court of New Jersey deemed traditional surrogacy contracts void, because compensation for adoption was illegal and such contracts too closely resembled baby selling.⁴⁴ *In Re Baby M.* involved a traditional surrogacy agreement where the surrogate provided her own egg and was artificially inseminated with the contracting man's sperm.⁴⁵ Subsequent to the birth of the child, the surrogate, who was also the biological mother, changed her mind and refused to relinquish her parental rights.⁴⁶

The provisions of the surrogacy contract that particularly concerned the court in *In Re Baby M.*, included the clause that granted \$10,000 in compensation to the surrogate/biological mother, the clause that rescinded said compensation if the surrogate miscarried, and the fact that the biological father's wife was not listed anywhere on the contract, which the Court found to be an attempt at making the transaction look less like baby selling.⁴⁷ Many of the policy reasons behind the New Jersey Supreme Court's holding are also arguments of opponents of compensating birth mothers for adoption, such as the desire for children to be raised by their natural parents, preserving equal right-to-parent between the biological mother and father of the

⁴² American Society for Reproductive Medicine, Third Party Reproduction, A Guide for Patients (Sperm, egg, and embryo donation and surrogacy), 3, http://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/thirdparty.pdf

⁴³ *Id.*

⁴⁴ Matter of Baby M, 109 N.J. 396, 537 A.2d 1227 (1988).

⁴⁵ *Id.* at 412.

⁴⁶ *Id.* at 414.

⁴⁷ Baby M, at 412, 422-425.

child, and protecting a birth mother's right to revoke consent.⁴⁸ These concerns are addressed in further detail under the "Safeguards" section of the paper.

Gestational surrogacy is legal in some states, whereas other states refuse to recognize gestational surrogacy agreements as repugnant to public policy.⁴⁹ With gestational surrogacy, the surrogate is implanted with an embryo, or multiple embryos, consisting of the contracting couple's egg and sperm, donor egg and sperm, or a combination of both.⁵⁰ Surrogates can be compensated from \$80,000 to \$100,000.⁵¹

Some opponents of ART argue that ART has contributed toward the decrease in adoption rates due to its ability to satisfy prospective parent's desire for genetic children, even when their faced with infertility.⁵² On the other hand, the argument can also be made that the ability to have genetic offspring is just one factor that leads infertile couples to turn to ART in their effort to have a child, and that prospective parents favor ART to the adoption process due to a number of reasons, including the reality that it takes less time to receive a child through ART than through adoption.⁵³ On average it takes only one to two years to conceive a child through surrogacy, while it can take four to six years to obtain an infant through private adoption.⁵⁴ Thus, it could be reasoned that if compensation was legalized in adoption, the adoption process would speed up

⁴⁸ Vanessa S. Browne-Barbour, Bartering for Babies: Are Preconception Agreements in the Best Interests of Children?, 26 Whittier L. Rev. 429, 480 (2004).

⁴⁹ The Human Rights Campaign (February 20, 2012, 11:02pm), <http://www.hrc.org/laws-and-legislation/state>

⁵⁰ American Society for Reproductive Medicine, Third Party Reproduction, A Guide for Patients (Sperm, egg, and embryo donation and surrogacy), 3, http://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/thirdparty.pdf

⁵¹ Saul, *Building a Baby, With Few Ground Rules*, <http://www.nytimes.com/2009/12/13/us/13surrogacy.html?pagewanted=2&ref=assistedreproductivetechnology>.

⁵² Elizabeth Bartholet, Beyond Biology: The Politics of Adoption & Reproduction, 2 Duke J. Gender L. & Pol'y 5, 9-10 (1995).

⁵³ Peter J. Neumann, Should Health Insurance cover Ivf? Issues and Options, 22 J. Health Pol. Pol'y & L. 1215, 1219 (1997).

⁵⁴ Northeast Assisted Fertility Group, *Surrogacy Frequently Asked Questions* (March 29, 2010, 9:22am), <http://www.assistedfertility.com/faqs/faq-surrogacy.shtml>.

significantly due to the increased supply of infants available placed for adoption, and this would result in placing adoption on a more level playing field with ART, in terms of attractiveness to would-be-parents.

Selling “Parental Rights.” Not Babies

Judge Richard Posner has infamously argued, that legalizing compensation for adoption is not “baby selling” but merely “parental rights selling.”⁵⁵ Posner relied on the fact that compensation is already exchanged in adoption to advocate for an experiment that could result in increased “efficiency and equability” as a result of legalizing and thus regulating the transactions that already take place.⁵⁶ Whereas Posner’s intent was to address the uneven level of supply and demand in the adoption market, this paper seeks to tackle the imbalance of rights granted to birth mothers who relinquish their infants for adoption, as opposed to egg donors and gestational surrogates.⁵⁷ This is not to say that there would not be indirect benefits of equalizing these rights, similar to the benefits predicted by Posner in his theory, and these benefits would also come without the risks that intrinsically exist when a monetary value is placed on an intangible priceless right.⁵⁸

Black Market vs. Free Market

The black market is inherently illegal.⁵⁹ Compensation for adoption, not related to pregnancy expenses, is illegal in every state, therefore any adoption transactions where the birth mother is compensated for anything beyond pregnancy related expenses is illegal and was performed on the “black market.” The effect of the illegality of the black market is that it is not regulated and the lack of regulation leads to exorbitant costs and prices, which would normally be lowered by

⁵⁵ Posner, The Regulation of the Market in Adoptions, at 63.

⁵⁶ *Id.* at 61

⁵⁷ *Id.* at 61.

⁵⁸ *Id.* at 61.

⁵⁹ *Id.* at 62.

the competition that naturally exists in a free market.⁶⁰ Posner's theory essentially argues that legalizing the sale of parental rights would allow for a free market and thus eliminate the unnaturally high prices that run rampant in grey and black market adoptions that are presently occurring under the existing framework.⁶¹ Currently, compensating a birth mother in order to secure an adoption can run very steep because the transaction is performed on the black market and thus it is not subject to regulation.⁶² The regulation, safeguards, and competition that exist in a free market would have the effect of bringing prices down.⁶³

Posner counters arguments that a free market for adoption would lead to a system of adoption where only the rich would be able to adopt, by noting that adoption is already relatively expensive and is not necessarily accessible to everyone.⁶⁴ *Legal* adoptions performed by state regulated and licensed adoption agencies presently favor "wealthy and well-connected" prospective adoptive parents.⁶⁵ Posner believes the competition that naturally exists in a free market would actually lower the costs of adoption, and therefore adoption would become more, not less, accessible to the general population.⁶⁶

Treating Women and Children as Commodities?

Margaret Radin, in her article "What, If Anything, Is Wrong with Baby Selling?", acknowledges the argument that by allowing a free market on adoption, society is condoning treating women, birth mother's specifically, as commodities in the sense that those with blue eyes, athletic ability, high SAT scores, and Ivy League educations will be able to demand a

⁶⁰ Posner, The Regulation of the Market in Adoptions, at 62.

⁶¹ *Id.* at 63.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 62.

⁶⁶ Posner, The Regulation of the Market in Adoptions, at 62.

higher price for relinquishing their infants.⁶⁷ Yet, this argument fails to acknowledge that the ability to demand a higher price already *legally* exists in the market for donor eggs. A simple Google search for “egg donor” produces a list of websites, the first titling in bold letters on their egg donor application form: “Welcome Smart Beautiful Healthy Egg Donors.”⁶⁸ If society condones such treatment of women as commodities in the donor egg market, logically, they would condone the same to an adoptive mother that is simply serving as the egg donor and a surrogate for a family seeking to have a child.

Radin also acknowledges the same argument but focusing not on the birth mothers, but on the infants who are subsequently adopted with the use of compensation.⁶⁹ Specifically, that this would be treating children as commodities by making them feel that they are only worth the price they were paid, and if their neighbor down the street “cost more,” he is worth more.⁷⁰ In reality, paying more for children based on certain characteristics is already legally occurring in the United States today.⁷¹ Adoption agencies charge more for white babies, less for Latino, Native American and Asian babies, and the least for biracial and African American babies.⁷²

Opponents also argue that if infant adoptions become more available and accessible to the general public, that this will have the negative effect of decreasing the number of public adoptions that take place.⁷³ Posner strikes down arguments that free market effects will lower the rate of public adoptions, by highlighting that they will be free, and thus maintain a desirable

⁶⁷ Radin, What, If Anything, Is Wrong with Baby Selling?, at 145.

⁶⁸ Egg Donation, Inc., Donor Registration, (February 20, 2012, 10:30pm), https://www.eggdonor.com/healthy-egg-donor/?gclid=CP_K9_Lvxq4CFYSK4AodoAi4BA.

⁶⁹ Radin, What, If Anything, Is Wrong with Baby Selling?, at 145.

⁷⁰ *Id.* at 145.

⁷¹ Maldonado, Discouraging Racial Preferences in Adoptions, at 1427.

⁷² *Id.* at 1427.

⁷³ Posner, The Regulation of the Market in Adoptions, at 63.

characteristic in a free market.⁷⁴ Certainly, it is much easier and less expensive to adopt some children over others under today's current framework, and this has not abolished the practice of public adoptions.⁷⁵

The Benefits of the Domino Effect

Posner suggests other benefits would result as well as greater availability and accessibility to infant adoptions, including decreased abortion rates, increased supply of infants placed for adoption, and thus much more efficient and particularly quicker placement rates than prospective adoptive parents currently endure.⁷⁶ Historically, when a woman encountered an unwanted pregnancy she had two options: keep the baby or give it up for adoption.⁷⁷ Subsequent to the Supreme Court's holding in *Roe v. Wade*, a woman now has the right to choose to have an abortion and terminate her pregnancy.⁷⁸ Posner suggests the right to abortion has decreased the number of babies placed for adoption, and if given the incentive of compensation, women who become faced with an unwanted pregnancy might choose adoption over abortion.⁷⁹

The typical profile of a birth mother who chooses adoption over parenting is a white teenager with aspirations of higher education and long-term career goals.⁸⁰ It is easy to imagine the scenario where a high school or college student, with a promising future ahead of her, encounters an unwanted pregnancy. As the law currently stands, her options are to, in effect, donate her child out of pure altruism and receive no other benefit for her sacrifice, or to procure an abortion

⁷⁴ Posner, The Regulation of the Market in Adoptions, at 63.

⁷⁵ Maldonado, Discouraging Racial Preferences in Adoptions, at 1427.

⁷⁶ Posner, The Regulation of the Market in Adoptions, at 63.

⁷⁷ *Id.* at 63.

⁷⁸ *Id.* at 63; see also Roe v. Wade, 410 U.S. 113, 154 (1973) holding modified by Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992).

⁷⁹ Posner, The Regulation of the Market in Adoptions, at 63.

⁸⁰ U.S. Department of Health and Human Services, Administration for Children & Families, "Children Welfare Information Gateway: Who Are the Women Who Place Their Children?", http://www.childwelfare.gov/pubs/s_place.cfm (May 4, 2012, 9:30am).

where she will have to undergo minimal negative repercussions, all moral beliefs and ensuing implications aside. If the student chooses to continue her pregnancy and give her child up for adoption, she is subjecting herself to countless direct and indirect adverse effects.

For nine months her life is no longer her own: she has to be conscious of everything she puts in her body, cannot drink alcohol, cannot smoke and cannot eat certain foods.⁸¹ She is also putting her own health and even life at risk, although advances in medicine have greatly reduced the risk of health implications and death due to pregnancy and childbirth.⁸² Despite the fact that the supermodels and celebrities pictured in the tabloid magazines she reads seem to bounce back to their pre-pregnancy self in a matter of days, the reality is that the physical structure of her body may never recover from the stresses and strains inflicted by pregnancy.⁸³ The pregnancy may also have negative effects on her education and ability to procure future employment or continue her education in graduate studies.

Not diminishing any of the previously mentioned sacrifices, the focus of this paper is the sacrifice she will make if she places her infant for adoption. She is in effect donating her genetic material in the form of her egg that co-created the fetus, and she is providing the gestational surrogate service in the process of carrying the fetus to term. Yet, for these sacrifices she is illegible to receive only the good feeling that inhibits someone who performs an altruistic act for no benefit of their own. On the other hand, if she chooses to have an abortion she will likely experience some discomfort during the procedure and a certain sense of loss and sadness in the moments and days following, but arguably nothing comparable to the adverse effects she would

⁸¹ Parents Magazine, "A Food Guide For Pregnant Women," <http://www.parents.com/pregnancy/my-body/nutrition/a-food-guide-for-pregnant-women/> (May 11, 2012, 3:24pm).

⁸² Center for Disease Control, "Maternal Health and Medical Services Utilization," http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60_01.pdf (May 11, 2012, 8:02am).

⁸³ Sylvia Brown, "Nobody Told Me: Challenges After Childbirth," <http://www.medicinenet.com/script/main/art.asp?articlekey=54613> (May 11, 2012, 3:30pm).

endure by opting for adoption. Many egg donors concede that although altruism played a role in their decision to become an egg donor, they would not have donated their eggs, had it not been for the benefit of compensation.⁸⁴ Therefore, if women were compensated for their reproductive donations and services in adoption it could induce them to continue pregnancies they otherwise would have terminated. Thus, the component of compensation would equalize the costs and benefits of a women's choice between adoption and abortion.

Like Taking Candy From A Baby?

Opponents of compensation for adoption argue that the inducement of compensation will create that risks that these adoptions will not be truly voluntary and will result in young, poor, and specifically minority women, being taken advantage of. This is based on the reasoning that women who exhibit these characteristics cannot negotiate at arms length, because they are more susceptible to coercion and duress as a result of their economic hardship.⁸⁵ Vanessa Browne-Barbour, in her article "Bartering for Babies: Are Preconception Agreements in the Best Interests of Children?" argues that, given the fact that racial minorities make up the majority of the "poor and disadvantaged class," allowing for the sale of their parental rights will basically be creating a system of "reproductive slavery," where disadvantaged minority women are "pressured" into having babies for wealthy, affluent, Caucasian women.⁸⁶

To counter Browne-Barbour's theory, the argument could be made that the population she focuses on: poor, disadvantaged and minority women, are *not* likely to be swayed by the prospect of compensation for reproductive services, as they are not the typical population that

⁸⁴ Rabin, *As Demand for Donor Eggs Soars, High Prices Stir Ethical Concerns*, <http://www.nytimes.com/2007/05/15/health/15cons.html>.

⁸⁵ Browne-Barbour, Bartering for Babies: Are Preconception Agreements in the Best Interests of Children?, at 475.

⁸⁶ *Id.* at 476.

chooses to place their infants for adoption.⁸⁷ The typical profile of a woman who chooses adoption for her infant is a Caucasian teenager or young adult under the age of twenty-one, who resides with her well-educated parents in a middle to upper-class suburban neighborhood.⁸⁸ The population of disadvantaged minority women that Browne-Barbour is fearful for, do not typically chose adoption over parentage.⁸⁹ Therefore, if any population were to become more susceptible to the inducement of compensation, it would more likely be the population of white teenagers from economically stable, educated homes, since they are already more prone to choosing adoption over parentage.

To be sure, the potential risk does exist that the incentive of compensation could cause some women in economic duress to place their infants for adoption “involuntarily”. The proposed framework takes this risk into account and limits the amount of compensation to what the particular women would have received had she donated her eggs and served as a gestational surrogate. This limitation is in contrast to other theories that choose to frame the exchange as compensation exchanged for parental rights. Parental rights are fundamental rights in our society and our legal system⁹⁰, and thus are arguably intangible and priceless, and therefore much more susceptible to inflated compensation, which would more readily lend itself to the risk of procurement due to economic duress. By framing and limiting compensation to reproductive

⁸⁷ Children Welfare Information Gateway, Voluntary Relinquishment for Adoption: Numbers and Trends, (2005), (April 20, 2012, 10:14pm) http://www.childwelfare.gov/pubs/s_place.cfm.

⁸⁸ Children Welfare Information Gateway, Voluntary Relinquishment for Adoption: Numbers and Trends, http://www.childwelfare.gov/pubs/s_place.cfm.

⁸⁹ *Id.* (citing statics, since the mid-1970s, relinquishments among never-married Black women has remained very low-declining from 1.5% to almost 0%, while relinquishment by White women has declined sharply-but remains higher at less than 2 percent.)

⁹⁰ Troxel v. Granville, 530 U.S. 57, 58, 120 S. Ct. 2054, 2056, 147 L. Ed. 2d 49 (2000) (holding a parent has a fundamental right to raise their child how they see fit.)

services, many of the risks of undue economic distress and therefore involuntary relinquishments, are greatly reduced.

Thus, the proposed framework would limit compensation to reproductive services that are already *legally* compensated for today. By limiting compensation in this manner, the purposed framework would not entice anyone who is set on parentage to waiver in that decision and consider adoption, merely due to the possibility of compensation. Such compensation would only serve as an incentive to those who do not want to parent, to choose adoption over abortion.

This is not to ignore the plausible scenario where the compensation indirectly creates the ability for the birth mother to properly raise and care for the child later in life, and thus regret choosing adoption. For example, imagine a birth mother is compensated for her donation and reproductive services, thus allowing her to pay for college, establish a career and become financially secure ten years later. The possibility does exist that women who use the compensation received from adoption toward furthering their education and broadening their opportunities in life will later have some regret for their previous relinquishment once they can afford to properly care for their biological child. The reality is that such potential for regret already exists under today's legal framework, and the only component the purposed legal framework would change is that it would create this opportunity for women to further their educations or similar life goals. Regrets are an inevitable risk regardless of whether compensation is involved in the equation, and at least under the purposed framework there are potential benefits due to the added component of compensation.

The Slippery Slope: Baby Selling to Organ Selling and Beyond

It is illegal to sell human organs in the United States today.⁹¹ Opponents of compensation for adoption rely on society's decision not to allow the sale of human organs in arguing that if compensation is exchanged in adoption, this will blur the line and inevitably lead society down the slippery slope toward selling human organs.⁹² The purposed framework is not suggesting that we legalize actually selling human infants, but instead limits compensation to a woman's reproductive donations and services. As previously discussed, compensation is legal for egg donation and gestational surrogacy. This is not to suggest that simply because the law condones something, that it should automatically condone comparable acts. The purpose is to demonstrate that by limiting compensation to what is already legally practiced, is feasible and arguably not detrimental to society, that many of the risks proposed by opponents of compensation in adoption will not occur in a legally regulated market.

Opponents of compensation in adoption rely on similar reasoning behind the laws prohibiting the sale of human organs. Such opponents argue that analogous risks apply in both exchanges. For example, there is the argument that if human organs were available for purchase and sale on the open market, that abduction and illegal trafficking to obtain these organs would skyrocket.⁹³ This argument ignores the regulation that would go hand-in-hand with a free market, which would reduce the risks of abduction and illegal trafficking of human organs that occurs on the black market today.⁹⁴ The same logic could apply to an adoption market. Once taken out of the black market, legal compensation for adoption and the regulation that ensues would actually

⁹¹ Prohibition of Organ Purchases, 42 U.S.C.A. §274e(a) (2007).

⁹² Kenneth Baum, Golden Eggs: Towards the Rational Regulation of Oocyte Donation, 2001 B.Y.U. L. Rev. 107, 153 (2001).

⁹³ Kenneth Baum, Golden Eggs: Towards the Rational Regulation of Oocyte Donation, 2001 B.Y.U. L. Rev. 107, 142 (2001).

⁹⁴ Baum, Golden Eggs: Towards the Rational Regulation of Oocyte Donation, at 143.

prevent such concerns as abduction and trafficking of infants, because birth mothers and prospective adoptive parents will be able to freely contract in the open, under clear regulations and safeguards, thus eliminating the black market and the inherent dangers that thrive in such a market.⁹⁵

Further, the risks of abduction and human trafficking in a market for adoption are arguably not akin to what is present in a market for human organs, because the need for human organs is life or death.⁹⁶ Such high-stake desperation that is prominent in the face of death simply does not exist in an adoption market.⁹⁷ Even more so, under the purposed framework, women are limited to compensation for their reproductive services, which arguably would make infants less prone to abduction and trafficking, because desperate prospective parents who may be prone to participating in the black market, would be able to pay for a women's reproductive services on the free market to procure an adoption.

Suggested Framework and Safeguards

Framework

Parental Rights Selling vs. Compensation for Egg Donation and Gestational Surrogacy

Posner argues that parental rights, versus actual babies, are exchanged for compensation in an adoption market.⁹⁸ Although Posner's proposal does an exemplary job of framing an adoption market in a free market versus black market for opponents who argue from that vacuum when proffering risks, his proposal fails in that many of the dangers that exist in the black market would continue to exist under his "parental rights selling" theory. This is due to the fact that

⁹⁵ Posner, The Regulation of the Market in Adoptions, at 63.

⁹⁶ Baum, Golden Eggs: Towards the Rational Regulation of Oocyte Donation, at 145.

⁹⁷ Baum, Golden Eggs: Towards the Rational Regulation of Oocyte Donation, at 145 (discussing the risk of trafficking and abduction are not similarly present in Oocytes as they are in human organs).

⁹⁸ Posner, The Regulation of the Market in Adoptions, at 63.

parental rights are intangible, priceless, and fundamental rights.⁹⁹ Such a valuable “item” available for exchange would arguably be just as susceptible to inflated prices as compensation for adoption currently is on the black market. Posner counters exclamations of such risks by arguing that the competition inherently present in a free market will drive prices down. Yet, even in a free market, commodities that are placed on pedestal and viewed by society as priceless, such as artwork, still manage to achieve astronomical and unattainable (at least to the general population) prices.

These readily drawn conclusions run directly counter to Posner’s allegation that a free market on adoption would make it more accessible. To be sure, if there is an increase in the amount of infants placed for adoption, arguably Posner’s theory is correct and such adoptions will become more accessible than they are currently. But if the cost of obtaining an infant adoption is similar to the cost of a “priceless artwork” then only the rich and affluent will be able to cough up the hundreds of thousands of dollars, possibly millions, to participate in such a market. The inflated prices will continue to cause desperate potential adoptive parents to go to extreme means, such as using unscrupulous intermediaries to obtain infants, whether it be abduction, human trafficking or preying on an unknowing, disadvantaged teenager. Thus, the risks and dangers of the black market will still thrive under Posner’s proposal.

Placing a price on parental rights poses too many risks that clearly outweigh the proposed benefits, such as the result of an increased supply of babies available for adoption.¹⁰⁰ This paper proposes a new framework where women are compensated for their reproductive services, not their parental rights. Under the proposed framework a birth mother would merely be compensated for providing her egg and her services as a gestational surrogate, as would an egg

⁹⁹ Troxel v. Granville, 530 U.S. 57, 58 (2000).

¹⁰⁰ Posner, The Regulation of the Market in Adoptions, at 63.

donor and surrogate in a similar situation. Many of the same benefits, such as an increase in the number of infants placed for adoption, proffered in Posner's "parental rights selling" theory can be achieved without the risks of inflated costs, by providing a equitable framework that encourages the choice of adoption by granting birth mothers the same right to compensation as those who participate in ART.

"Similar circumstances to an egg donor or surrogate" refers to the attributes and characteristics innately found in the birth mother, and how she would be compensated in the same fashion as an egg donor or a surrogate for possessing such desirable traits. For example, if the birth mother has blue eyes and a degree from Harvard she may be compensated more for her donation and services which she provided in the adoption process, then a birth mother who did not attend college and scored poorly on the SATs. To reiterate, this paper is not attempting to criticize or condone these processes that are already in place, but is instead seeking equality for birth mothers of adopted infants who are sacrificing equally, if not more, than egg donors and gestational surrogates.

Don't Throw the Baby Out With The Bathwater

The fact that compensation is already exchanged in the process of obtaining an adoption is insufficient justification to continue to deny birth mothers a right to equal compensation for their reproductive donation and service. The reason for illustrating how compensation for adoption is presently occurring in society today is to highlight that such exchanges are taking place in a black market due to the fact that compensation for adoption is illegal, and thus any compensation exchanged for adoption will not be regulated under the law. Therefore, the risks and concerns opponents proffer only apply to the *illegal* exchange of compensation for adoption, not the suggested *legal* exchange, that would logically be subject to strict regulations that

provide for safeguards to prevent the risks and harms that ran rampant in the illegal market. As Posner argues, the risks and cons are being proffered in the vacuum of the black market and thus are not necessarily applicable to a purposed legal framework.¹⁰¹ If legalized, the purposed framework would be regulated subject to the practices and price setting of the current market of reproductive donations and services. In addition to price regulation, additional safeguards will be put in place to insure the voluntary nature of the transaction and to eliminate other potential risks.

The regulation of the exchange of compensation also raises the question of who would be responsible for such regulation. Currently adoptions are regulated state-by-state.¹⁰² An issue of state-by-state regulation arises when compensation is added to the picture because then adoptions become commerce.¹⁰³ Due to the fast paced, high-tech society we live in today, travel is readily accessible to the general public. These adoptions will most definitely occur across state lines, with money exchanged from one state to another and could thus be subject to federal regulation under interstate commerce.¹⁰⁴ Ideally, Congress would set the minimum acceptable standards and implement required minimal safeguards and states could then employ agencies to carry out the day-to-day aspects of the regulation based on Congress's requirements.¹⁰⁵ Such regulation by congress would not be the first time the federal government utilized their power to regulate interstate family activity, such as child support and child abuse prevention, under "its spending

¹⁰¹ Posner, The Regulation of the Market in Adoptions, at 63.

¹⁰² Jana B. Singer, The Privatization of Family Law, Wis. L. Rev. 1443, 1444, 1478-86 (1992).

¹⁰³ Black's Law Dictionary, 4th Ed., p. 955 (defining interstate commerce as "Traffic, intercourse, commercial trading, or the transportation of persons or property between or among the several states...").

¹⁰⁴ Wickard v. Filburn, 317 U.S. 111, 128, 63 S. Ct. 82, 90, 87 L. Ed. 122 (1942) (discussing that even a seemingly small impact on interstate commerce, when taken in the aggregate, can affect and thus implicated federal regulation of interstate commerce.)

¹⁰⁵ Brock A. Patton, Buying A Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts, 79 UMKC L. Rev. 507, 528 (2010) (discussing globalization and the need for federal regulation with surrogacy contracts).

and commerce powers under Article I, its power under the Full Faith and Credit Clause in Article IV, and its enforcement power under Section 5 of the Fourteenth Amendment” to delve into the area of family law historically left to the states.¹⁰⁶ Cooperation and co-management between the federal and state governments would ensure a uniform minimum standard of regulation and safeguards that would be followed by all states and yet would still allow for individual states to implement stricter regulations or heightened safeguards where they determine is necessary in their particular state.

Splitting the Baby

Assuming, for arguments sake, that it is permissible for a biological mother to give up her child for adoption and receive compensation for her reproductive donation and service, the question then arises of who should receive compensation. It takes sperm and an egg to create an embryo and subsequently a fetus, thus it takes a woman and a man to make a baby. Therefore, men should be compensated for their reproductive donation as well, just as a sperm donor would in similar and like circumstances.

The birth mother is essentially providing “the donor egg” and providing her services as a surrogate so it follows that she could be compensated anywhere from \$25,000 to \$300,000 (up to \$200,000 for serving as a surrogate and up to \$100,000 for donating her eggs) in return for her donation and services as a surrogate.¹⁰⁷ The biological father is comparable to a sperm donor and

¹⁰⁶ Brock A. Patton, Buying A Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts, 79 UMKC L. Rev. 507, 529 (2010) quoting Robert G. Spector, The Nationalization of Family Law: An Introduction to the Manual for the Coming Age, 27 Fam. L.Q. 1, 3 (1993).

¹⁰⁷ Stephanie Saul, *Building a Baby, With Few Ground Rules*, THE NEW YORK TIMES, (December 12, 2009), <http://www.nytimes.com/2009/12/13/us/13surrogacy.html?pagewanted=2&ref=assistedreproductivetechnology>.

thus should receive \$40 to \$100 for his donation, depending on certain innate characteristics and educational pedigree, as a sperm donor would in similar and like circumstances.¹⁰⁸

Although these prices may seem high, adoption for a healthy Caucasian infant cost up to \$35,000 currently.¹⁰⁹ As similarly enumerated in Posner's theory, compensating birth mothers for their donation and services in the adoption process could induce more women to forgo abortions and choose adoption. This could then result in an increase in the availability of infants placed for and thus available for adoption. The purposed framework's indirect benefits could create a much quicker process to procure an infant to adoption, due to their increased availability, which would thus make a marginally greater cost worth it to the majority of couples who wait four to six years for a healthy infant to become available for adoption. Also, families without the means to adopt an infant will still be able to adopt, as the adoption system will remain the same as it is today for all children old enough to leave the hospital.

Another consideration if biological fathers are to be compensated for providing their sperm in the adoption process, is notice. Currently, if not married to the biological mother and not named on the child's birth certificate, in order for a man to receive notice that his biological child is being placed for adoption, the biological father has to register with the state's putative father registry.¹¹⁰ The same procedure and requirements could continue and along with receiving notice, the biological father could receive details on collecting compensation for his reproductive donation in the event he consents to the adoption. If the potential biological father does not register then he will not receive notice and will be ineligible for compensation, regardless of

¹⁰⁸ Dr. Randi Hutter Epstein, *Ivy League sperm: Do you have it?*, CBS NEWS (Feb. 29, 2012, 7:03am), http://www.cbsnews.com/2300-204_162-10007254.html?tag=page.

¹⁰⁹ Dean Schabner, *Why it Costs More to Adopt a White Baby*, ABC NEWS, (March 12, 2012), <http://abcnews.go.com/US/story?id=91834&page=1#.T3YJRhyOQeQ>.

¹¹⁰ Lehr v. Robertson, 463 U.S. 248, 254, (1983).

whether he finds out about the adoption at a later date, just as he would not be ineligible to contest an adoption today if he found out it occurred a year ago without his knowledge.

This would not only encourage more men to register with the putative father registry, thus eliminating many of the problems that arise due to fathers discovering their biological children's placement for adoption after its too late, but it would also encourage improvements in the system itself. As it stands, the putative father registry is run state-by-state. The implications of state-by-state management of the putative father registry, in the era we live in where everyone travels and moves from state-to-state frequently, is that it is highly unlikely that even if a man registers in the state where he had sexual intercourse or where the biological mother lives or lived when the sexual intercourse occurred, that he will have registered in the "correct" putative father registry and in fact receive notice of an impending adoption. If the putative father registry was national on the other hand, potential biological fathers could register, be located, and given notice of adoption proceedings much more efficiently and effectively.

The potential downside to compensating biological fathers for their reproductive services is that it could provide further incentive for birth mothers to refuse to reveal the biological father's identity.¹¹¹ Providing compensation to both the birth mother and the biological father arguably prevents an incentive to conceal the biological father's identity. Although the birth mother obviously receives a much greater percentage, both levels of compensation will be based on the relative amount of compensation they would receive if they were participating in ART. Therefore, the purposed framework remains feasible with minimal risks while providing compensation for all parties who contribute donations and provide reproductive services.

Safeguards

¹¹¹ Lehr, 463 U.S. at 269.

“Great Interests Demand Great Safeguards”¹¹²

The recommended safeguards would include counseling for the birth mother, attorneys for all parties involved, and time limits and constraints on when the relinquishment must occur. In order to prevent the outright sale of human beings compensation may not be exchanged once the mother leaves the hospital. The birth mother must decide that she is placing her infant for adoption before she is released from the hospital in order to be eligible to receive compensation for her reproductive services and donations. Although it can be argued that due to hormones and the prominent possibility of post-partum depression, some women may not be able to make rational decisions immediately following giving birth, the risks of not drawing a firm time limit on relinquishment too greatly lend themselves toward actually selling human beings. Imagine if the time constraint was relaxed and birth mothers had up to three months to make the decision to place the child for adoption and still be eligible to receive compensation for their reproductive services. The decision to relinquish parental rights for compensation after parenting a child for three months, even if disguised under the label of “compensation for reproductive services” will have the appearance of baby selling, which would destroy the legitimacy of the entire framework rendering it unfeasible.

The subsequent safeguards discussed seek to eliminate that risks of drawing such a firm relinquishment time line by ensuring that the birthmother is making an informed, voluntary decision. For example, a recommended safeguard would be that all parties: the birth mother, biological father, and prospective adoptive parents; must have separate and independent legal counsel to ensure that everyone’s separate rights and interests are adequately protected. Along those same lines, an additional safeguard to protect any potential for involuntary relinquishment

¹¹² Quote by Thomas Francis Meagher.

and ensure that the decision is not one solely due to economic distress, would be to require the birth mothers participation in mandatory counseling with an independent counselor throughout her pregnancy, and at a minimum, weekly during her last semester. The age of the birth mother will not ban her from compensation as the mandatory counseling and access to independent legal counsel would provide sufficient safeguards against the possible immaturity and lack of full comprehension in all the aspects and effects of her decision.

The term “independent” regarding the attorneys and counselor refers to the fact that an *independent* attorney and an *independent* counselor cannot be provided by the adoptive parents or by an adoption agency or intermediary, but instead must be completely unconnected to all parties involved. Thus the counselor and attorney for each party will have only the best interest of their patient and child in mind. Compensation will not be exchanged if either the attorney or counselor determines that this is not a voluntary transaction, such as the determination that the adoption is due to the mother being forced against her will or pressured by undue duress such as financial distress. Any adoption transaction will be deemed void upon any showing of involuntary relinquishment by the birth mother.

In sum, only birth mothers that relinquish their infants before leaving the hospital, attend the required counseling during their pregnancy, and consult with independent counsel, will be eligible to receive compensation for their reproductive donations and services. The above safeguards will prevent many of the risks proffered by opponents of compensation for adoption including involuntary relinquishment due to economic distress and the risk of crossing the line to selling human beings.

Conclusion

In conclusion, women who provide reproductive donations and services, such as egg donation and gestational surrogacy should be compensated. Women should have an equal opportunity to such compensation regardless of whether they are an egg donor, a gestational surrogate or a birth mother of an infant placed for adoption. In addition to justice and equality being served as a result of such an equalization of rights, the indirect benefits such as a decrease in the abortion rate and thus increase in the amount of infants placed for adoption will improve the current system where prospective adoptive parents wait up to six years to obtain an infant through adoption. The risks, such as economic duress leading to involuntary relinquishments, will be preempted by the regulations and safeguards that will be put in place under the proposed framework, such as the requirement for independent counsel for all parties involved as well as the requirement of mandatory counseling for the birth mother throughout her pregnancy. The purposed system will reap all of the benefits while eliminating the costs and risks of previous attempts at creating an adoption market.