

Boston University School of Law

## Scholarly Commons at Boston University School of Law

---

Faculty Scholarship

---

1-1987

### The Inapplicability of Market Theory to Adoptions

Tamar Frankel

*Boston University School of Law*

Follow this and additional works at: [https://scholarship.law.bu.edu/faculty\\_scholarship](https://scholarship.law.bu.edu/faculty_scholarship)



Part of the [Agency Commons](#), [Family Law Commons](#), [Judges Commons](#), and the [Social Welfare Law Commons](#)

---

#### Recommended Citation

Tamar Frankel, *The Inapplicability of Market Theory to Adoptions*, 67 Boston University Law Review 99 (1987).

Available at: [https://scholarship.law.bu.edu/faculty\\_scholarship/754](https://scholarship.law.bu.edu/faculty_scholarship/754)

This Article is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact [lawlessa@bu.edu](mailto:lawlessa@bu.edu).





Content downloaded/printed from

[HeinOnline](#)

Wed Nov 13 09:47:03 2019

Citations:

Bluebook 20th ed.

Tamar Frankel; Francis H. Miller, *The Inapplicability of Market Theory to Adoptions*, 67 B.U. L. Rev. 99 (1987).

ALWD 6th ed.

Tamar Frankel; Francis H. Miller, *The Inapplicability of Market Theory to Adoptions*, 67 B.U. L. Rev. 99 (1987).

APA 6th ed.

Frankel, T.; Miller, F. H. (1987). *The inapplicability of market theory to adoptions*. *Boston University Law Review*, 67(1), 99-104.

Chicago 7th ed.

Tamar Frankel; Francis H. Miller, "The Inapplicability of Market Theory to Adoptions," *Boston University Law Review* 67, no. 1 (January 1987): 99-104

McGill Guide 9th ed.

Tamar Frankel & Francis H Miller, "The Inapplicability of Market Theory to Adoptions" (1987) 67:1 BUL Rev 99.

MLA 8th ed.

Frankel, Tamar, and Francis H. Miller. "The Inapplicability of Market Theory to Adoptions." *Boston University Law Review*, vol. 67, no. 1, January 1987, p. 99-104. HeinOnline.

OSCOLA 4th ed.

Tamar Frankel and Francis H Miller, 'The Inapplicability of Market Theory to Adoptions' (1987) 67 BU L Rev 99

Provided by:

Fineman & Pappas Law Libraries

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

Use QR Code reader to send PDF to your smartphone or tablet device



---

## THE INAPPLICABILITY OF MARKET THEORY TO ADOPTIONS†

TAMAR FRANKEL AND FRANCIS H. MILLER\*

Judge Posner addresses an important issue. More than 130,000 couples in this country want to adopt children, and plenty are available. But most couples want healthy, white infants, and those children are in short supply. To get the child of their choice, these couples are forced to pay large sums of money to intermediaries. On the other hand, many unwed, teenage women face unwanted pregnancies. Many of them opt for abortion, which is relatively inexpensive, or for carrying to term and raising the children themselves, which is governmentally subsidized. But few of these women choose to have the child and give it up for adoption, in part because there is no financial incentive to do so. Judge Posner aims to change that.

To address the shortcomings of the existing adoption system rationally, we must separate the issue into two components. The first is informational. There is no efficient means for prospective adoptive parents and women with unwanted pregnancies to contact each other. "Privatizing" adoption agencies and relaxing regulation of these intermediaries would reduce information costs. Like dating services, adoption agencies could, for a fee, bring interested parties together. There is no reason not to stimulate the growth of such a market of information.

We should be aware, however, that while dating services bring together *all* relevant parties, adoption agencies cannot. Adoptions involve an important but unrepresented third party—a baby who is unable to fend for himself or herself,<sup>1</sup> yet whose whole life depends on the transaction.

The second component of the issue Judge Posner addresses is more serious. There are fewer "desirable" children (healthy, white infants) than prospective adoptive couples—the "demand" for these babies exceeds the "supply." The problem is one of both allocation and production. First, there is no efficient means to determine who should receive the "desirable" babies. Judge Posner believes that a freer market is the solution. Second, the adoption system has too few "desirable" babies but too many children adoptive parents simply do not want.<sup>2</sup> Judge Posner does not address the

---

† © 1987 by Tamar Frankel and Frances H. Miller.

\* Professors of Law, Boston University School of Law.

<sup>1</sup> We refuse to dehumanize the baby and call him or her "it."

<sup>2</sup> In his first baby selling article, Judge Posner referred to the excess supply of black and impaired babies, and of children who are no longer babies as a "glut." Landes & Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 324-25 (1978).

production aspect explicitly, but he seems to believe that the market model will resolve this issue as well.

Judge Posner's proposal seems mild. He would leave intact most current adoption regulation; all he proposes is a little experiment. His proposal is also rational in that improving product allocation and stimulating production by offering financial inducements have worked, in other commodities markets, to satisfy consumer demand. Opposition to his proposal, therefore, may seem not only irrational, but almost hysterical. Certainly, Judge Posner is at a loss to understand why anyone would quarrel with his "little" experiment; this comment offers an answer.

The adoption problem is similar to the dilemma confronting marriage-minded singles: they seek marriageable, attractive, intelligent, giving, warm, and financially secure spouses, but find them in short supply. These people may then be "forced" to remain single or to marry spouses who lack one or more of the desirable attributes, because the law prohibits people from obtaining their spouses of choice by force or purchase.

Some adoptive parents, too, are "forced" by the law to take "less desirable" (non-white, older, or physically or mentally impaired) children.<sup>3</sup> These adoptive parents must choose between their need to nurture a child and their preference for adopting a healthy, white infant. In short, for public policy reasons, the allocation of spouses to mates and of children to adoptive parents is currently outside the money exchange market.

In our society, people produce children primarily for "use value": to love them, to care for them, and to satisfy the children's emotional and physical needs. The rewards of child rearing are assumed to be predominantly in the giving. Furthermore, our society's ethos is that the child is entitled to all these "goodies." He or she must "pay" for them only in obedience, and even that only up to a point. Parents are not entitled to sell their children's labor, since state labor laws prohibit children from working until they reach adolescence. The law denies exchange value for any human from the day he or she is born, and thus precludes a market approach to the production and allocation of people.

Arguably, this is an overstatement. Our society does permit the conversion of human labor into a commodity, and attributes exchange value to that labor. In fact, our society encourages such a conversion by providing mar-

---

<sup>3</sup> Judge Posner believes that adoptive parents "subsidize" non-white and impaired babies. The basis of this statement escapes us. Presumably, he assumes that "less desirable" children are better off even with adoptive parents for whom they are a second choice than with their natural mothers. Presumably he also assumes that "less desirable" children are going to be better off with adoptive parents even if they would pay less for them. Finally, he assumes that rather than trying to place "less desirable" children with adoptive parents, we should simply make them wards of the state. We question all these assumptions.

kets for labor. Indirectly, society even forces people to sell their labor in order to buy economic survival.<sup>4</sup>

Nonetheless, the sale of labor is accompanied by the adult laborer's consent and substantial freedom of choice. The value of labor depends on the worker's willingness to provide it. We have learned that in trying to induce desired behavior from adults, incentives are generally more effective than coercion. Moreover, a laborer can decline to offer his or her services whenever he or she chooses, and once hired can terminate his or her services at any time. This is so even if the laborer would be breaching a contract because there generally is no right to specific enforcement of a labor contract.

Adoption, on the other hand, transfers full control over a baby from one person to another. Infants have no say in the matter; they have no way of terminating the contract made in their behalf. The duration of an adoption contract is 18 or 21 years, the formative period in a human being's life, and they are neither consensual nor terminable. With few exceptions, adoption agreements will be specifically enforced.

By describing the adoption system in the language of economics—"market," "commodity," "supply and demand"—Judge Posner creates a model for the parent-child relationship that differs fundamentally from the traditional fiduciary model. He explains his use of these terms as a mere heuristic,<sup>5</sup> yet the words are crucial because they shape the reader's perception of Judge Posner's proposal. Only if one accepts his terminology, and thus his model, does Judge Posner's conclusion seem so logically irrefutable. But his model, like all models, is incomplete. His proposal may maximize commodity values, but it ignores completely the non-commodity values we find essential to any viable alternative to the existing adoption system.<sup>6</sup>

His model turns a baby into a commodity. By adding exchange value to a baby's traditional use value, the model affects both the allocation and production of babies. Under Judge Posner's proposal, babies would be allocated to the prospective adopters who could best afford them—a radical shift from the current emphasis on the prospective adopters' appropriateness as parents. His model would also change the current emphasis with

---

<sup>4</sup> Society only supports humans when they are unable to survive on their own. What inability to survive means may change with social mores. Under the Reagan administration, the definition of ability to survive is broadening, forcing people to exchange their labor for money even if this labor seems to them coercive. *See, e.g.*, Food Security Act of 1985, Pub. L. 99-198, § 1517, 99 Stat. 1354, 1573-74 (codified at 7 U.S.C. § 2015) (making persons who refuse job training ineligible for food stamps).

<sup>5</sup> Posner, *The Regulation of the Market in Adoptions*, 67 B.U.L. REV. 59, 64 (1987).

<sup>6</sup> Cf. Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537, 1538 (1983) ("market economy stunts personal development by narrowing the terms of human association and fostering commodity consumption as a dominant value").

respect to the production of babies. When products are created for use, as babies are, the emphasis is on the relationship between producers and product, between parents and baby, and on the use to which the product will be put. A commodity, on the other hand, is produced for exchange, and the benefit to the producer shifts from use to profit. With commodities, unlike use-value products, the volume of production depends not on the producer's needs or desires but on the demands of others; it increases with demand and decreases with over-supply.

The market model therefore answers Judge Posner's concern about the unsatisfied demand for babies. Focusing on what consumers want, as is appropriate in a commodity market, he aims to increase the supply of white babies until their price reaches an equilibrium. Naturally, he opposes abortion: aborting white babies decreases supply.

Judge Posner's proposal uses money and market demand to provide incentives for having babies—white babies, that is. The resulting reduced demand for minority and unhealthy babies may indirectly induce unwed minority mothers to abstain from bearing children (if not to abort). Since adoptive parents will no longer “subsidize” these babies, the government's burden of supporting them will increase. In response, the government may increase pressure on the potential mothers of such “undesirables” not to produce.<sup>7</sup>

Judge Posner's model also makes babies fungible, smoothing over the intangible qualities that make each child unique. If a baby's value can be expressed in dollars, then a baby can be compared to a car, a dress, a year's tuition, or a trip to Bermuda. There are already too many parents to whom a child's use value is less than satisfying without encouraging such dissatisfaction by supplying a competing exchange value.<sup>8</sup>

Even though Judge Posner does not focus on married couples as producers, his model affects them as well—especially those parents who value money more than children, and who can produce healthy, white, marketable babies. The model may also affect the relationship between parents and their adopted children. When parents pay a market price for a child, they will tend to view the child as a commodity; they may regret the purchase, feeling cheated or overcharged. They may take their frustration out on the child, attempting somehow to extract more child for the dollar. Natural parents often do the same thing if the child was unplanned, or if the child has not provided the emotional satisfaction they expected. Under the market model, these parents would have a new option—they could sell their baby.<sup>9</sup>

---

<sup>7</sup> This could be accomplished by, among other means, reducing the benefits under the Aid to Families with Dependent Children program.

<sup>8</sup> Changing the value of a child from that of use to that of exchange has serious moral implications. Judge Posner thinks the mother, for some reason, is better-suited than the father to bear the brunt of such change. Presumably, money will compensate her for that burden as well.

<sup>9</sup> The predicted results are similar to those concerning other commodities. There is

Since, in Judge Posner's view, a baby is the product of its mother's labor, it becomes the mother's (and perhaps the father's) property—there can be no market without property rights. The idea that children are their parents' property is archaic. Children can not be forced to work for their parents, or sold into marriage or apprenticeship. In one form or another, this notion of children as property was pervasive in this country until about eighty years ago. Then our society moved from the idea that parents own their children to the concept that parents are more like fiduciaries.<sup>10</sup> Their power over their children is held in trust for the child's benefit. This power is subject to legal constraints, and the child's (as opposed to the parents') interests are entitled to great weight.

The market model would reverse this development. It would reconvert the child into the property of the mother, entitling *her* to sell her infant. That is why Judge Posner is greatly concerned with obtaining the mother's consent to the adoption, as he rightly would be concerned with any seller's rights in any sale.

We hope that our comment explains why some people might rationally view Judge Posner's proposal as radical. In fact, however, his proposal is hardly that. Though it seems innovative, the proposal merely revivifies ancient social theory in the guise of capitalist markets. The proposed market model for babies demonstrates the power and danger of the image.

Judge Posner's proposal shows how much we have changed: immediate gratification is the battlecry of the eighties; we worry little about the legacy we will leave for the next generation. Today most people cannot imagine a money alternative to their children; in 100 years people just might. There is a problem with the existing adoption system, but we must seek to resolve it without destroying the dignity and autonomy of infants. They are the future. Their welfare is of paramount importance if society is to survive the immediate desires of this generation.

---

proof that a person's attitude toward a particular product is dependent on whether it is produced for self use or for sale. In the latter case, the producer focuses on the money he or she will make from exchanging the commodity; in the former, the producer focuses on the product itself.

<sup>10</sup> See generally Zanalain, *The Emergence of a Modern America Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 83 NW. U.L. REV. 1038 (1979); Comment, *The Rights of Children: A Trust Model*, 46 FORDHAM L. REV. 669 (1978).

