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978-0-521-73510-0 - Baby Markets: Money and the New Politics of Creating Families  
Edited by Michele Bratcher Goodwin  
Excerpt  
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**PART ONE. WHAT MAKES A MARKET? EFFICIENCY,  
ACCOUNTABILITY, AND RELIABILITY OR GETTING  
THE BABIES WE WANT**

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Although economists have studied extensively the efforts of government to regulate the economy, public regulation of social and personal life has largely escaped economic attention. With the rapid development of the economic analysis of nonmarket behavior, the conceptual tools necessary for the economic study of social (as distinct from narrowly economic) regulation are now at hand. Nor is there any basis for a presumption that government does a good job of regulating nonmarket behavior; if anything, the negative presumption created by numerous studies of economic regulation should carry over to the nonmarket sphere.

– Elisabeth Landes and Richard Posner

Part One of this book examines the economic contours of baby making and adoption. This section critiques the ways in which market dynamics have become central to creating families. Assisted reproductive technology is now a multibillion-dollar industry, which thrives on market principles. Not to be overlooked, however, are the ways in which adoption is a global industry, promoted and sustained by economic exchanges between individuals, agencies, and foreign governments. To overlook these contours is to ignore the sociocultural nuances of family making in the twenty-first century. Authors in this section consider the upsides and also the pitfalls of baby markets. They examine who benefits from and who is harmed by the ways in which baby creating and baby sharing operate in the United States and globally.

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## 1 Baby Markets

MICHELE BRATCHER GOODWIN

Watt and her husband, Jason Hillard, residents of Athens, Ohio, wanted to adopt a child. When they saw Jolie on that magazine cover with her adopted daughter, their decision to raise a child from Ethiopia was clear.<sup>1</sup>

And with that magical stroke of the pen, the door to a whole world of plentiful, newborn, brown-skinned little boys . . . opened up to me from behind the curtain marked, “Doesn’t Care.”

– Patricia Williams

The recent backlash against famed pop musician and actress Madonna in her attempt to adopt a little girl from Malawi highlights a growing social tension and cultural criticism in transnational adoptions. In that case, the celebrity was criticized for using her status to skirt the country’s stricter adoption criteria, which includes a yearlong residency requirement. Madonna’s public life perhaps offers an unfair advantage to critics, who can trace her lifestyle and travels through the Internet, Twitter, and newspapers. To them, international residency requirements are a farce, especially when celebrities can circumvent such routine protocols by exploiting the financial weaknesses of governments. By donating funds to the state or establishing charities in those countries, celebrities can seemingly expedite the adoption process in ways that middle-class people, who wait years, cannot.

Clearly, with photos emerging of Madonna and her newest lover in South America and the United States,<sup>2</sup> she has not been spending much personal or professional time in Malawi. But should that matter, so long as a child is relieved from poverty? Do residency requirements serve any purpose beyond the symbolic in transnational adoptions as the children will depart without much memory of their native countries and grow up in the West?

Understandably, adoptive parents find market comparisons to the adoption process offensive. The free market in children, as a concept, is rejected based on what it symbolizes, including its argued resemblance to slavery or the auction block.<sup>3</sup> Yet, according to David Smolin, a professor of law and an adoptive parent, directly and indirectly, market forces or economic considerations influence adoptions in the United States to a greater extent than traditionally acknowledged. Recent celebrity adoptions and subsequent international pushback tell a complicated story about

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adult desire, children's needs, and the mishmash of state and international laws in the adoption realm.

Celebrities figure significantly in the public's perception about contemporary adoption. Often at the center of public focus are Hollywood celebrities and music moguls like Angelina Jolie or Madonna, who seem to defy the bureaucratic necessities that regular people endure such as wait lists, residency requirements, and stable homes. Cambodia, Malawi, and Ethiopia are among the countries where governments have accommodated celebrity adoptions. In turn, celebrities and the countries from which they adopt bring attention to the devastating conditions of children in orphanages, who desperately need families. In the words of one adoptive mother interviewed by *ABC News* in 2005, "In the grand scheme of things, she changed our lives. It's kind of hilarious to think of, but yeah, Angelina Jolie probably brought us an African child."<sup>4</sup> It is not entirely clear who changed the adoptive mom's life – Angelina or the child – but the Ohio couple now have an Ethiopian daughter, just like Brad Pitt and Angelina Jolie.

Perhaps because of the celebrity gloss on adoption, a broader chorus of critics is beginning to raise alarm bells. They wonder about the children in the United States whose urgent need for safe homes seems overlooked not only by celebrities, but by middle-class Americans who adopt abroad before considering domestic children from less exotic locations like Milwaukee, Detroit, and Newark. To those critics, celebrities and middle-class Americans who adopt abroad contribute to an international baby market. Commentators argue that the high cost of adopting children abroad and schemes to subsidize the costs for adoptive parents are evidence of baby markets.<sup>5</sup>

### A. CONVENTIONAL WISDOM

Conventional wisdom and early legislation held the best interests of children at the center of all adoptions.<sup>6</sup> In 1851, Massachusetts passed the first adoption law in the United States. That law served as a model for other states – and each emphasized the best interests of the child. Adoptions functioned as a child welfare model for abandoned, abused, neglected, and orphaned youth.<sup>7</sup> Adoptions resolved a social crisis as well as a public health nightmare, as abused, neglected, and homeless children were often malnourished and in need of medical treatment. The charitable function of adoption removed children from desperate situations and repositioned them within families – thereby fulfilling a public service.

Contemporary adoption services expose more complicated motives, from multiple (although nonetheless well-meaning) players. Aesthetic characteristics such as race, hair texture, eye color, and other market variables determine the welfare of children, or at least their likelihood of placement.<sup>8</sup> Between two ends of a spectrum, the first representing child welfare and the other "adult needs," the latter influences U.S. adoptions far more than imagined.<sup>9</sup>

This chapter scrutinizes financial considerations involved in adoption, including so-called baby valuing and rationing, and suggests that those transactions illustrate the market nature of adoptions in the United States. Certain parallels to assisted reproduction are apparent in the adoption realm but are not dealt with here. Other

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chapters in this volume capture and contest the extent to which market dynamics exist within the assisted reproduction realm. I leave to those chapters the task of unpacking markets in that domain.

This chapter illuminates market consciousness in the adoption process, arguing that economic interests influence adoption more than we might like to acknowledge.<sup>10</sup> It demonstrates that the adoption process is more like a market than less so. Section B frames the adoption market debate, arguing that current adoption indeed resembles a free market. It describes current adoption processes in the United States, which are governed by factors of availability, race, class, and aesthetic preferences. Section C scrutinizes the moral and ethical obstacles to recognition of a market in adoption: the degradation of personhood, the charitable roots of child placement, and the social costs associated with adoption. Section D examines alternative adoption models, including price caps and taxation alternatives, and suggests that each model tramples on established values. It argues for greater transparency and information in the adoption process and proposes a different model to effectuate adoptions in the United States.

## B. THE POSNER PARADIGM

### 1. The Market Debate

Thirty years ago, Elisabeth Landes and Richard Posner encountered strident criticism from scholars concerned that their 1978 publication on adoption, colloquially known as the “baby-selling article,” endorsed a market in babies.<sup>11</sup> In that article, Landes and Posner proposed evaluating the efficiency of adoption through a market analysis.<sup>12</sup> They applied a law and economics framework to study the pros and cons of incentives in adoption as well as mechanisms that could increase the matching of babies to couples.<sup>13</sup> Ironically, their article attracted criticism about incentive models that preexisted the article’s publication.<sup>14</sup> Opponents decried the language of efficiency in evaluating adoptions, suggesting that it reduced children to objects in a mechanical economic analysis.<sup>15</sup>

Posner’s critics characterized the article, “The Economics of the Baby Shortage,” as promoting the introduction of financial incentives in the adoption allocation process, thereby suggesting that Landes and Posner were tainting an unflawed and otherwise purely (or primarily so) altruistic process. Transaction fees received by adoption agencies were believed to be so negligible at the time or infrequently present as to pose insignificant ethical problems. Some critics thereby dismissed the resemblance between transactional fees, indirect incentives, and payments. They refused to entertain the proposition that an adoption “market” already existed.

Refusal then and now to acknowledge financial incentives in adoption does not negate the free market’s existence and influence in adoption services. In other words, a community preference that adoptions are free from financial transactions does not mean that it is so.<sup>16</sup> Nor does it mean that financial transactions in these spheres necessarily bring about offensive externalities. However, financial transactions and interests govern the adoption process both directly and indirectly. Financial exchanges, including exorbitant fees paid to adoption agencies, medical

payments for birth mothers (or surrogates in the case of in vitro babies), transportation costs, and living expenses,<sup>17</sup> although characterized under the umbrella of “transactional costs,” resemble payments in most other spheres.<sup>18</sup> Some commentators, including Posner, describe these payments as part of the adoption “black market.”<sup>19</sup> To be clear, there seems to be very little that is *illegal* about these transactions, which is implied by the *black market* terminology<sup>20</sup>; rather, exorbitant transaction fees and direct payments to parents and their attorneys are evidence of a de facto, largely unregulated adoption free market.<sup>21</sup>

## 2. The Free Market: Direct and Indirect

**a. Deregulation.** Several factors give indication of the free market in adoptions. First, adoption services are largely unregulated and an entrepreneurial enterprise in a growing number of cases.<sup>22</sup> Deregulation is a key factor in free market economics. Robert Horowitz explains that deregulation of a given market must occur to obtain a truly free and competitive marketplace.<sup>23</sup>

Babies are routinely adopted indirectly through the free market by way of an agency process. Some agencies are licensed, and others are not. In the agency setting, fee bundling often occurs, and an adoptive couple pays one fee, which supports salaries for staff, medical expenses for the birth mother, and transportation costs.<sup>24</sup> Babies can also be adopted directly through the free market, by way of independent agents who facilitate the process, including lawyers, pastors, and doctors.<sup>25</sup> Unlike agencies, independent agents may be interested in only one specific adoption. These processes are not monitored by any federal agency, nor are there special exams or classes that agents must take before earning money for facilitating adoptions. State laws govern part of the adoption process but are generally inadequate in addressing the interstate and transnational aspects of adoption. Thus, even with the best intentions of promoting child welfare, children become exposed to free market dynamics. In the free market realm, supply, demand, and aesthetic preference factor significantly in the cost of a baby.<sup>26</sup>

Distinctive adoption practices can be seen prior to and after 1973, the year of the landmark *Roe v. Wade* decision. In 1973, 2.3 percent of women adopted; twenty years later, that percentage dropped to 1.3 percent.<sup>27</sup> Prior to 1973, abortions were illegal, and single motherhood and unwed pregnancies were taboo. Almost 20 percent of unwed white women placed their children for adoption prior to 1973. Since 1973, researchers estimate that as few as 1.7 percent of white unwed mothers place their babies for adoption. Some commentators attribute the low surrender rates to the legalization of abortions (i.e., women are choosing to abort rather than endure pregnancies and have babies). On the other hand, single parenthood is less stigmatized now among certain classes of Americans than prior to 1973.

According to a recent report by the National Center for Health Statistics, nearly 40 percent of births in the United States are to unwed mothers. In raw numbers, this means that 1.7 million children were born to unwed parents – a 25 percent rise in just five years.<sup>28</sup> This trend is most noticeable in black and Latino communities, where 72 percent and 51 percent of births are to unwed parents, respectively. Paula England, a Stanford professor, points out, however, that her study, which

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tracked unwed parents of color over five years, revealed that 80 percent remained in committed relationships with their children's other parent, and 50 percent lived together.<sup>29</sup> Thus single parenting and abortion add to the debate on child availability for adoption but do not fully explain the financial variations and costs distinguishing adoption fees for white versus black children in the United States.

**b. Race-based baby valuing.** Second, baby valuing indicates that racial and genetic preferences determine or can help to predict adoption costs and fees. Consider the following: couples may spend upward of fifty thousand dollars to adopt a healthy white infant.<sup>30</sup> Black infants, however, are adopted for as little as four thousand dollars.<sup>31</sup> Adoption agencies attempt to clarify this discrepancy by explaining that black children are more difficult to place than white children,<sup>32</sup> and therefore the costs associated with adopting white children are higher. This logic appears flawed, even though it is true that black children wait longer for permanent placements.<sup>33</sup> Why would it cost more to do less, if transaction costs were based *purely* on the labor and transactions involved?<sup>34</sup> If placing white children is far easier than placing black babies, it would seem that *less work* would result in *less pay* and lower fees. Instead, fee structures based on race give evidence that adoption is subject to the free market forces of supply, demand, and preference.<sup>35</sup> In this market, racial preference matters; biracial children also attract higher fees than black babies.<sup>36</sup>

*The National Association of Black Social Workers.* The impact of the National Association of Black Social Workers's (NABSW) urgent call against white families adopting African American children cannot be ignored. In the 1970s, the organization campaigned against transracial or interracial adoptions. The focus of their concern was a question that persists in international adoptions, namely, will the adopting parents prepare (or be capable of preparing) their new sons and daughters for healthy, well-adjusted lives in a racially divided society, where social interactions – even within their families – might sharply differ?

Members of the organization, including Charles Mays, suggest that NABSW's position must be understood within the context of the time. Deep patterns of housing, employment, and education segregation meant that African American children adopted into white families in the 1970s and 1980s were isolated and lacked the opportunity to interact with children or role models who resembled them. Equally, it seems, NABSW's leadership feared that white parents would be unable to cope with racism and social stigma experienced by their children, ultimately undermining the children's self-esteem and trust. According to NABSW,

understanding the historical experiences and their impact on a group of people is essential to developing relevant support services. People of African ancestry have distinct traits and characteristics that are important to raising healthy children of African ancestry. These experiences are typically absent from assessment models and practice decisions.<sup>37</sup>

David Eng explores these dynamics in transnational adoptions of Asian children by white American parents. In a lecture at Barnard College in spring 2009, Professor

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Eng suggested that the early transracially adopting parents were oblivious to the unique and often traumatic encounters their new children experienced.

On November 9, 2009, the Evan B. Donaldson Adoption Institute published what is likely to be the “most extensive” study on identity development in adopted adults in the United States. The study, which involved 468 adopted adults, sheds light on interracial and transnational adoption. Findings from the study were immediately picked up by the *New York Times* and other media likely because this was the first time that a study focused on adults rather than children. Most compelling were the narratives of adult adoptees from South Korea (179 participated in the study). Most of the study’s participants were adopted as babies or toddlers and grew up in two-parent, white families. Here is what they reported:

Eighty percent [experienced] discrimination from strangers and 75 percent from classmates. Nearly half (48%) reported negative experiences due to their race in interaction with childhood friends. A notable finding was that 39 percent of Korean respondents reported race-based discrimination from teachers.<sup>38</sup>

Nearly 80 percent of South Korean adoptees grew up thinking of themselves as or wishing they were white. The study participants also disclosed considerable pushback from their white parents when they disclosed the desire to learn more about their ethnic identity. According to one woman, later interviewed by the *New York Times*, her adoptive parents saw her desire to go to Korea as a sign of rejection, she revealed “my adoptive mother is really into genealogy, tracing her family to Sweden, and she was upset with me because I wanted to find out who I was.”<sup>39</sup> Her story was echoed by other study participants.

Ironically, NABSW’s early concerns about transracial adoptions are reverberating after the Evan B. Donaldson Adoption Institute report. The Institute’s recommendations are somewhat in line with early statements issued by NABSW. For example, the Institute calls for the expansion of “parental preparation and post-placement support for those adopting across race and culture,” and the “development of empirically based practices and resources to prepare transracially and transculturally adopted youth to cope with racial bias.”

Nonetheless, NABSW’s critics blame the organization’s leadership on the low rates of black adoptions. The seemingly intractable problems that accompany black placements are alarming to critics and the organization. On their Web site, NABSW reminds readers that African American children wait longer in foster care than all other ethnic groups and represent 40 percent of all children in foster care, which is staggering considering that African Americans are less than 15 percent of the total U.S. population.

Measuring the impact of NABSW’s position on contemporary adoptions remains difficult. Fifteen years ago, the federal government enacted the Multi-Ethnic Placement Act and, soon after, the Interethnic Placement Act and the Adoption and Safe Families Act, in 1996 and 1997, respectively. These legislative efforts directly promote interracial adoption by requiring agencies to look beyond race and ethnicity in an effort to remove as many children from foster care as possible and place them in loving homes. Thus, as a matter of law, Congress has made a very bold attempt to urge the placement of African American children



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into homes that will embrace them. As a result, some scholars are skeptical about whether NABSW's 1972 position detracts from whites adopting African American children. For them, white families simply do not want to adopt African American children, even though they are abundantly available.

*Racialized adoptions.* Although an “estimated 2 million American families” are looking to adopt, the majority will pass over black babies for children from abroad.<sup>40</sup> A recent study published by the National Center for Health Statistics reveals the ways in which race matters in adoption.<sup>41</sup> Whereas 86.4 percent of black women would accept a white child, only 72.5 percent of white women would accept a black child, and only 1.8 percent of white women expressed a preference for a black child.<sup>42</sup> Most notably, more women expressed a preference for adopting a child with severe physical or mental disabilities than a preference for adopting a black child.<sup>43</sup>

In reality, adoption agencies and so-called independent adoption agents establish fees with adoptive parents based on characteristics of children in the adoption supply pool such as race, gender, and supposed genetic strengths, including the parents' intellectual aptitude.<sup>44</sup> In U.S. adoptions, white children are more highly valued than black children by both adoption agencies and, obviously, by those who seek to adopt them.<sup>45</sup> A *Chicago Sun Times* report found that “babies who have two white parents cost the most and those who have two black parents cost the least.”<sup>46</sup> Adoptive parents are acutely aware that competition is involved in free market adoptions.<sup>47</sup> Thus, those serious about adopting a white baby, and with the resources to do so, realize that balking at the high costs associated with those adoptions would prove futile.

But for the racialized nature of adoption, the market in babies and children might be less detectable. If U.S. adoptions were primarily focused on child welfare and charity, rather than adult need and desire, the costs associated with adopting white children would not exceed that of black children. A child welfare focus in adoption that emphasizes the best interests of *all* children might avoid artificial values attaching to racial characteristics. Why spend more to adopt a white child if, in fact, the social and moral motivations are the same – to serve the best interests of a child?

Thus, pursuit of the best interests of children in adoptions is modest fiction. Even if the rate of adoption for white babies exceeded that of their black counterparts, black children might nevertheless be second in line to foreign adoption if the fulfillment of the best interests for U.S. babies was the reality. But sadly, it is not. According to the Department of Health and Human Services, many couples wait more than eighteen months, and spend as much as thirty thousand dollars, to adopt children from abroad,<sup>48</sup> bypassing the less “expensive” and less desired black babies.<sup>49</sup> In fact, according to a recent report, adoption of black children can be facilitated in less than three weeks.<sup>50</sup>

### c. Social valuing

If the mother wanted to show a commitment to her daughter, then she should learn English to the extent that her daughter had.<sup>51</sup>



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The third factor that provides evidence of a free market in U.S. adoptions is the use of financial status of adoptive parents in the child allocation process. In this capacity, judges and social workers play significant roles. Adoptive parents' social status, including household income and family type, figures significantly in adoption decision making.<sup>52</sup> Angela Kupenda, Zanita Fenton, Kim Forde-Mazrui, and other child welfare law scholars provide an interesting race-based critique of the challenges faced by families of color seeking to adopt.<sup>53</sup> According to these scholars, black families encounter greater obstacles in qualifying for child placements.<sup>54</sup> They suggest that the prevalence of single-parent households weighs against black families, as does lower income status.<sup>55</sup> Thus, potentially, black adoptive parents are comparatively less competitive players in the free market for children; they will lose more often than white parents, even if their goals are to adopt black children.<sup>56</sup>

More recently, immigration status, regardless of legal or illegal residency, might affect whether parental rights are protected or possibly terminated.<sup>57</sup> A Tennessee court recently removed an eleven-year-old girl from the custody of her mother, a Mexican migrant worker, and placed her with a family that "lives in a brick ranch house with a basketball hoop in the driveway, a swimming pool in the backyard."<sup>58</sup> One of Linda's teachers took a special interest in her and petitioned for her adoption.<sup>59</sup> The case attracted considerable attention as Judge Barry Tatum demanded that the mother, Felipa Berrera, *learn to speak English* before visitations would be permitted with her daughter, whose first language is Spanish.<sup>60</sup> Ironically, Linda Berrera Cano was never surrendered by her mother to the state, nor was she in foster care when she was placed with the Patterson family.<sup>61</sup> Instead, Linda was simply a poor, migrant worker's child who missed some days of school to care for her siblings. It is more than likely that Linda suffered from the conditions that poverty typically produces. But is it unreasonable to address the underlying conditions of poverty through the arbitrary displacement of children from their parents?

Tennessee law provides for direct petition to courts in cases of child abuse and neglect. Most would view this law as progress and in the best interests of children; after all, it avoids removal delays. Deciding, however, whether this case and its aftermath were about the welfare of the child or the desires of the adults is more complicated. The facts of the Berrera case seem unique, thereby leaving us with the impression that the case itself is an aberration from traditional adoption practices. Nevertheless, this unique case provides limited precedent for wealthier individuals to directly petition courts to adopt handpicked children. Poverty, immigrant status, limited political clout, and limited English proficiency may factor significantly in one's ability to effectively compete for a child, despite a biological connection and preexisting close relationships.<sup>62</sup>

**d. Unrestrained international market.** Finally, private, transnational adoptions, including celebrity adoptions (e.g., Madonna and Angelina Jolie), provide evidence of market competition. Foreign adoptions figure significantly in U.S. adoption services,<sup>63</sup> with interesting growth on three fronts. First, the exotification of Africa and the colonizing of black wombs provide an interesting Petri dish of topics to unravel. Celebrity adoptions in Africa are hailed for giving attention to the

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plight of Africans but also illuminate the tension of domestic adoptions. As one commentator recently noted, Africa, but not Alabama . . . why? Second, overwhelmingly, white couples who are unable to locate white babies for adoption in the United States are increasingly looking for and adopting children from abroad, including China, South Korea, Guatemala, Russia, and eastern European countries.<sup>64</sup> Couples who decide to adopt from abroad pay far more than the costs associated with adopting black children in the United States, including international transportation fees, transactional costs with foreign governments, and fees locally and abroad.<sup>65</sup> In this way, they exercise another key component of free markets: choice.<sup>66</sup>

Third, a notable trend is affecting the lives of African American children. Canadians, Germans, Swedes, and other predominantly white ethnic groups are adopting black children from the United States.<sup>67</sup> With open adoptions, there are no restrictions on the adoption of American children to foreign couples, as long as they can meet the requirements and fees established by adoption agencies and birth parents.<sup>68</sup> Of the many ironies, one which has not escaped the scrutiny of commentators is the dramatic difference in costs associated with these adoptions. The adoption of African American children and babies usually costs about four thousand dollars per child – between 8 and 13 percent of the costs associated with adopting a white baby in the United States or a child from abroad.<sup>69</sup>

### C. MARKET PITFALLS AND CONVENTIONAL WISDOM

According to conventional wisdom, the needs and best interests of children would always prevail over the special interests of the adults seeking to adopt them.<sup>70</sup> After the enactment of the first modern state adoption statute in 1851, adoption in the United States evolved as both a state judicial process and a specialized child welfare service to promote the best interests of children in need of permanent homes. Quite correctly, systems were developed to guard against a child being placed into an abusive family or one that sought to exploit the child's labor, sex, or talent. In reality, however, adoption has never been a flawless system.<sup>71</sup> Adoption is no longer a domestic welfare service that attends primarily to the needs of children born in the United States.

That more than five hundred thousand children live in foster care arrangements gives some indication of the strain on the current child welfare system to serve the needs of all kids. But as interesting is what such statistics reveal about potential parents. Each year, thousands of children are adopted from abroad, often through cumbersome, complicated processes that can take years before a foreign child arrives. The irony is that many Americans would like to (and will) adopt, and many children in the United States need adoptive families but will be passed over. Sixty-seven percent of all those in the public foster care system are children of color.<sup>72</sup> Children of color will wait considerably longer for adoption than their white counterparts. For example, in Michigan, white children are three times more likely to be adopted from foster care than their black counterparts.<sup>73</sup>

Adoption is a multimillion-dollar transnational service, in which aesthetics and genetic traits are significantly scrutinized.<sup>74</sup> However, there are