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## PARENT AND CHILD

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### Abstract

The law and economics of parent and child involves several models. Before the child becomes part of the family, the actions of the parents resemble those of market participants, with the appropriate paradigm contract. Nonetheless, the fact that children are the 'goods' over which adults bargain, mandates some government intrusion on contractual freedom. Once parents and child form a family, the social importance of the relationship and the legal helplessness of the child suggest that the relationship differs significantly from contract. In fact, the ongoing family is in many respects like a firm, and the principal-agent paradigm aids understanding. When the children become adults, or when the family is divided by divorce, the relationship of parent and child change but do not disappear. The relationship then approaches the franchise.

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### 1. Introduction

Before families are created, the people involved are acting primarily as individuals. They thus exhibit contract-like behavior rather than the firm-like behavior seen when the families are functioning. In some respects, the creation of a family resembles a search for consumer goods. However, people creating families are far more excited and involved than those buying even the most exotic car. Further, the adults who determine the families in which children will be raised are not simply but profoundly affecting parties who are silent in the transaction, the children themselves. Parental contracts, and indeed all behavior involving children, thus involves externalities.

When people think of producing babies, they do not usually contemplate markets. However, in families where adoption occurs, it turns out that there are explicit markets. Even in the majority of families, where parents are able to conceive their own children, their timing and number involve economic behavior. For single women the decision of whether or not to bear and raise the child is even more an economic one.

In most families, the market for babies is at work before the child is conceived. Parents control the genetic qualities of their children when they choose each other as marriage or sexual partners. They have some control over the type of offspring they produce by attempting to choose the time for reproduction, since the difficulty of conception and incidence of genetic problems both increase with the age of the mother. Some recent biological evidence suggests that women can influence the incidence of conception not only through the use of contraception but also through the type of female orgasm that takes place during the intercourse leading to conception (Baker and Bellis, p. 903). The timing of intercourse during the menstrual cycle influences the probability of having male as opposed to female children (Billings, 1975, p. 103).

Other children in the family, consciously or not, may influence the incidence of conception, as they will compete for the same family resources once a new baby is born (Anderson and Tollison, 1991). Certainly the nursing of a child delays the onset of menstruation, and thus the possibility of another conception. The very presence of a child in the family may make the parents more tired, so that intercourse occurs less frequently than before the child was born. Children may also attempt to monopolize the affections of at least one parent, interrupt the parents during the times when intercourse would otherwise occur, or even cause so much trouble that another child is not an obvious decision.

## 2. Investing in Children: Fertility

A tremendous volume of literature, beginning with the work of Gary Becker, analyzes fertility behavior among women of past and present societies (Becker, 1991; Becker and Lewis, 1973; Becker and Tomes, 1988). It is clear that the number of children born to Western women has declined dramatically over the past forty years, when contraceptives became effective and abortion legal. Both of these technological changes were accompanied by legal changes, as the United States Supreme Court developed a right to privacy that encompassed contraceptive use (*Griswold v. Connecticut*; *Eisenstadt v. Baird*) and abortion choice (*Roe v. Wade*; *Planned Parenthood v. Casey*). In the United States, since the abortion cases most of the forces shaping fertility behavior have been economic, as opposed to legal.

The reasons for having large numbers of children (a high infant mortality rate that required many births before a single child would survive to adulthood, or an agricultural economy necessitating large families to work the acreage) (Rubin, James and Meeker, 1972) have been irrelevant for many years. As Becker explains it, what has replaced the numbers is an emphasis on the quality

of children (Becker and Lewis, 1973). In other words, we invest more in the way of time and money in the smaller number of children we do have, a fact that contributes to the rise of contract thinking.

There are still some ways in which law might profoundly influence fertility: no-fault divorce, the legislation regulating public assistance for mothers of dependent children and, theoretically, more direct policies encouraging single children such as those in place in China (How, 1995). This section will take up the question of single mothers later, but it is perhaps worthwhile briefly noting the less obvious question of the effect of no-fault divorce on the birth rate.

Brinig and Crafton (1994, pp. 885-886), looked at the effect of no-fault divorce on the birth rate. Holding time and the number of marriages constant, they found that for the period 1965-87, no-fault divorce had a negative and significant relationship to the birth rate. They explained this result as a decreased investment by couples in their marriages as these became less secure. Another way of looking at the same phenomenon is to consider the thinking of a married woman considering or faced with pregnancy who realizes that her marriage is unstable. Thirty years ago, when divorce was quite difficult and was coupled with substantial stigma, the birth of a child might have seemed a stabilizing influence. Faced with the same problem today, the married woman might well elect not to conceive or bear the child because of the additional costs the child would bring and be subject to should the couple divorce. (This in addition, of course, to the reluctance of most mothers to bring children into unhappy families, *Heup v. Heup*, 1969.) Divorced women with minor children remarry less frequently than those without them (Becker, Landes and Michael, 1977, pp. 1157, 1176). It is also more difficult for a woman with small children to be economically self-sustaining, since employment must usually be more flexible for the single-parent custodian (Fuchs and Riklis, 1992, pp. 44-45).

### **3. The Market for Babies: Adoption**

Many couples are actively preventing conception until later in their marriages, and are marrying later. These tendencies are counteracted to some extent by technological progress in the area of infertility, but in any event, many are increasingly discovering difficulties in conceiving a child. The demand for adopted children has increased dramatically since the mid-1970s. At the same time, the supply of available babies has decreased.

Probably the most important change in the supply of children for the adoption market is the ready availability of abortion. Another cause is the greater societal acceptance of unwed or single parents, causing women who might otherwise give them up to carry children to term and then bring them up themselves. Further, the modern emphasis on natural parents rights slows the

supply of available children. Because it has become so difficult to prove permanent parental unfitness and the social work caseload has expanded geometrically, there are fewer and fewer children to adopt. Instead, they remain in foster care, sometimes indefinitely, because parental rights cannot be terminated and the parents maintain a token relationship with them.

The increased demand and decreased supply coincide in a market where there cannot be the expected price increase that would equate the number of parents demanding and supplying children. All American states prohibit explicit baby-selling and in most cases any payments, made directly or through middlemen, that are not directly connected to the wellbeing of the child. The result is analogous to other cases where government imposes a price ceiling: a shortage develops, with a growing queue made up of parents wishing to adopt (Prichard, 1984). A market with such supply shortages typically sees a black market emerge. The market for adoptable babies is no exception.

Richard Posner suggested that a market in babies would rectify many of the problems of the adoption system (Landes and Posner, 1978; Posner, 1987). Posner's critics proclaimed that sales of children reduced the children, or their mothers, to commodities. Further, unscrupulous but wealthy parents might purchase children to abuse them. Ultimately baby-selling became code for the foolish extreme to which its proponents could carry law and economics (Donohue and Ayres, 1987).

Posner's articles suggest that legalization of compensation would benefit most of the players in the adoption market. In the market he describes, the supply of adoptable babies would increase, given a legal market price. Adoptive parents would acquire the children they so badly desired. Natural mothers would suffer less because they would be compensated for bearing the children (Prichard, 1984, p. 346). The market would provide incentives for the pregnant women to take better care of themselves so the children would be healthier (Landes and Posner, 1978, pp. 329-330). Arguably fewer women would terminate unplanned pregnancies by abortion. Finally, the children would go to the parents who valued them most, as evidenced by their willingness to pay the contract price and the mother's willingness to forego it should she decide to keep the child.

Although child custody statutes and decisions begin with a 'best interests of the child' standard, most end with choosing the interests of one parent or one set of parents (Scott, 1992), much as a Posnerian market would. For example, although Posner (1987, p. 152) briefly addresses concerns about abusive adoptive parents and a potential oversupply of older or handicapped children, he concentrates on the benefits a market price confers on parents. The market would remain regulated by the agencies screening adoptive parents in Posner's vision, but primarily to reduce the chance that parents would acquire children

to abuse them (Prichard, 1984, pp. 353-354). Agencies could also match birth and adoptive parents, reducing search costs for both parties to the transaction.

Although he is keenly aware of the costs of regulation in other contexts, Posner (1974) does not spend much time in his adoption pieces discussing the welfare losses caused by adoption agency regulation. The current costs are part of what makes the present adoption system so frustrating. Now, agencies rather than price act to ration the scarce resource of adoptable children among the many potential parents who want them. In Posner's system, price would be the primary mechanism for allocating children, and agencies would serve a licensing function.

Although agencies do guard against abuse by adoptive parents, they also increase transactions costs for both sets of parents. Agency investigations are not only expensive and annoying, but they also greatly increase the time required for adoption (Brinig, 1993). And because only the final order of adoption prevents the natural parents from revoking consent, the six months minimum waiting period while agencies investigate adds uncertainty to the transaction. Thus, the transaction costs added by legislatures to protect natural parents custodial rights and ensure suitability of adoptive couples may hurt more children than they assist. Virtually all couples trying to adopt children are suitable (National Committee for Adoption, 1989). As Posner was quick to note, we have no corresponding *ex ante* checks on parents who do not adopt. Because there is no real way to predict what kind of parents most childless couples will make, agencies make errors of overinclusion and underinclusion.

#### **4. Transaction Costs in Adoption: Revocation**

As a society, we strongly presume that natural parents are the best custodians for their children. (*Holland-Moritz v. Holschuh*, 1972; *State v. Meyers*, 1971). By definition, then, others are not as qualified. This emphasis on parental rights to custody as opposed to children's rights to the best custodian may lead courts and legislatures to second-guess the parental consent for adoption.

Birth mothers are almost universally forbidden from giving binding consent until after children are born (Ely, 1992) because of the tremendous and overwhelming bonding between parent and child that occurs at and shortly after childbirth. But even after arrival of the child and a recovery period, courts scrutinize assent to adoption *ex post* more fervently than they examine virtually any other transaction.

Looking at this judicial behavior charitably, we see that natural parents placing children will feel tremendous regret (Deykin, Campbell and Patti, 1984). It is more likely, though, that we allow revocation of this transaction despite unquestionable harm to the promisee adoptive parents, and frequently

the child, because of the tremendous primacy we give parental rights. Although revocation does not occur very often (National Committee for Adoption, 1989, p. 170), the possibility introduces very significant uncertainty into the transaction. Uncertainty creates major effects in the adoption market in much the same way that the very small risk of a catastrophe dominates the insurance market (Friedman and Savage, 1948). There are, of course, other transaction costs to adoption, including the fees charged by social service agencies, the intrusive nature of the investigations and the waiting period that frequently stretches for several years. As we have noted already, many of these costs serve to 'ration' the short supply of adoptable children, since price cannot. While fees may be charged on a sliding scale, they are so high that critics of trans-racial adoptions have charged that adoption has become a middle class phenomenon.

In adoption and termination cases, courts have extended the power of natural parents. *Schmidt v. DeBoer* (1993) illustrates the expanded power of natural parents, particularly unwed fathers, to withhold consent for adoption and how uncertainty invades the process. The case was finally decided based on procedure: which state had the ability to grant an adoption. The direct effects, particularly as portrayed in the popular press, show the human costs of interstate custody conflicts. Despite more than two years' placement in a suitable adoptive home, Jessica (now Anna) was returned to her natural parents although it was her mothers' deception that created the loophole voiding adoption.

Although some children enter the adoption market when their parents are found unfit, the vast majority begin the process after their parents, like Jessica's mother, voluntarily relinquish parental rights. Because there is no federal regulation or even federal court review of child custody matters, each state has enacted its own adoption system, and these demonstrate the tremendous variation typical of family law.

The conditions for revocation are not always explicit. In states with statutes leaving room for question, the general consent law has been interpreted by judicial decisions. Some state adoption systems treat consent for adoption much like agreement to any other contract. In these states, once a parent has given valid consent (after birth), it becomes irrevocable (Brinig, 1993). Another group of states lists short time periods for revoking consent. These give some time for the natural parent to have a change of heart, but the time period is short enough that neither the child nor the adoptive parents will be greatly injured by revocation. Other states have very strict revocation requirements, but do not make consent irrevocable. These statutes provide that there can be no revocation except in cases where consent was obtained by fraud, duress or coercion, where the consent itself is involuntary. If the states require a standard similar to the commercial contracts definition of fraud, the defrauding conduct would have to induce performance, would have to involve a material fact and

would have to be performed by the other party to the transaction (Kronman, 1978; Darby and Karni, 1973). In adoption cases the other party is usually a state agency, but in direct placement cases it might be the adoptive parents themselves. A restrictive definition of the conditions in which revocation is possible tends to value children's rights to a rapid and certain placement as opposed to those of the natural parents. In fact, those statutes that provide for no revocation except in cases of fraud and coercion have restrictive definitions.

On the opposite - parents rights - end of the spectrum are states that permit revocation any time before the final decree (Brinig, 1993). Since the adoption process may take years, and usually must take at least six months, bonds between the child and adoptive parent are almost certain to form. In such states, a typical case will allow revocation in circumstances that would not suffice for revocation of a commercial contract. In commercial cases, the threat must usually be of a severe physical sort that would clearly cause a reasonable person to enter into a contract where he would not otherwise, and cannot be merely ordinary economic circumstances. In a natural 'parents' rights' revocation state, duress may be the type of hardship most single parents of unplanned children experience.

In between the two extremes are a number of states that allow revocation before final placement or within longer time periods following consent (Brinig, 1993). Physical or psychological harm to children (and, at the same time, to adoptive parents) occurs when natural parents are permitted to revoke long after they have given consent. In addition, there will be other, market-driven, effects. Some parents may be so wary of adoption, particularly if they have gone through one unsuccessful placement, that they withdraw altogether. This prevents potentially loving, good parents from benefitting children. Adoptive parents have other substitute sources of children - these include the black market, where virtual certainty can be purchased at some price. Further, parents insecure about the stability of adoptions in their own states can look for children from other states or foreign countries. Because they are so eager to raise children, adoptive parents as a group tend to be exceptionally well informed. They will discover placements initiated in other states, and a quasi-legal intermediary mechanism flourishes.

Alternatively, because of the natural parents' relative market power (Prichard, 1984, p. 343), she can behave opportunistically, extracting consumer surplus from the adoptive parents. These additional payments might range from concessions by the natural parent to visitation after adoption or listing in an adoption registry (Comment, 1986). Where legal, the payments might be more direct, such as greater reimbursement for prebirth expenses or loss of income.

In an empirical analysis of the effect of adoption revocations on the number of adoptions, Brinig (1993) tested the effect of consent revocation legislation on the per capita adoptions in states. Obviously other things beside revocation

legislation affect the number of adoptions. The number of available babies changes with alternatives to adoption such as abortion or single parenthood. Unmarried women are more inclined to bear children as opposed to abort them if single parenthood becomes socially acceptable and if they receive adequate public assistance. The monthly rate for AFDC was therefore included as a controlling variable, as was the number of abortions in the state for 1987. Factors influencing the desire to adopt include couples' income and fertility rate, both of which are proxied by the percent of adult women in the labor force. The results of regression analysis were that the number of unwed births, the revocation statutes and the median income were the best predictors of state adoption rates.

### **5. Fraud in the Adoption Market: 'Wrongful Adoptions'**

The idea that a 'Market for Lemons' (Akerlof, 1970) extends to adopted children sounds at once abhorrent and seductive. However, given an adoption market, some amount of fraud may be optimal (Darby and Karni, 1973; Nelson, 1970). Fraud, like the prohibition of a free market in babies, may be one of the costs of placing less desirable children - those who are nonwhite, handicapped, or past infancy.

In many ways, the layout of the adoption market closely resembles the more familiar 'lemons' situation discussed by George Akerlof. A purchaser (an adoptive parent) acquires something (a baby) at considerable cost (in terms of cash, time, and emotional investment) from a seller (usually an agency). The seller possesses greater information (health or emotional problems) about the subject of the transaction than the buyer (Stigler, 1961). In many cases, it is impossible for the adoptive parent to discover this important quality information prior to consummating the transaction.

Once the child is placed with the adoptive parents and a major problem is discovered, the question becomes one of remedy. The fact that children are involved, with their own interests if not their own rights, changes the set of possible remedies from those appropriate in the typical commercial fraud situation. In most cases, returning the children to their birth parents or the agencies placing them (the equivalent of annulment) presents an unacceptable alternative. Children need stability, particularly early in their lives. Disabled children may need a stable loving home even more than those without special needs. Rescission of the adoption contract therefore loses power as a device because of the third party effects, or externalities, involved. In some cases, adoptions are annulled because of agency misrepresentation or nondisclosure. In a growing number of cases, although the adoption remains intact, distressed adoptive parents have sued the placing agencies. Courts have allowed recovery



in five of the ten cases reported before mid-1995. In three of these successful suits, the child involved had life-threatening diseases. In all, the agencies deliberately misinformed the parents that the child was healthy. The parents were able to recover for past or future medical expenses although the agencies were not guarantors of the child's health. Although the agencies knew of the genetic or other problems, the parents could not have discovered the illness or disability through their own diligence.

In the other half of the reported cases, the parents' suit was barred. In some, the defects, though undesirable, were not substantial. For example, one child was deaf, while another turned out to be unavailable for adoption because his father had never given consent. In others, although the agencies might have negligently failed to discover the problem, plaintiffs could not show fraud. Perhaps the agency was not the 'least-cost avoider' given the difficulty of placing these children.

The special needs of hard-to-place infants creates another barrier to recovery: a heightened burden of proof of fraud. Particularly if the adoptive parents were willing to accept a special needs child, courts will be reluctant to penalize the agency by finding fraud and concomitant damages even if the agency withheld some important medical or psychological information. If these 'wrongful adoption' cases became routine, the government would have even fewer incentives to attempt permanent placement of disabled children, thus forcing still more to remain in permanent foster care (Cass, 1987).

Finally, as in the 'wrongful life' cases brought a generation ago, the courts in the adoption fraud cases confront situations where the damages are very difficult to measure. Even if the child possesses some trait that the adoptive parent wished to avoid, he or she is nonetheless a human being, capable of giving and receiving love. The courts typically find that the positive aspects of having a child outweigh the negative. Taken as a whole, the child presents a net benefit to the adoptive parents despite the agency misinformation.

## **6. Open Adoption: Overcoming Transaction Costs**

In her celebrated *The Joy Luck Club*, Amy Tan (1980) describes a mother who leaves infant twin daughters beside the road in despair that she will die and in the hope that they will be found and raised in a better life. She spends the rest of her life looking for them, and it is only after her death that they are found. In a caselaw parallel, a Vietnamese woman places her children in a Saigon orphanage after a harrowing journey through the wartime Central Highlands (*Doan Thi Guong An v. Nelson*, 1976). Both she and they end up in the United States, where by the time she finds them, several of the children have been placed for adoption in an American home.

Someone who acted in good faith will clearly be unhappy with any adverse outcome in such a court case. When a family has been disrupted by war, or hardship, or death, need the ties be cut as clearly as we sever them in adoption? From the perspective of the mothers, clearly placement of the child was the appropriate action at the time (*Painter v. Bannister*, 1966). From the perspective of the child, should he or she know his heritage and how much the mother (or father) loved him? The quest for each other by birth parents and children defies easy characterization, but may be an example of 'uncommensurables' (Sunstein, 1994) where the legal effect of an action does not square with reality.

The law protects birth parents by hiding their identities from all who seek them, except in some clear cases of emergency. This is clearly what adoptive parents want, as well, for the protection allows them to determine when their children should be told of their adoptive status. But increasingly states are responding to pressures by both birth parents and adoptive children and enacting statutes permitting parents to leave identifying information with adoption agencies. Although the provisions differ, they usually allow the adopted child, at his or her option, to discover the birth parents identity at majority.

This may appropriately satisfy the longing felt on both sides of what seems to be a genetic-based franchise (Millen and Roll, 1985). The other option would be to move toward a more open adoptive process, as some are urging (Ames, 1992; Dowd, 1994; Holmes, 1994). In open adoptions, both the birth and adoptive parents know each others identities.

## **7. Contracts for Children: Surrogate Parenting**

Legal recognition of surrogate parenting continues to be contentious in the United States. Over the past several years, several states have enacted legislation prohibiting or otherwise regulating surrogacy. Since the landmark case of *In re Baby M.* (1988), there have also been a number of important state cases applying common law principles to this new technological area. In *Johnson v. Calvert* (1993), the California Supreme Court found that the surrogacy agreement between the genetic parents and the surrogate implanted with their fertilized embryo did not offend the state or federal constitution nor public policy. The surrogate was therefore not the 'natural parent' entitled to custody or visitation with the child. The court suggested that the legislature resolve the public policy questions. To date, the state legislative responses to the practice vary from a few that reluctantly acquiesce to a majority that find such contracts illegal and therefore unenforceable (Wadlington, 1993). Several states enforce the contracts when they are regulated if there is no monetary consideration for the surrogate's service.

The chief product of all this legal activity is uncertainty. As we saw in the consent revocation context, uncertainty itself begets more litigation, higher prices to attempt to secure conformity with the contracts, and more opportunism on the part of all involved, particularly intermediaries. More litigation comes to surrogacy just as it plagues other uncertain areas of the law (Priest and Klein, 1984). The higher prices charged by surrogates and attempted close relationships with them may thus be bonding devices because the contractual remedy is questionable or unenforceable (Kronman, 1985).

On the other hand, the childless couple may become opportunistic, taking advantage of the surrogate's pregnancy and relative poverty to extract concessions ranging from more restrictions on her behavior during the pregnancy to letting them film the delivery. It is more likely that the surrogate will behave opportunistically, however, because the couples demand for their genetic child is very inelastic, meaning that they will still want the child even if the 'price' is raised (Prichard, pp. 342-332). She may therefore demand additional compensation because 'she is thinking about keeping the baby' or ask for continued contact once the child is born.

Both what pushes some couples towards surrogacy and what makes observers nervous can be explained in simple biological terms. As Epstein (1991) has noted, we are driven by our genes to reproduce and, more controversially, to behave in ways that will allow each succeeding generation also to be fruitful and multiply. Infertile couples are tormented in part because of this unsatisfied and fundamental need. They choose surrogacy over adoption because they wish to have at least some of their own genetic code replicated in another human being. Surrogate mothers are also affected by their biology. They may desire other genetic children that they cannot afford to keep in their own families, and so be attracted to surrogacy in the first place. They may simply enjoy being pregnant and the powerful feeling of creation that comes with giving birth (Epstein, 1995; Trebilcock and Keshvani, 1991). But the dark side of these good feelings is that women are not programmed to have children and then part with them. A contract made beforehand, even though it may make the rational part of the placing easier, cannot affect these biological drives. The regret that such a placement causes does not pass away. It is large, probably larger than the \$10,000 that a typical surrogate receives, and it may not be anticipated beforehand.

If the surrogate has other children and therefore more information about what giving up the children will cost her, problems for the surrogate's other children surface, too (Brinig, 1995a). How do they know that Mommy will not decide to give them away if she needs money or if she decides that another couple needs them more than she?

Some object to surrogacy because, like real estate agents who get paid by commission whether or not the closing ever takes place, placing agencies get

compensated by the infertile couple upon signing the surrogacy contract (Areen, 1988). They may not insure that the surrogates are adequately investigated or counseled. They may not do extensive checking about the infertile couple, either. From a practical viewpoint, they are dealing with very vulnerable people on both ends of the contract they are making, and that may encourage 'matches' with unsuitable players.

Now let us reconsider these three primary objections: regret by the surrogate, hardship on the surrogate's other children, and exploitation by for-profit placing agencies. In economic terms, the problems are incomplete information, substantial negative externalities and rent-seeking.

Surrogacy contracts may be suboptimal because the surrogate cannot *ex ante* have perfect, or even minimally adequate, information. It is not her *ex post* regret that drives the analysis. It is that she *cannot* have predicted accurately what the situation will be at closing time. She cannot have gauged precisely the long-term effects of what she promised before conception. Even in the case of the marriage contract, which society positively favors, specific performance of non-financial terms will never be ordered (Cohen, 1987, p. 300). In surrogacy, knowing during pregnancy that specific enforcement was possible could make the pregnancy a nightmare (Schneider, 1990, p. 128), because the woman who changes her mind has every incentive to hate and resent the child she carries. She might try to extract additional money from the intended parents to guarantee that she will not engage in conduct that will harm 'their' child - engaging in reckless activities such as sky diving, drinking excessive amounts of alcohol or caffeine, dieting, or injecting drugs to numb the pain of her three-month predicament after a statutory 'turnback point'.

The information problem at least justifies some intervention into a free surrogacy market. The state might require counseling or provision of mental health follow-up services. It might allow the customary ten-day period after birth before consent is finally - specifically enforceably - given. It might simply change the contract from a 'fully enforceable' agreement to one where the remedy is the more typical one of money damages (Epstein, 1995, p. 41).

Contracts may become less than fully enforceable where there are substantial negative third-party effects. Although most contracts affect third parties at least indirectly, sometimes the contracting parties must buy-off the affected outsiders. So long as the compensation takes place, the contract remains efficient and enforceable. When the external costs are too high, the contract may be prohibited criminally, enjoined, or just not enforced (Goetz, 1984, pp. 15-17).

Although any negatives flowing to the contracted-for child are probably outweighed by the benefits of existence, the benefits of the contracted-for child's existence to the surrogate's other children are far more speculative (Trebilcock and Keshvani, 1991, p. 577).

Family law theoretically places children first despite parental activities, witting or not, that might seriously harm them. In our fascination with the adults involved in surrogacy arrangements, these children are forgotten. Whether we ought to compensate them directly, offer them family therapy, or just question whether surrogacy is a good idea, remains a policy question (Posner, 1992b, pp. 103-105).

Middlemen, or finders, because they can reduce the transaction costs associated with search, are highly desirable in many contexts (Posner, 1992b, p. 427). Where there are easy ways of obtaining the information and making the efficient trades, one would expect that the market would eliminate brokers because they were not eliminating costs in the system. However, there are several features about this particular market that make this assumption problematic. Two of these create incentives for brokers to enter the market. First, there is an extremely inelastic demand for the 'good' in question. The middleman may therefore extract the 'consumer surplus' from one or both parties to the transaction. For example, in the debate on the British surrogacy legislation, which ultimately prohibited commercial surrogate contracts, one speaker noted that 'the distress ... of infertile couples who are anxious to have a child should not be exploited for financial gain' (Parliament, 1985). To extract the surplus, the middleman may engage in substantial and wasteful rent-seeking.

The second unusual feature is the legal uncertainty that has surrounded surrogacy. Because in most states the law of surrogacy has been unsettled, lawyers can offer what looks like a guarantee of greater success, a 'watertight' contract. This, of course, may be a transitory phenomenon as more legislatures react to the surrogacy question, so this apparent (and illusory) insurance function will disappear. The third feature is that any 'mistakes' will reveal the relevant information to prospective contracting parties only at the expense of existing children. That is, once the brokered contract fails, the parties' litigation itself will probably have negative effects on the child. These might be financial, or could be emotional if the child is ultimately removed or if the family encounters significant publicity. Because of their incentive structure, as noted previously, these agencies may also act to *reduce* the beneficial flow of information between contracting parties, causing some inefficient contracting. While state legislatures may be moved by reasons that do not include economic efficiency, it is surprising that commercial 'baby brokering' is almost universally illegal (Atwell, 1988, pp. 29-39). In our jurisdictional market, if these middlemen were a good idea, presumably some state would have experimented with them.

Yet a surrogate black market is a still worse alternative (Prichard, 1984, p. 343; Landes and Posner, 1978, p. 388). If surrogacy becomes illegal and there are still people on both sides of the market who want to participate in these transactions, as there will be, the consequences will be yet more grave. First, the price will rise, in part to cover the risk of detection and in part because

measures must be taken to prevent detection. Illicit organizations that specialize in the black market activity are likely to flourish, and these will extract their price, whether for information or protection, from the participants. Finally, the black market would preclude any legitimate information gathering and transmittal between the parties that legitimate state or private agencies would otherwise provide.

However, just because surrogacy should not be precluded does not mean that the state needs to encourage baby brokerage. In surrogacy, the finder (broker) is frequently paid as much as the surrogate. It would be preferable either for the surrogate to reap this consumer surplus or for the intended parents to have to pay less. The brokers should not extract this surplus. Lawyers may be needed to handle the adoptions by the intended mothers, but should only charge their - much lower - customary fee for this service.

Surrogacy may in fact be a kind of 'demerit good', viewed instinctively as harmful regardless of what the individuals participating in the transaction decide (Sunstein, 1994, p. 850). Society need not prohibit these goods, but may merely tax or otherwise regulate them to make them less attractive, while not forcing participants into the black market.

### **8. Foster Care and Agency**

Many children do not live under their parents' care and protection, but that of state agencies. In the not-too-distant past, children whose parents could not care for them would have remained in their families, living with uncles, aunts or grandparents until they could fend for themselves (Hacsi, 1995). In some parts of the country, boys would have been apprenticed at a fairly early age to learn a useful trade. Only in cases of the very last resort would the family have relied on public help, and that would have come in the form of foundling homes or orphanages. These institutions were grim enough to inspire a wave of nineteenth-century reform as well as immortalization in the tales of Dickens.

The foster care idea that ensued is that adults with experience as parents will take children from families unable to cope with them, tend the children for awhile in a loving and stable situation, and prepare them for their return to their own families who have meanwhile been provided with community assistance (Mnookin, 1973). In extreme cases, where parents are unwilling or unable to resume relationships with their offspring, new (adoptive) homes will take the parents' place. The foster relationship begins with a contract assuring all parties that the arrangement is temporary, that the agency will pay some compensation to the foster parents, that the agency will inspect the foster home, and that the agency may remove the child for return to the natural parent or to another foster home in the agency's discretion.

Foster care was designed to be temporary, and was therefore never expected to be anything but a 'second best' solution. Instead, for a tragic number of children, it has become a permanent way of life, for they are never returned to their birth parents nor adopted by others. This seems to be especially true of African-American children, who are frequently placed with relatives as part of 'kinship care' (Hegar and Scannapieco, 1995). They may be cycled through a number of foster families, so that they never receive a sense of attachment and stability. And, in some metropolitan areas, the system itself has become overwhelmed by the scope and depth of the child care problem.

From an economic standpoint, foster care presents a classic principal and agent problem, with the unhappy result exactly what the analyst predicts where agents do not have correct incentives (Ross, 1973; Stiglitz, 1987). The theoretical solution to foster care problems is to correct the incentive incompatibility. But this is difficult because the agent's duties involve vulnerable human beings with their own distinct interests and because the overseers are government agencies, who also have conflicts in their missions.

As Ross (1973) describes it, an agency relationship arises between two or more parties when one, the agent, 'acts for, on behalf of, or as representative for the other, designated the principal, in a particular domain of decision problems'. The concepts of principal and agent, with the theoretical solutions to the problem, have been extended to law primarily in the business context (Holmström and Tirole, 1987; Hart, 1989). Reduced to its simplest terms, combining more than one worker will take advantage of economies of specialization and scale and will reduce transaction costs (Coase, 1937). However, when the amount of effort each worker contributes to the joint production of a unit of output cannot be measured, the rational worker will shirk, free-riding on the others because the loss in his or her compensation will be less than the reduction in contribution (Alchian and Demsetz, 1972). In order to reduce this shirking, managers monitor each employee's performance. If salaries are sufficiently higher than unemployment compensation, the employees will work harder to avoid losing their jobs. The theory is that the residual, or profit, should go to those who employ the monitor - the owner. In the noncorporate context, this is the same actor.

In a recent extension of the principal-agent theory to the field of fiduciaries, Cooter and Freedman (1991, p. 1065) argue that the fiduciary is like the agent and the beneficiary the principal, and that fiduciary law has developed to discourage misfeasance (the duty of loyalty) as well as nonfeasance (through the duty of care). Cooter and Freedman suggest that compensation through a variable rate for observable effort and a fixed rate for unobserved effort will further discourage these problems.

In foster care, the foster parent serves as the agent of the birth parent (or the state, if the parent is permanently unfit) and also the child, who is something

like a third party beneficiary of the adults' promises. Like the agents in business, the foster caretakers have incentives to shirk or even neglect the child in their care, except for their own sense of duty, the effects of reputation (on their potential next foster placement) and, most important, the affection they develop for the child in question.

On looking more closely at the foster question, we see two separate fiduciary problems. The first is the tie between the foster parents and the state. Although both have an interest in seeing the child cared for, their incentives may not be the same. The custodial (foster) parent has day-to-day responsibility for the child, and the state (or the natural parent) cannot monitor the care effectively. The foster parent, like the custodial parent after divorce, acts as a fiduciary, or agent, for the children's custody and the allocation of any money paid by the state. The other perspective for the same problem, and the one that is most applicable for the foster parent rights cases, is that of the foster parent. From this vantage point, the state acts as an agent to provide guidance and support and to resolve any conflicts fairly. Finally, the child is always an implied beneficiary, or principal, looking to the foster parent for custodial services and to the state for support and resolution of the ultimate custody question.

Usually caselaw and academic literature approach foster care from the birth parent's perspective (*Smith v. Offer*, 1977; *DeShaney v. Winnebago Co.*, 1989; Kurtz, 1994). The emphasis, then, is on parental rights, not upon any harm to children that might result from removal, or even their feelings about which set of parents would be better for them (*Doe v. Kirchner*, 1995). Occasionally, individual courts have changed their perspective to the states, valuing what would advance goals of the foster care system as a whole (*Matter of J.C.*, 1982).

When children are removed from foster care placement, the problem, as set up here, is that the children who are subject to foster care in many cases do not have the same interests as any of the adults involved: the foster parents who now care for them, their natural parents who may have abused or abandoned them, or who may not have been 'real' to the children for many years, or 'The State' which may have removed them from the only home they knew and is threatening to remove them again.

As long as the family remains intact, birth parents view the upbringing of their children as a joint enterprise, or 'collective good' (Zelder, 1993; Weiss and Willis, 1985, p. 270). They see how children thrive when they are appropriately cared for; they are rewarded by their smiles, hugs, and imitation of themselves as valued adults. However, when the family breaks up and the children are placed elsewhere, the interests diverge. Although the parent probably still loves the child, and is usually required by law to support him or her, they no longer reside together, and visitation may be infrequent. The parent may be quite preoccupied with attempting to meet the conditions set before the child can return: securing employment, dealing with substance-abuse



problems, settling adult emotional relationships. There are economic strains as well, because the family now in part maintains two households, eliminating economies of scale that were present before foster care placement (Weiss and Willis, 1985, p. 269). But more important, the natural or birth parents are now unable to have day-to-day contact with their offspring. They cannot know exactly what the foster parents are doing to care for the child (Weiss and Willis, 1985, p. 270), and cannot watch him or her grow from 'close up'.

Finally, because the natural parent lives away from the children and sees them less frequently, he or she may lose interest in the child or become preoccupied with other things (Weiss and Willis, 1985, p. 288). The natural parent would like to see the child happy in the new situation, but not so happy that the real home will be forgotten.

The state as agent has monitoring problems as well, although monitoring is usually required by the foster care contract. Too frequent visitation upon foster care parents, even if practical from a staffing viewpoint, would only disrupt the temporary family foster care is designed to create. The agencies are concerned with 'rehabilitating' the natural parents, and may also be overwhelmed by other truly horrible home situations in their caseload that require immediate intervention. Like the natural parents, the government agents are concerned that a good, but not great, relationship develop between foster child and foster parent. Thus, the agency may be apt to remove children who have been with a particular family for some time, despite any harm to the child that may result (*Matter of J.C.*).

Using Cooter and Freedman's (1991) analogy to principal and agent, the caring natural parent as principal fears that the agent, the foster parent, will shirk (nonfeasance), undermine the parent's standing in the child's eyes or, worst of all, actually harm the child. From the foster parent's perspective, the noncustodial birth parent is a complicated mixture of the source of the child (who may be easy or very difficult to care for, depending upon whether the natural parent was abusive or whether the child has other problems such as physical disabilities), the agent for support, and source of the threat of removal. The agency is placed in the difficult position of being at once an agent for the natural parent and an advocate (agent) for the child. Finally, of course, there is the child. If quite small, he or she may be a helpless pawn in this situation, desiring only love and some stability in life (*Watson v. Shepard*, 1976). If the child is older, he or she may manipulate most if not all of the adults involved (Ross, 1973). Because finding the residual claimants and even the monitors is problematic, it is difficult to see how any contract could be written to give all these parties appropriate incentives.

The child and the various sets of parents do not have the same interests. Perhaps this is obvious, since the children are concerned only about their own wellbeing, while the parents think both about their own consumption and the

welfare of their children (Bernheim, Shleifer and Summers, 1985, p. 1049; Becker, 1974). In the extreme, because giving up the child or having the child forcibly removed may have been very painful, the natural parent may want emotional distance from the child, may avoid the child services agency, or may even want to hurt the child. If there is less visitation by a fit parent, both the natural parent and the child lose (Hetherington et al., 1982).

'Bad' foster parents care for children to get the money they are paid by the state. They do not invest emotionally in the children in their care, a failure that hurts the child. 'Successful' foster parents are often at odds with state agencies because they do invest and become attached. Removal will be costly for them and the child; long-term placement will make adoption tempting.

To resolve the problems inherent in foster care because of its principal-agent problem, the law must make the players' incentives compatible. For the natural parent, there must be no 'parental right' that will trump what is clearly best for the child. To prevent discretion and uncertainty from running amok, time limits must be set after which 'rehabilitation' comes too late. Making the agency's incentives compatible with either, let alone both, sets of parents (and possibly a third set if adoption is a possibility) is probably impossible. But they could be made compatible with the child's interests in stability and safety (Bartlett, 1984). This would require rethinking the goals of the foster care system. If most children do not return successfully to their parents' care, and a time limitation can be set, certainty could return to the system. Such a move obviously requires some new empirical work, for there are many questions without answers here. A system with set time limits and emphasis placed on the child's choice and best interests might drastically curtail the number of voluntary placements.

Because children are not material goods, the particular type of principal-agent relationship foster parents enjoy is fiduciary rather than market-like (Scott and Scott, 1995). That is, the duties required of foster parents more closely resemble family duties than commercial ones: the foster parent, like the natural parent, must put the child's welfare before his or her own.

This hybrid relationship makes foster-parent cases difficult for courts. Clearly foster parents differ from teachers or nannies or babysitters. Yet because the relationship is designed to be temporary, is incomplete ('title' remaining in the natural parent or state), begins most often with contract and carries with it some financial reward, foster parents do not have precisely the same rights and obligations as do natural parents.

## 9. Single Mothers

Men and women are complementary factors in childrearing. Women may be more likely to perform their role without prodding (or channeling) than men, for as Seltzer (1994) puts it, men, as opposed to women, feel responsible to the children of women to whom they are married. Thus, men are likely to contribute in cash or kind when they are certain of fatherhood, and when they can interact with the child. They are more likely to invest when they have the ability to monitor, either through frequent contact with the child or through trust of the maternal 'agent'. They are also more likely to keep their support commitments when they do not have new families to distract them or drain financial resources. All of these reasons suggest why marriage, as opposed to some alternative family arrangement, is necessary for 'first best' childrearing. Children are not just factors to be ignored or non-actors whose preferences should be lumped in with their parents (Anderson and Tollison, 1991).

This argument accepts some of the premises advanced by such writers as Lupu (1994), namely that children, rather than their parents, ought to be central, and the fact that there are two parents presents advantages for the child. But after these agreements, our roads diverge. Lupu sees the two parents as contesting and checking one another to ensure that the child is brought up well, with society intervening at points where they can or will not perform this mediating function. They may also be viewed as complements working together and taking advantage of each other's differences: specializing, if you will.

Despite the desirability of dual parenting, the number of children born to unmarried women (as a percentage of all births) has increased substantially in the last twenty years, with the unwed white rate nearly tripling (Brinig and Buckley, 1996b). During that time, many social commentators argued that such trends were benign. Some touted the benefits of single motherhood (Fineman, 1994), while others argued that cultural conservatives should not impose their views of morality on indigent women who are responding rationally to their own environment (Sugarman, 1995).

Recent studies offer more detailed support for the conservative critique of increased unwed birth rates (Whitehead, 1993). The absence of a father is seen as the single most important cause of poverty (Wojtkiewicz, McLanahan and Garfinkel, 1990). Involved natural fathers provide strong role models, discipline, and a dependable source of income. Without these benefits, children do much less well than those from married families (Gottschalk, 1990; McLanahan and Garfinkel, 1989; Moffit, 1992).

The focus of attention has therefore shifted from the consequences to the causes of illegitimacy, particularly to welfare subsidies for illegitimacy. The most direct subsidy to illegitimacy in the United States is the Aid to Families with Dependent Children (AFDC) Program, now the Personal Responsibility

and Work Opportunity Act (1996) which offers a cash subsidy to mothers of children whose cannot or do not fully support them. Illegitimate births under the AFDC program are on the rise, and at present constitute about one-third of all AFDC children. Support for single parents goes beyond AFDC to include Food Stamps, Medicaid and WIC, which are all regulated by the new legislation.

From an economic perspective, it is uncontroversial to suggest that the AFDC program results in increased unwed births. Subsidize something, and theoretically you will always get more of it. However, critics of welfare reform argue that public assistance cuts will not reduce unwed birth rates because they have not done so in the past. If this is so, the proposed cuts in welfare payouts would harm children without benefitting society.

Welfare supporters also argue that illegitimacy rates are more closely correlated with exogenous (external) social norms than with welfare subsidies. What has happened, they say, is that the social stigma of illegitimacy, always weaker for blacks, has declined for whites, and this has made all the difference. However, this does not exclude the possibility that welfare subsidies may affect illegitimacy rates.

Social norms might *not* be exogenous, and might instead be shaped in part by welfare subsidies (Brinig and Buckley, 1996b). Welfare subsidies to illegitimacy, beginning in the 1950s, might have slowly affected social norms. Unwed women are probably not completely insensitive to economic subsidies. Indeed, we might expect stronger reactions to increases in public assistance as social norms weaken. This might explain why illegitimacy rates increased while real AFDC payouts declined from 1975-90.

To date, most empirical studies have failed to detect a significant positive welfare coefficient (Ellwood and Bane, 1985; McLanahan and Garfinkel, 1989; Kimenyi and Mbaku, 1995). Some studies report ambiguous results, such as a significant positive AFDC coefficient for some but not other measures of welfare availability (Plotnick, 1990). A longitudinal work based upon survey data reported that the fact that the mother received welfare prior to conception was significant in predicting the child's legitimacy status, but that the amount of the welfare payment was not (Duncan, Martha and Hoffman, 1988). Lundberg and Plotnick (1995) reported a significant positive welfare coefficient for white unwed births, but not black unwed births. Duncan and Hoffman (1990) reported a positive but insignificant welfare predictor of black teenage illegitimacy. A review of these studies comments that '[t]he failure to find strong benefit effects is the most notable characteristic of this literature' (Moffit, 1992).

Brinig and Buckley (1996b) estimated unwed birth rates for whites and blacks in each state for each year from 1975 to 1990, using economic, welfare and social predictors of illegitimacy and found that the AFDC coefficient was significantly associated with increased unwed births for both blacks and whites. Of the social predictors, those suggesting weak community support systems (or

social capital) were associated with higher unwed birth ratios. There were significantly more unwed births in cities, and the percent Black coefficient was uniformly positive and significant. Cities are apparently more likely to lack the social networks which promote marriage and sanction deviancy because illegitimacy is associated with an urban underclass. High divorce rates were also related to illegitimacy both because of a breakdown in social structures and because the pool of potential unwed mothers is higher in high divorce states.

### **10. Parents as Fiduciaries**

Implicit rather than express contracts between parents and children bind families together. While the contractual terms used to be far more widely recognized than they are at present, they have never been legally, as opposed to morally, enforceable. The current trends toward thinking of the family in contract terms and recognizing more and more children's rights tempt some to question the wisdom of the assumptions made by any implicit family agreements. In any event, the family contract will likely remain illusory and unenforceable because more than contract binds the members of a family together.

Eroticism aside, the relationship between parents and young children is not the same as the bond between their parents, and for good reason. Children are not merely 'little adults'. Although the vast majority of them possess the potential for meaningful adult contributions, their needs during childhood and even adolescence are quite different from their parents or even other emancipated peoples. Children do not make decisions like adults. They require a special kind of legal protection to accompany satisfaction of their primary needs. In order to be free to just be children, they need to rely on adults, usually their parents, to make adult decisions. The parents thus act as fiduciaries: trustees or stewards of their offspring (Scott and Scott, 1995). Treating children as independent legal actors in any but the narrowest range of circumstances limits not only their ability to be children but also their parents' ability to be good parents. This is not to say that children should not be considered independently of the adults who act in their names, when the interests of parents and child conflict.

An implicit contract between parent and child was detailed by William Blackstone, writing between 1765 and 1769. In this premodern time, the language of contract was not out of place, for Western families have not had their current structure for very long (Glendon, 1980). In Blackstone's time, the contract involved the parent having the duty to provide support, protection, education, discipline and religious instruction in return for the child's providing wages during minority and support and protection in the the parents' old age, honor and reverence, subjection, and obedience (Brinig, 1994a, pp. 299-300).

The fact that this contract transcends the generations may seem problematic. Yet, as the Bible says, the sins of fathers may devolve upon their children. Accepted wisdom dictates that societies receive the customs and institutions of their ancestors (Rawls, 1971, pp. 284-294). There will also be a 'passing down' of attitudes about parenting. For example, one researcher claims that in single-earner families, the father's attitude toward the fathering he received as a youngster will be the most consistent predictor of the time spent with his children (Barnett and Baruch, 1987, p. 37). Finally, economists write that altruism within the family occurs in part because of the expectation of future inheritance from a parent (Epstein, 1992, p. 89; Buchanan, 1983).

Scholars have concluded that many of the current perceptions of childhood postdate the change from an agricultural to an industrial economy (Zainaldin, 1979; Glendon, 1980). In an agrarian economy, children over the age of five were assets, since they could work around the farm or household. As cottage industry and then factory production developed, the feeding, clothing and educating of children became more of a consumption activity than a financial investment (Becker, 1993). The only positive input children could provide for the total family financial picture was their income (Stern, Smith and Doolittle, 1975), which theoretically belonged to their parents. And when child labor laws and compulsory education statutes were enacted, even the relatively small income that most children could provide evaporated.

Whatever power a contract analogy might have held in Blackstone's time, its usefulness becomes questionable when we analyze the contemporary family as an economic unit. This problem is particularly evident when we consider the incentive structure within the family. Currently the incentive provided for investment in children is almost entirely subjective. Parents may 'spend' time or money on their children because they are altruistic (McGarry and Schoeni, 1994; Woodhouse, 1993). They may invest in their children because they feel some sort of duty to do so (Becker, 1993). They may act because they take pride in their children's achievements, either because these enhance the family reputation or their own immortality (Buchanan, 1983). They may be thinking in terms of some eventual reciprocity, at least in terms of a meaningful relationship with their children as adults (Brinig, 1994a; Cox and Stark, 1993). They do not act because they expect any sort of reward, especially not in a monetary sense.

The law still presumes that some sort of a formal relationship exists in the family setting. Clearly parents enjoy enormous discretion and privacy as they raise their children (Scott and Scott, 1995), although Blackstone's contractual family seems to have eroded from both sides. The state now plays a far greater role in family life, and children have been given independent rights. But there are limits upon what they can do legally, in part because they cannot make adult decisions. Becker and Murphy (1988) suggest that the limitations on

children's ability to contract suggest a role for the state in creating Pareto efficient investments both in them and the elderly.

Recently, children have been given some autonomy in areas of personal privacy, such as contraception and abortion (*Planned Parenthood v. Danforth*, 1976; *Bellotti v. Baird*, 1979) though the Supreme Court has upheld statutes giving parents of immature pregnant minors the right to be informed in most cases of their daughter's pregnancy (*Planned Parenthood v. Casey*, 1992). As the child approaches majority, he or she may also acquire decision-making power in terms of elective medical care, and child custody placement with divorcing parents. Children over age seven are able to testify in most cases, and where criminal behavior directed at them is involved, even younger children may be witnesses if they understand the difference between right and wrong (Scott, 1992; Sanger and Willemsen, 1992).

Despite this growing independence, children are usually incapable of enforcing their parents' contracts. The first reason that courts will not interfere in most families, involves an unwillingness to disturb family privacy. *Kilgrow v. Kilgrow* (1958) is a classic case involving an intact family. Mr Kilgrow sued his wife for failing to abide by her premarriage agreement to educate the children in parochial school. The court declined to become involved, fearing that otherwise courts would have to deal with a flood of 'intimate family disputes'. Second, the court did not wish to 'interpose its judgment' about proper child rearing. Taking an extreme position even for a legal academic, Fitzgerald (1994, p. 40) recently argued that if children could enforce their parents' obligation to support them, children might evolve legally from the status of chattel to some form of personhood. She states that 'children will remain excluded' from personhood because '[t]heir experiences and perspectives of dependency find no recognition in any legal model positing an exchange between autonomous individuals'.

Courts do not usually allow the type of intervention Fitzgerald suggests, even when family privacy has already been breached by the parents' divorce. Children cannot sue to recover unpaid child support under a parental agreement or divorce decree, although courts may permit suit based upon promises made solely for the child's benefit. Nor will courts entertain the child's action if he refuses to submit to parental authority or to live with either parent.

As the cases make clear, to some extent the duty to pay child support rests upon parents' reciprocal obligations of custody and support. There is also an important relationship between the duty of support and the ability of the parent to exercise control over the child. For example, in *Oehler v. Gross* (1991) a 17-year-old girl refused to live with her father, who was willing to have her reside with him. She sought reimbursement for apartment rent, and the court denied that he had an obligation. 'It is quite clear from reviewing this record that the father is not refusing to support his daughter. Rather, he is refusing to

allow his daughter to dictate the proper allocation of support monies'. She somehow was not living up to her part in the family scheme.

Even the parents may not be able to enforce the implicit family contracts. As *Kilgrow* shows, courts are reluctant to invade the privacy of the intact family even when basic parental decision making is involved. If one spouse goes so far as to abuse the child, the other has the duty to protect the child, but there is no way to compel affirmatively good behavior. The only remedy seems to be breaking up the family by filing for divorce. If the spouses divorce, there are still limits to enforcement. Decades of federal intervention have not ameliorated a child support enforcement problem: only 63 percent of the amount ordered is collected (Chambers, 1995; Brinig and Buckley, 1996b). Visitation cannot be tied to child support. Nor may the noncustodial parent force the other to spend the child support money for the child's benefit rather than her own. For children, then, the right to enforce contracts becomes illusory. They must rely on other institutions to assure parental cooperation in their upbringing. Because they cannot enforce contracts, the rationale for something like a fiduciary status becomes clear.

Finally, analysis of many of the third-party enforcement cases under the principal-agent framework of Cooter and Freedman (1991, pp. 1065-1069) reveals a ratification problem. The presumption is that the child constructively ratifies the contract by providing what might be called 'childhood services', pursuant to the implied contract described earlier. Although many of these functions have been attenuated today by state involvement with the family (Becker and Murphy, 1988), parent and child still operate on a reciprocal basis, and the child's function at a minimum involves accepting parental support and advice. Rescission of ratification occurs when the child refuses to abide by the parent's wishes. The child may refuse to go to the college of the parent's choice, or to live on the college campus. In the extreme, the parent may be 'abandoned' by the child. In such a case, the child will be unable to enforce support.

### **11. Efficiency as a Goal of the Law of Parent and Child**

The legal aspects of the family have long been treated as a world of their own, separate from any practical or theoretical connection to theories of liability in other fields. This division occurred partly for historical reasons - the rules governing marital separations and parental obligations developed before modern contract and tort theories, and they developed in a separate (ecclesiastical) system of courts - and partly because, under the influence of formalism, theories of civil obligation focused on the prerequisites for liability. Modern theory, influenced by the insights of law and economics, has shifted its focus from liability's prerequisites to its consequences (Goetz and Scott, 1983;



Posner, 1992a). Traditional contract analysis, for example, may have asked whether parental obligations are sufficiently definite or sufficiently voluntary to constitute enforceable agreements. Under the influence of law and economics, scholars now are apt to examine the incentives that might be supplied by various contract remedies (Ellman, 1990). The result is to focus attention on the policies that family laws are designed to promote.

In analyzing parenthood as a form of civil obligation, and in identifying the policies that are served by modern divorce law, the most striking observation is the identification of the interests that are not protected. Parenthood, like marriage, historically involved the exchange of support for services, though this time it was the trading of the father's obligation for support in return for the child's services during minority, and the lifelong exchange of affection reciprocated by what Blackstone called 'honour'. Termination of parental rights historically occurred only where the parent egregiously violated these obligations, so that the child deserved to be rescued and released from the duties of a relationship that had effectively ceased to exist. As children become more emancipated, and acquire their own 'rights', the idea of parental fault, or unfitness, becomes problematic. However, the parents still have a duty to perform as good parents while the relationship exists, a duty that they cannot vary (*Hogge v. Hogge*, 1993; *Huckaby v. Huckaby*, 1979). And breach of the parental contract could still give rise to liability. Presumably, to the extent tort - or contract - reward is prohibited by the law, decision makers in the legislative or judicial branch must have determined that the costs of allowing recovery, whether in restitution (tort) reliance or expectation, exceed the benefits (Cooter and Eisenberg, 1985, pp. 1467-1475; Brinig and Carbone, 1988, p. 898; Katz, 1988, pp. 544-545).

Such an analysis of the benefits and costs of increasing children's rights has never been undertaken with any rigor. While, for example, the costs of a fault determination for divorce are deemed self-evident by anyone familiar with the older system, the costs of a parental non-enforcement system have not been weighed against the possible benefits of a more expansive system of awards to children whose parents have behaved egregiously. The benefits are those traditionally identified with civil obligation - deterring breach and encouraging reliance over the life of the relationship. Within the family, deterring breach translates into lower rates of child abuse and more investment in the children, including mothers who might stay in the home to raise them or couples who decide to stay married 'for the sake of the children' (Scott, 1990).

Encouraging such reliance primarily means encouraging both parents and children to think in terms of lifelong reciprocal obligations. A decision to preclude consideration of parental misconduct (except by terminating parental rights) could be justified, therefore, either on the ground that the cost of the determination is too high (because of over-zealous enforcement and consequent

invasions of privacy and parental prerogatives, or the bitterness any lawsuit can cause) or because of a conclusion that the interests to be served by such a determination (primarily the interests associated with perpetuating traditional parental roles) are not very important. Either way, the interests sacrificed must be considered along with the costs. The difficulty of determining the degree of fault on the parent's or child's part should not be used to cloak important societal decisions about what makes the best family.

## 12. Human Capital Investments in Children

One observable manifestation of the change in family functions over time is that as recently as when our parents were children, elderly people frequently lived with their children's families. Children provided the security when parents could no longer work (Brinig, 1993). Granted, there were fewer octogenarians or nonagenarians and there were more children in most families to share the expense of housing and caring for an aged parent. But the change in functions affects more than children. In some industrialized nations, even though children are 'useless' during childhood, aged parents, who have stopped most labor force production, remain far more integrated into the economy and their families' lives than in the United States (Rubin et al., 1972).

The legal, as opposed to social, treatment of children in families has always presumed a lack of anything approaching formal contract between them and their parents. Because of the presumption that parents will act in their children's best interests (*Parham v. J.R.*, 1979), parents are given almost all legal decision-making power when it comes to interactions with the outside world. Thus, children cannot sue their parents for simply being bad parents (*Burnett v. Wahl*, 1978), nor for failure to provide the education or other amenities that the children feel appropriate. In divorce cases, this is described as a problem of standing. The child does not have the ability to enforce court-ordered support nor to ask for increased support to meet additional expenses (*Yarborough v. Yarborough*, 1933; *Kelleher v. Kelleher*, 1974). In other words, they cannot enforce the implicit agreement by which their payments may be bound.

Even though there is no legal enforcement of the contract, there may be some other mechanism in place to motivate parents to invest in children. Becker and Murphy (1988) suggest that state provision for education encourages optimal investment in children, if bequests are taken into account. In some Western countries, because adult children will be expected to support their now infirm parents, such investments have a financial as well as a psychic reward. In North America and Western Europe, elderly parents are expected to support themselves out of some combination of accumulated earnings, pension plans and social security (Kline, 1992, p. 200). Unlike the elderly in

non-Western industrialized nations, our elderly largely live alone or in nursing homes (Bernheim, Shleifer and Summer, 1985, p. 1074).

Reduced to its simplest non-mathematical terms, the argument is that positive investments in children will depend in part upon the parent's expectation of reciprocal care in advanced age (Posner, 1996). Since families tend to mirror patterns of care through the generations (Kolko, 1992, pp. 244-276), the parent's current involvement with his or her own parents reflects these expectations. Of course, the family expectations will not be the only thing influencing investment, so the empirical work controls for other factors as well.

Studies have examined the investment in children based upon the number of children in the family (Becker and Lewis, 1973; Becker and Tomes, 1988). Economists have related the number of children to such factors as parental income, years of education and the divorce rate. Another way of measuring investment in children is to calculate the time spent on their care. Studies have already modeled time spent on children as a function of their age, income, gender and the employment status of each parent (Parkman, 1996).

Other measures of investment in children may be quantifiable. One obvious additional measure of parental investment is the parents' financial outlays (Zelder, 1993). A data source measuring this outlay is the payment of agreed-upon or court-ordered child support by noncustodial parents (Weiss and Willis, 1985). Another data source measuring successful parenting is the child's performance on standardized tests given to all children in school systems. Unfortunately, as well as these positive contributions, families also experience negative 'investments,' akin to dissipation or wasting of assets (Whitehead, 1993). The data source measure that relates directly to children is parental child abuse.

If it is correct that there at least used to be an intergenerational pact for support at the time of dependency, investment in children should be highest where more elderly people are cared for by their adult children. Conversely, where many elderly people live alone, their children should not be investing as much in minor children. Brinig (1993) looked at both United States' and international evidence of both positive and negative contributions by parents, examining whether provision for the elderly was an important contributing factor to the investment. The independent variables included general demographic information as well as the elderly living alone that alternatively might explain the investment. The percentage of elderly living alone was statistically significant, and was in the direction expected: more positive investment (reflected in test performance) occurred where a lower percentage of elderly lived alone; more negative investment (abuse or nonsupport) where there were more elderly on their own.

This does not rule out the possibility that, if the culture supports reverence for the aged ancestor for a non-economic reason such as religion (Posner, 1996), the economic result may hold true as well: the elderly citizen will be supported by his adult children. A deeper regard for all family members will increase benefits for both the children and the elderly (Becker, 1993). One would expect the investment in children that is reflected in the analysis above (Epstein, 1989, p. 1466).

There are therefore two recommendations, besides the suggestion for further study, that might be made. One assumes that the economic motivation is dominant: if public provision for the elderly results in less investment in children, some thought might be given to discontinuing or limiting public support. The other assumes that the cultural motivation dominates, although the economic effect might follow. Under this alternative view, the Western nations, which are the ones with the least significant connection between adults and their parents, might try to strengthen these ties. The beginning of a process of strengthening these ties could be made by heavy investments of time and money in our own children, perhaps induced through a 'well-chosen combination of taxes on adult consumption and subsidies of childrens goods and services' (Fuchs and Reklis, 1992, p. 44), or by providing the example in offering homes for our elderly parents (Cox and Stark, 1994).

### 13. The Parental Covenant

Parents presumptively act in their children's best interests. They are bound by invisible, illusory contracts to do so. But what enterprise engages us, then? As with the married couple, this chapter argues that there is an analogy for parent and child relations that holds more promise than the contract. The human parties to a covenant may enjoy horizontal equality, although parents and children are typically in a more vertical relationship.

The implicit contracts discussed so far may be better described as default or off-the-rack provisions or that they substitute for what parties wanted *ex ante* (Scott, 1992; Scott, 1987). However, since both the parents in question may not want these obligations, even beforehand, default provisions do not completely answer the objection. Some parts of family life are invariable because they are necessary for the family to meet its historical and present-day societal obligations, the externalities of the parental exchange. They make the family what it is.

These obligations translate from the boundless and undeserved love that flows in families. Covenantal love is quite different from economist Gary Becker's definition of altruism (Becker, 1991, ch. 8), which he derives from a single family member's caring. In addition to requiring only one active party

rather than the two or more needed for covenant, Becker's definition of altruism also implies that the altruist must have the means to withdraw support from the rest of the family. It does not imply sacrifice without expectation of reward.

We have already seen that children do not make choices the same way adults do, for important economic reasons. To get their physical wants satisfied, they need to be selfish (loudly so), their wants-suppliers altruistic (Anderson and Tollison, 1991). They need to be careful of what they have, at least until they reach adulthood. Since they have (meaning actually possess) very little, and even have limited human capital as yet, losing what they do have becomes enormously important. Hence they are more risk averse (Brinig, 1995a). They also, despite feelings of 'immortality' in their teen years, have nearly infinite discount rates. When very young, they cannot understand that an object that rolls under a table is still there where they cannot see it (or that covering one's eyes does not make you invisible). Their sense of time, as Goldstein, Freud, and Solnit (1973) note, is different from the adults' around them. A month to an eighteen-month-old is forever. Delaying gratification, putting off television-watching until after homework is finished, requires parental intervention. Planning for any extended period is impossible even more than with many adults.

Children need parents to supply these deficits. In a first-best world they need male and female parents to supply the physical needs as well as emotional ones. They need interested people to invest in their human capital in order to make them productive in the future. Men and women are complementary factors in childrearing.

#### **14. Conflicts between Parental and Childrens Interests**

Because of the limitations of childhood, we have noted that parents are presumed to act in their childrens best interests (*Parham v. J.R.*, 1979, p. 590). Parents may be led to act in their children's best interests simply because they love them. They may so act because to do otherwise is to invite tremendous social disapproval (Scott and Scott, 1995). Their child's best interest may coincide with the parents' - having a nice home to live in benefits both parent and child (Weiss and Willis, 1985). Teaching a child to be helpful and neat will benefit the parent who then does not need to live in a chaotic pigsty. They may be acting 'properly' because they are making the type of investment discussed earlier: anticipating an eventual reward of cash or kind.

Courts approach the problem of parent's and child's conflicting interests in a number of ways, although usually repeating the axiom that parents are presumed to act in the child's best interests. In some more recent cases, children are given independent rights that carve away at the parental domain.

The parental role as fiduciary is lost in the facts of these families with problems. The parent or child becomes the winner; not both. In the process, parenting becomes something both more temporary and less important, in short, less covenant-like.

We have not yet seen the limit of the extension of children's rights. Now, according to some courts, minors can exert a privacy interest in their own homes and possessions (*In re Scott K.*, 1979). Statutes give them the right to independently seek medical care where they might wish to keep the information private. They can sue their parents in tort for unintentional wrongs or those so 'extreme and outrageous' as to violate the essential bonds between parent and child (*Mahnke v. Moore*, 1951; *Akenbrandt v. Richards*, 1992).

The question of Kaldor-Hicks efficiency comes up in families because parents often make decisions that may be optimal for themselves, but perhaps harmful for the children (Becker and Murphy, 1988). For a mother and father to both work outside the home may not be the best situation for the children. It may be necessary for the financial survival of the family, and it may provide the additional funds needed to purchase items such as private schooling or sleep-away camp. Entering the labor force may be necessary for the psychological wellbeing of the parent who had stayed home to care for the children when they were very young (Brinig, 1993, pp. 466-467). He or she may be better equipped to deal with the children's needs after a day spent in some sort of meaningful activity with adults. In any event, the wellbeing of the entire family is considered in making this type of decision, which will be Kaldor-Hicks efficient.

In the family setting, the more difficult efficiency problem occurs when the parents separate or divorce. Then mother and father may well be making an agreement that is efficient for the two of them, considered separately (Zelder, 1993). However, the decision to dissolve the family almost always disadvantages the children, sometimes very substantially (Chambers, 1984, p. 504). Because the divorce process is usually painful for the adults, they do not always think about compensating the children: the absence of the non-custodial parent and the financial losses that are inevitable in most divorcing families. Perhaps for this reason, state legislatures and courts provide some remedies for children of divorcing families that are not available in intact families. Good examples of these are the provision of support beyond the child's minority, or the requirement that the non-custodial parent supply medical insurance or college tuition (*Kujawinski v. Kujawinski*, 1978; *Curtis v. Klein*, 1995). Such Kaldor-Hicks compensation is not perfect, and may be inadequate in most cases, but it may be enough to deter couples on the margin from separating and causing the children harm. Nothing within existing civil theory, however, provides a basis for considering the wisdom of these developments toward Kaldor-Hicks as opposed to Pareto efficiency, in which everyone involved would actually, as opposed to theoretically, be made at least as well off.

## 15. Deadbeat Parents

Family deadbeats seek to avoid legal obligations, abandoning their spouses and children to public welfare or private charity (Brinig and Buckley, 1996b). They are the stuff of Dickensian novels and of Grimm's fairy tales. They were the immigrants who never sent back for their wives, and the pioneers who cast off their families to move West. They were Theseus at Naxos and Leatherstocking on the prairie. They lived lives without second acts and, because they have always been with us, we have the laws of support, alimony and divorce. For them, the West offered freedom from family responsibilities as well as political freedom.

Deserted wives historically could assert a variety of remedies against their spouses. Desertion was a ground for divorce, and states mandated child support obligations. Children were also protected through child abuse and compulsory education legislation. There is, however, a wide variance among states in family support obligations, and deadbeat spouses have an incentive to move to low-payout and low-collection states (Brinig and Buckley, 1996b).

Nearly a quarter of the more than four million family support cases involve deadbeat dads who have crossed a state line. Deadbeat migrants are apparently attracted to jurisdictions that permit them to scale back family obligations, such as Florida, which did not collect 85 percent of the child support due in 1992. The recent example of Virginia shows how sensitive collection rates are to state collection efforts. In the early 1980s, Virginia ranked thirteenth in the child support collection. But after state funding for collection was cut in 1986, the state fell to forty-ninth place. After this decline became a political issue in 1989, Virginia's collection rates improved dramatically.

Brinig and Buckley (1996b) conducted an empirical examination of migration trends within the United States for the period 1985-90, looking among other things for the indices of a nonpayment of child support. They found few surprises among predictors of the noncustodial parents who did not pay child support. The Unwed Births and Divorce coefficients were both significant and positive. A state with a climate supporting unwed births would appear to be one in which divorce bears less stigma as well. The coefficient for women in the labor force was also significant and negative. Husbands whose wives are working spend more time with their children and are apparently likely to have a closer attachment to them after divorce (Brinig and Alexeev, 1993). Similarly, the joint custody dummy was also negative and significant. Parents appear more likely to support their children when they maintain close contact with them through joint custody orders (Weiss and Willis, 1985). The AFDC coefficient was positive and significant, suggesting that fathers might be more likely to abandon their families when the state will be generous in assuming the support obligation.

## 16. The Family Franchise

After the legal ties of infancy and parental responsibility disappear, something remains (Brinig, 1996). Just what that something is may change. Some of the bond between parent and adult child undoubtedly is primordial and emotional, and therefore unlikely to change with years and fortunes. Whether the siblings maintain that sort of relationship with each other and together *vis à vis* their parent, depends to some extent upon whether the parent is viewed as a net good, in which case a franchise model operates (Hadfield, 1990; Mathewson and Winter, 1985; Rubin, 1978), or a net neutral or bad, in which case the 'state of nature' governs (Kronman, 1985). Law makes a critical difference in what is chosen - the franchise or the largely unenforceable agreements of the state of nature. And law will certainly be involved where family governance fails: there may be elder abuse, estate problems, suits to enforce statutory duties of support, quarrels over competency and the increasingly popular disputes over grandparent visitation.

From the point of view of the older person, when their child becomes an adult there may still be hope of enforcing the implicit contract made when the child was young - I will take care of you, love you, invest in you, and in return be cared for by you when I am enfeebled (Brinig, 1994a; Posner, 1996). But the younger person, at least one without the expectation of inheritance, has the opportunity for gaining quasi-rents, for the big parental investment was all made in the adult's youth, and without his or her explicit concurrence (Epstein, 1989). 'I never agreed to have you live with me, and I have a life of my own' may be the child's response to the parent's incapacity. The adult child may therefore think of self and siblings as individuals in isolation from each other and from their parents.

There are two possible models for describing the behavior of what might be described as mature families (or related adults): one is the state of nature; the other is the franchise. The appropriate model depends in part upon the parents' health, cheerfulness, and mental youthfulness. It will also hinge on whether the parents' estate is seen as large, small, or negative. Thus there may be a shift between paradigms as the parent ages or his or her fortune changes. Siblings may act as franchisees during their forties and their parents' late sixties, and with the independence of sovereign nations during their own late fifties and their parents' eighties, as the parents become less pleasant to deal with or the bond market crashes. On the other hand, the siblings may begin as 'independent nations' and end up as franchisees if their parent wins the lottery. Both models are therefore worth considering and, to repeat, we can influence which one dominates by our choice of law.

Students of human nature have seen the obvious parallels between the associations of adult children and their elderly parents and those of unrelated



citizens and communities. Locke ([1776] 1992), in his *Second Treatise on Government*, describes extended families residing together under the father's guidance or 'rule' through their own consent, that is, through their new and voluntary contract. Without such an agreement, the former infants are at liberty to govern themselves, or to unite at will with other societies or communities. The relationship with their extended family is in many ways similar to the relationship between sovereign nations.

However, if an elderly parent has property the younger generation wants, the estate then acts like collateral to induce the young to do what pleases the older people (Rubin, Kau and Meeker, 1979; Buchanan, 1983; Posner, 1996). Perhaps the absence of any such bond between adult siblings is the reason these relationships tend to be weaker, becoming intensely competitive as the elderly parents near death (Klein and Leffler, 1981). At the same time the competition for the scarce parental resource is growing, other things that would bind the siblings together are fading. The siblings may now see in each other the traits they most disliked in their parents: indecisiveness, greed and intolerance, especially if they are reminded of these characteristics by the old people themselves (Posner, 1996). In families without a great deal of wealth to pass on or where the elderly person is senile, the model also may explain certain types of hands-tying behavior: moving far away from the family home so as not to have too many visits from the aged parent or to avoid uncomfortable decisions like the question of moving the parent to a nursing home. On the other extreme, the hands-tying behavior may be building the apartment-addition that will only be useful for the in-law to occupy.

Alternatively, at least some elements of these extended families are like franchise arrangements: the older person is the franchisor, with reputational stakes as well as 'up front' investment in the middle-aged generation (Kornhauser, 1983; Ben-Porath, 1980, p. 3). The adult children are franchisees, who have reaped the benefit of their parent's educational and other investment in them, and who now actively operate their own family units with the name, possibly the fortune, and the reputation of their parents at risk.

Like the commercial franchisor, the elderly parent has a heavy specific investment in the family name as well as in the children he or she has raised (Brinig, 1996). The parent almost never terminates the parental relationship: although there may be threats of disinheritance, these usually will not be credible. However, the parent may well prefer, or even insist on, frequent monitoring. This serves two functions. First, the parent may actually desire the contact with the child. In addition to maternal or paternal affection, she or he may genuinely value the child as a friend. The parent may also be lonely, and one's children may be better company than are other old people, especially when friends begin to die off. Posner (1996, pp. 63-64) suggests that the elderly have relatively few relationships with non-family members of different age

cohorts, and fewer in total as they become very old. Finally, the parent may be monitoring the child's activities, to make sure that the family tradition, whatever it is, is being carried on. Of course, keeping in touch with one's children was simple in the era when many parents did not live long, and those who did were likely to own the farm their children worked or even the home the children lived in. As we have moved away from our ancestral homes and off to faraway parts of the country or world, we of course distance ourselves from our parents and make monitoring more difficult. We are also less likely to support them, given Social Security, Medicare and pensions (Brinig, 1994a; Ben-Porath, 1980, p. 6).

For the children who are franchisees, the relationships are complex. Children sometimes *vie not* to support their parents. They compete in rivalries about which grandchildren are most successful, about whose job is the best, sometimes about who has best been able to keep up the family traditions. Yet they still care about brother or sister (Kronman, 1985, p. 22), and they have a common interest in maintaining the family name, and perhaps in keeping the family property, or genetic endowment, intact (Bergström, 1995). This interest is more apparent in rural communities, as it was in Continental feudalism. What may be more important now, as John Langbein argues, is human capital (Langbein, 1988). The parents' investments in our human capital occurred when we were young, and we now have the opportunity to reap 'rents' from them. Whether we choose to repay the parents for their investment will depend in part upon non-financial considerations: love, guilt and generalized emotional intermeshings (Becker, 1993). It will depend also on state requirements, such as for support of the elderly, or legislation against elder abuse, both of which involve a coercive type of state intervention. Finally, it will depend upon whether the unpleasant short-term burdens of caring for the older person outweigh the longer term benefits, either in memory or inheritance.

The child may be concerned that, like the commercial franchisor, the elderly parent may 'up the ante' by requiring increasingly more onerous performance. Such opportunism could take the form of whining, complaints about physical ailments, demands for attention that point up the competition among siblings. To some extent, the escalation is inevitable given the deteriorating health of the parent. The franchisee-child has the problem, like the parent of an infant faced with a onslaught of crying, of differentiating the selfish behavior from the genuine concerns.

One of the immediate puzzles is the question of why the elderly parents are more concerned with the long-range benefit of the family's reputation than are their adult children. The answer may lie in the concept of wasting assets (Posner, 1996, around 27). If an adult is conceived of as having two goals, lifetime consumption and preserving 'trademark capital' for the future, the first goal will predominate during most of life. As there is less and less time to enjoy present consumption, however, the second goal will ascend, until, shortly

before expected death, it will occupy a preeminent position in the elderly person's utility function. As the parents approach old age, the competition motive frequently prevails. Those who have read Kenneth Arrow know about the phenomenon of cycling. As with Kronman's contracts and the state of nature (1985), the answer to the cycling problem is to require unanimity: the building of consensus as to the appropriate division.

Buchanan (1983, p. 78) has proposed a rigidly defined succession rule such as primogeniture to prevent rent-seeking, or strategic behavior. If all are certain from the beginning that only one child can inherit and which child that one is, the cycling will not occur. Of course, this analysis is challenged by hundreds of years of English history in which younger sons killed off their older siblings or sent them off to fight in the Crusades.

Modern nations have emphatically rejected the customs of primogeniture, and has made it unprofitable to use violence to end the cycling phenomenon. Yet more and more tales of families apparently 'fall apart' when an elderly parent passes away and the estate, or even the personal property, has to be divided among the siblings. Not only have we abolished primogeniture and prohibited property gains through murder, but we have also done much as a society to insure that there will not be too much in most people's estates to squabble over. Most elderly people live on their own. Most of them support themselves through some combination of social assistance and Medicaid, pension plans and private savings. The elderly live long enough at this turn of the century to use up most of the resources they have saved, and perhaps more, leaving debts to nursing facilities and hospitals. We have accomplished enough in medical technology to prolong the physical body past the point where mental activity has reached a point of diminishing returns: a point, in fact, where the old person may actively dislike his or her existence (Posner, 1996, p. 16).

The relationship between elderly parents and their children depends upon whether the elderly person has, or is expected to have, property left to devise at the end of his or her life. If there is property, competition for it will prevail (Ben-Porath, 1980, p. 7). If there is no property (as may be the case with many elderly women who have outlived their husbands and any resources put aside for old age), a different kind of competition prevails. The siblings may engage in a 'hot potato' avoidance game, which may hurt the elderly person directly (particularly the woman, since most victims of elder abuse are women), or indirectly as she sees that she is no longer valued, or even wanted, by the children for whom she sacrificed so much. If the commercial franchise has no value, the franchisees may well breach the franchise agreement and start out on their own, abandoning the franchise (*Land O'Lakes v. Fredjos*, 1992). The franchisor will go out of business (Malcomson, 1984, pp. 486-487). With people, adjustment for the failing franchise is not so simple. Rejection of elderly people has always been a concern, but not a common law concern. Some

jurisdictions have fairly recently enacted requirements that adult children provide for their 'aged and necessitous' parents (Branes and Frolick, 1993), and still more recently have drafted legislation to deal with the increasingly visible phenomenon of elder abuse.

The fact that elder abuse is on the rise suggests that this application of the franchise model may also be testable. Positive contacts with one's parents may be signals to your own children of how you wish to be treated some day (Cox and Stark, 1993). They may also evidence Buchanan's (1983) rent-seeking, an angling for parental affection in expectation of a larger testamentary gift. On the other hand, all other things being equal, more adults should abuse their parents when the 'franchise' fails - as the size of the parent's expected estate decreases. In order to verify the franchise story empirically, reliable statistics on elder abuse would be needed. On an individual level, other things held constant would include whether the parent lived with the child, the size of the parent's estate, the number of siblings in the child's family, the income of the child's family, and the life expectancy of the involved parent.

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