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## Battling Baby Brokers: A Comparative Analysis of the United States' Versus Europe's Adoption Policies

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# BATTLING BABY BROKERS: A COMPARATIVE ANALYSIS OF THE UNITED STATES' VERSUS EUROPE'S ADOPTION POLICIES

## INTRODUCTION

Parenting a child in the United States (US) is a challenging and demanding undertaking but the process of *becoming* a parent can be equally arduous for many families.<sup>1</sup> Hopeful parents often face a myriad of obstacles to having a baby, including fertility complications,<sup>2</sup> age,<sup>3</sup> and relationship status.<sup>4</sup> On the other hand, some women become pregnant unexpectedly in challenging circumstances that make the prospect of parenting seem impossible.<sup>5</sup> Children require significant amounts of time, money, and effort to raise.<sup>6</sup> Without an adequate support system, many people feel inadequately prepared and too overwhelmed to undertake such substantial responsibility.<sup>7</sup> There are several options for those who are unable or unwilling to have biological children as well as for those faced with an unwanted

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1. See generally *Infertility FAQs*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 1, 2022), <https://www.cdc.gov/reproductivehealth/infertility/publichealth.htm> (explaining the frequency with which couples struggle to conceive as well as common complications with getting pregnant and maintaining pregnancy to term).

2. *Id.*

3. Ashley Stahl, *New Study: Millennial Women Are Delaying Having Children Due To Their Careers*, FORBES (May 1, 2020, 10:40 AM), <https://www.forbes.com/sites/ashleystahl/2020/05/01/new-study-millennial-women-are-delaying-having-children-due-to-their-careers/?sh=7c413509276a>.

4. See *Poll: 2 in 5 women would consider parenting solo*, THE DISPATCH (May 31, 2015), <https://cdispatch.com/news/2013-05-31/poll-2-in-5-women-would-consider-parenting-solo/#:~:text=An%20Associated%20Press%20DWE%20tv,who%20would%20consider%20adopting%20solo;see%20also%2029%20Reasons%20Why%20Women%20Place%20Baby%20For%20Adoption>, CRADLE OF HOPE (Mar. 23, 2021, 7:57 AM), <https://cradlehope.org/birth-mothers/29-reasons-why-women-place-baby-for-adoption/>.

5. See *Unintended Pregnancy in the United States*, GUTTMACHER INST. SIDEBAR 1-2. (2019), <https://www.guttmacher.org/fact-sheet/unintended-pregnancy-united-states>; see also CRADLE OF HOPE, *supra* note 4.

6. See Mark Lino, *The Cost of Raising a Child*, USDA (Feb. 18, 2021), <https://www.usda.gov/media/blog/2017/01/13/cost-raising-child>; see also CRADLE OF HOPE, *supra* note 4.

7. CRADLE OF HOPE, *supra* note 4.

pregnancy.<sup>8</sup> One popular choice in the US for these groups of people is some form of adoption.<sup>9</sup> Adoption, in theory, allows a family faced with an unwanted or inopportune pregnancy to relinquish their child to a family or individual who has more sufficient means and the desire to become a parent.<sup>10</sup>

About one hundred and forty thousand children are adopted by Americans each year, and about one hundred and thirty-five thousand of those children are from the United States.<sup>11</sup> A large percentage of these adoptions take place through the foster-care system, which costs relatively little.<sup>12</sup> Nonetheless, partly because adoption from foster care is a more difficult and time-consuming process, many US adoptions take place privately through agencies.<sup>13</sup> The agency system is very costly and highly profitable, with adoptive parents spending tens of thousands of dollars to acquire a child.<sup>14</sup> This focus on profits has led to a more

8. *Id.*

9. *US Adoption Statistics*, ADOPTION NETWORK, <https://adoptionnetwork.com/adoption-myths-facts/domestic-us-statistics/> (last visited Mar. 11, 2023).

10. Michael Bohman & Sören Sigvardsson, *Outcome in Adoption: Lessons from Longitudinal Studies*, in *THE PSYCHOLOGY OF ADOPTION* 93, 93 (David M. Brodzinsky ed. 1990).

11. ADOPTION NETWORK, *supra* note 9.

12. Foster care adoptions account for 59% of non-stepparent adoptions and are often free, as they are normally funded by the state. Even if prospective parents elect to use an agency to facilitate this process, much of the associated costs are recoverable through government programs. *What is the cost of adoption from foster care?*, ADOPT US KIDS (n.d), <https://www.adoptuskids.org/adoption-and-foster-care/overview/what-does-it-cost> (last visited Mar. 11, 2023).

13. Private adoption involves birth parents voluntarily relinquishing rights to their child to an adoptive family of their choosing. This is typically facilitated by agencies that have been approached by prospective parents seeking to adopt for counseling/assistance with this process. There is no exact count, so numbers vary significantly, but best estimates suggest about 10,000-25,000 private domestic adoptions take place in the US annually. Dayna Gallagher et al., *It's the Wild West": Private Domestic Infant Adoption in 2020*, MATHEMATICA (Nov. 5, 2020), <https://www.mathematica.org/blogs/its-the-wild-west-private-domestic-infant-adoption-in-2020>; see also *Adoption in the US: How Many? How Much? How Long?*, CREATINGAFAMILY.ORG (2023), <https://creatingafamily.org/adoption-category/adoption-blog/adoption-cost-length-time/#:~:text=Adoptions%20from%20foster%20care%20have,welfare%20agency%20involvement%20was%2054%2C240>.

14. *Comparing the Costs of Domestic, International and Foster Care Adoption*, AM. ADOPTIONS, [https://www.americanadoption.com/adopt/the\\_costs\\_of\\_adopting](https://www.americanadoption.com/adopt/the_costs_of_adopting) (last visited Mar. 11, 2023); see also Jennifer S. Jones, *How Much Does Private Adoption Cost?*, GLADNEY CTR. FOR

exploitative, detrimental system that adversely affects adoptive parents, birth parents, and children alike.<sup>15</sup>

US legislation has further fueled the issues plaguing its adoption system through its heavy focus on perpetuating this profitable system.<sup>16</sup> Rather than focusing on programs that would enable birth parents to keep their children or would allow more hopeful adoptive parents to afford this process to provide more children in need with a better life, the federal government has tended to financially incentivize states' continuation of the current system.<sup>17</sup> Though the federal government has taken some noble steps to promote family preservation, such as through the Family First Prevention Services Act,<sup>18</sup> these efforts are severely undermined by its monetization of adoption through legislation.<sup>19</sup> The government spends about ten times more on foster care and adoption programs than it does on any form of reunification.<sup>20</sup> This skewed focus leads states to focus more on these more lucrative measures than on what is best for the child.<sup>21</sup> It encourages states not only to continue their current methods,

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ADOPTION (June 18, 2019), <https://adoption.org/much-private-adoption-cost>; Claire Swinarski, *Why is it so expensive to adopt a child?*, THE WASH. POST (Nov. 28, 2016), <https://www.washingtonpost.com/news/parenting/wp/2016/11/28/why-is-it-so-expensive-to-adopt-a-child/>.

15. See Jennifer Gilmore, *The Dark, Sad Side of Domestic Adoption*, THE ATLANTIC (Apr. 30, 2013), <https://www.theatlantic.com/sexes/archive/2013/04/the-dark-sad-side-of-domestic-adoption/275370/>.

16. For example, the federal government offers tax deductions for adoptive parents to offset adoption costs. See 26 U.S.C.A. § 23; see also I.R.C. § 23.

17. The federal government provides funding to states for their foster care and adoption systems in which states get reimbursed for each child that is successfully adopted once they hit certain numbers. See 42 U.S.C.A. § 674.

18. The Family First Prevention Services Act was enacted with the aim of funding services that would allow children headed for foster care to remain with their biological families, such as substance abuse treatment services. See Bipartisan Budget Act of 2018, Pub. L. No. 115-123, §§ 50701–82, 132 Stat. 64 (2018); see also *Family First Prevention Services Act*, NAT'L CONF. STATE LEGISLATURES (ed. Apr. 26, 2022), <https://www.ncsl.org/human-services/family-first-prevention-services-act>.

19. Elizabeth Brio, *The Government Spends 10 Times More on Foster Care and Adoption Than Reuniting Families*, TALKPOVERTY (Aug. 23, 2019), <https://talkpoverty.org/2019/08/23/government-more-foster-adoption-reuniting/>.

20. *Id.*

21. *Id.*

but to expand these measures further to receive more money from the federal government.<sup>22</sup>

In contrast, European countries experience relatively low domestic adoption rates with greater protective measures for birth parents and much less costs for adoptive parents.<sup>23</sup> France offers two types of adoptions to enable birth parents more flexibility when severing their parental rights and give adoptive parents more clarity as well as security through concrete expectations.<sup>24</sup> The requirements for eligibility to become an adoptive parent in France are also more stringent.<sup>25</sup> Germany reserves much more time regarding parental consent of biological parents and for revocation of that consent, giving birth parents more opportunity to evaluate their choices.<sup>26</sup> Italian adoptions are governed by the judicial system and require a probationary period before official approval to ensure the appropriate decisions are being made in the best interest of the child.<sup>27</sup>

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22. *See id.*

23. *Domestic* adoption, where the child and the adoptive parent(s) are from the same country, is statistically less common in Europe than *domestic* adoption in the United States. International adoption, where the child and the adoptive parent(s) are from the different countries, is statistically more common in Europe than international adoption in the United States. This is likely because of countries' varying adoption laws, as data shows that when international adoption rates of a given European country are higher, the rate of domestic adoption is lower comparatively, and vice versa. Reports also suggest "significant disparities" in the rates of domestic and international adoption between European countries, at least partly due to differing policies between such countries. This suggests that when domestic adoption is more difficult for prospective adoptive parents, they look to other countries with more permissive laws. Countries restrict international adoption at times as well, which thereby affects international adoption rates of countries subject to those restrictions, such as the United States. *See Adoption of children in the European Union*, EUR. PARLIAMENT SIDEBAR 2–5 (June 2016), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583860/EPRS\\_BRI\(2016\)583860\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583860/EPRS_BRI(2016)583860_EN.pdf); *see also* ADOPTION NETWORK, *supra* note 9.

24. *See Conditions for adoption in France*, NOTAIRES.FR (Jan. 13, 2017), <https://www.notaires.fr/en/couple-family/adoption/conditions-adoption-france>.

25. *Id.*

26. Center for Adoption Policy, *Overview for German Adoption Law*, ADOPTIONPOLICY.ORG, <http://www.adoptionpolicy.org/pdf/eu-germany.pdf> (last visited Mar. 11, 2023).

27. Center for Adoption Policy, *Overview of Italian Adoption Law*, ADOPTIONPOLICY.ORG SIDEBAR 4, <http://www.adoptionpolicy.org/pdf/eu-italy.pdf>.

Most central to the reasoning for these differences between the US's private agency system and these countries' adoption system is that this US system revolves around profit.<sup>28</sup> The US must move away from treating children as commodities to create a better, more supportive system for children, birth parents, and adoptive parents.<sup>29</sup> It is patently unethical to sell children as though they are a product, and it is leaving all parties involved in harrowing positions.<sup>30</sup> The current system is unfavorable to hopeful adoptive parents partly because the costs are so high that many people are barred from entry.<sup>31</sup> There are children in need of homes all over the country that are being overlooked, and those who would like to parent them often cannot afford the costs associated with adoption.<sup>32</sup> Alternatively, birth parents are often preyed upon and coerced into making decisions they may later regret because of a system that requires babies to derive profits.<sup>33</sup> Money then becomes the primary focus in the adoption process, rather than on the child being placed for adoption.<sup>34</sup> The child's needs and best interests become subordinate to how much that baby could be worth.<sup>35</sup>

This Note argues that the US must update its laws on private agency adoption to give birth parents a better opportunity to consider the consequences of their choice, alleviate adoptive parents' financial as well as emotional strain, and ensure children are placed in the most suitable home.<sup>36</sup> To accomplish this, the

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28. See Tik Root, *The Baby Brokers: Inside America's Murky Private-Adoption Industry*, TIME (June 3, 2021, 6:00 AM), <https://time.com/6051811/private-adoption-america/>.

29. See *id.*

30. See *id.*

31. Reed Alexander, *This is the shocking cost millions of Americans endure to adopt a child*, MARKETWATCH (Nov. 20, 2017, 12:55 PM), [32. See generally Olga Khazan, \*The New Question Haunting Adoption\*, THE ATLANTIC \(Oct. 19, 2021\), <https://www.theatlantic.com/politics/archive/2021/10/adopt-baby-cost-process-hard/620258/>.](https://www.marketwatch.com/story/this-is-the-shocking-cost-millions-of-americans-endure-to-adopt-a-child-2017-11-20-12885511#:~:text=Adoption%20is%20unaffordable.,according%20to%20data%20from%20Bankrate; see also Swinarski, supra note 14.</a></p></div><div data-bbox=)

33. Gallagher, *supra* note 13; see also *Common Coercion Methods that the Adoption Industry Uses on Mothers*, ADOPTINGBACK.COM (2004), <http://adoptingback.com/coerced-surrender/adoption-coercion-methods/>.

34. See Root, *supra* note 28.

35. See *id.*

36. See Gallagher, *supra* note 13.

US should implement a more holistic, family-centered adoption system, and can look to the procedures of European countries for guidance.<sup>37</sup> The US would create a better system for all involved by amending the current private agency adoption system in a manner more consistent with European regimes.

Part I will discuss the history of US adoption system through its present-day structure, with a focus on private domestic adoptions. It will then examine the current system's nuances and intricacies to highlight the issues plaguing the US private adoption system. Part II of this Note will assess the ways in which this system harms all parties to adoption. Part III will detail the adoption processes in France, Germany, and Italy, respectively. It will analyze the domestic adoption laws, costs, and restrictions of each of these countries to demonstrate how these systems facilitate a more ethical, efficient, and responsible approach to adoption as compared to the US. Part IV will provide suggested solutions to the problems plaguing the US private adoption system by reference to the systems of these European countries.

## I. THE UNITED STATES ADOPTION PROCESS

### A. A Brief History of Domestic Adoption

The first recorded legal adoption in the American colonies occurred in 1693,<sup>38</sup> yet the process of adoption was largely unregulated until the mid-1800s.<sup>39</sup> Though the first formal adoption law was passed in 1851 by the state of Massachusetts,<sup>40</sup> children were exchanged or placed with different families well before this date.<sup>41</sup> As adoption law developed, much of the process revolved

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37. AstridBeeMom, *A Comparison in Adoption – The United States Vs. Europe*, MUSINGS OF A BIRTHMOM (Apr. 16, 2015), <https://musingsofabirthmom.com/2015/04/16/a-comparison-in-adoption-the-united-states-vs-europe/>.

38. Daughters from Danang, *The Origins of Adoption in America*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/daughter-origins-adoption-america/> (last visited Mar. 11, 2023).

39. Alex Lipe, *The Adoption Industry and the Adoptee Rights Movement*, EVERGREEN, <https://sites.evergreen.edu/cc/carebodies/adoption-industry/> (last visited Mar. 11, 2023).

40. *Id.*

41. Children were placed in infant asylums or orphanages during this period. Some, usually immigrant or low-income, also went to boarding houses in which they would essentially become household labor. Others would be sent on



around “matching” children with families that were physically and culturally similar to them.<sup>42</sup> The goal was to construct families that appeared biologically related—the underlying theory being that these superficial elements would create an environment for the child that mirrored that which they would have had with their birth parents.<sup>43</sup>

The number of adopted children began to increase rapidly during the “Baby Scoop Era,” which ran from the end of World War II through the early 1970s.<sup>44</sup> Restricted access to birth control coinciding with a period of sexual liberation led to a stark increase of premarital pregnancies.<sup>45</sup> These pregnancies were viewed extremely negatively by society during this time, and women were often manipulated into giving their child up for adoption to avoid further shame.<sup>46</sup> Though these adoptions were characterized as “voluntary,” many women simply succumbed to pressures placed on them by agencies.<sup>47</sup> With this rise in adoption rates came an influx of organizations structured to aid in the process, which sparked an adoption rights movement that enabled official steps toward reform in the decades to come.<sup>48</sup>

In 1996 the adoption rights movement had a breakthrough with the founding of the adoption activist group Bastard Nation.<sup>49</sup> The group’s founding mission was to advocate for adoptees’ rights to unseal their adoption records and two years later they achieved its first success in Oregon.<sup>50</sup> This victory paved the way for the US’s modern version of open adoption,<sup>51</sup> which

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“Orphan Trains” to be displayed across the country to potential homes. There were systems in which children would be sold for money to “baby farms” as well. *Id.*

42. *Id.*

43. *See id.*

44. *What You Need to Know About the History of Adoption*, AM. ADOPTIONS, <https://www.americanadoptions.com/adoption/history-of-adoption> (last visited Mar. 11, 2023).

45. Non-relative adoptions increased from ~33,800 in 1951 to 89,200 in 1970. For context, in 2003 there were only 14,00 babies that were voluntarily relinquished. *What Was the Baby Scooper Era?*, BABY SCOOPER ERA, <http://babyscoopera.com/home/what-was-the-baby-scoop-era/> (last visited Mar. 11, 2023).

46. *See id.*

47. AM. ADOPTIONS, *supra* note 44.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*



will be discussed at length in the following section. Open adoption was initially far more limited, in which contact was mediated by the placing agency and all identifying information remained secret but has developed to become much more interactive.<sup>52</sup>

### *B. The Modern Domestic Adoption Process*

The parties to adoption are often collectively referred to as “the adoption triad.”<sup>53</sup> The triad is composed of the birth parents, the adoptive parents, and the adoptee.<sup>54</sup> The triad is intended to revolve around the child as the bonding member of the triad, given that they will be connected with both sets of parents to some degree for their entire life.<sup>55</sup> The triad label is meant to illustrate the interconnected nature of these parties and foster respect through understanding that each member is vital to this process.<sup>56</sup> Yet too often there are competing interests between each member of the triad that deface this ideal, such as how often and by what methods a birth parent can contact the adoptee, if at all, as well as what information the adoptee is entitled to access.<sup>57</sup>

#### 1. Types of Adoption

There are three options for adoption within the private industry: open, semi-open, and closed.<sup>58</sup> In closed adoptions, adoptive families and adoptees have no contact with or identifying information regarding the birth parents.<sup>59</sup> Records of the adoption itself along with the birth parents’ personal information are kept sealed in these situations, which includes the child’s Original

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52. *Id.*

53. Lita Jordan, *What is the Adoption Triad?*, GLADNEY CTR. FOR ADOPTION (Dec. 6, 2021), <https://adoption.org/what-is-the-adoption-triad>.

54. *Id.*

55. *Id.*

56. Morgan Bailee Boggess, *The Truth About the Adoption Triad*, ADOPTION.COM (June 3, 2020), <https://adoption.com/the-truth-adoption-triad/>.

57. *Id.*; see also Audra Behné, *Balancing the Adoption Triangle*, PUB. INT. 49, 77–83 (1996-1997).

58. *What Is the Difference Between an Open and Closed Adoption?*, GLADNEY CTR. FOR ADOPTION (Nov. 18, 2020), <https://adoption.org/what-is-the-difference-between-an-open-and-closed-adoption#:~:text=In%20closed%20adoptions%2C%20adoptive%20parents,or%20if%20an%20emergency%20occurs>.

59. Lipe, *supra* note 39.

Birth Certificate (OBC).<sup>60</sup> Some states allow adoptees to access their OBC, but most states have some level of restriction, or even entirely restrict, access to these important documents.<sup>61</sup>

Courts and legislatures have often reasoned that allowing adoptees to access their OBC would violate the birth parents' right to privacy and would disrupt the adoptee's life with their adoptive parents.<sup>62</sup> These contentions ignore the wealth of data that contrarily suggests the majority of birth parents want adoptees to be able to access to this information; that the privacy concern is much less prevalent given society's changing views on unwed mothers, which was the initial reasoning for sealing OBCs; and that many adoptees are simply seeking medical and ancestral information from their OBCs, rather than seeking a parental relationship or other personal connection to their birth parents.<sup>63</sup> Overall, because of the finality of and the information barriers involved with closed adoptions, parties are increasingly opting for more open adoption structures.<sup>64</sup>

Open adoptions are more complicated and varied but some level of direct contact between the triad is inherent in these types of adoptions.<sup>65</sup> Some adoption triads have closer relationships, including frequent visits and/or direct contact, while

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60. Original Birth Certificates are the initial record of a child's birth. The adoptee then gets a new birth certificate with their adopted parents' names listed, which replaces their OBC. *Id.*

61. In cases where adoptees are restricted from accessing the original birth certificates, they may never learn where they were born, when they were born, or even their true date of birth. *Id.*; see also *The United States of OBC*, ADOPTEE RTS. L. CTR., <https://adopteerightslaw.com/united-states-obc/> (last visited Mar. 11, 2023).

62. Behné, *supra* note 57, at 56–63 (1996-1997).

63. *Id.*

64. See generally ADOPTION NETWORK, *supra* note 9 (“60-70% of domestic adoptions are now open adoptions...”).

65. See *What's the difference between open adoption and closed adoption?*, FRIENDS IN ADOPTION, [https://www.friendsinadoption.org/faqs-by-adoptive-parents/difference-between-open-and-closed-adoption/?gclid=EAIaIQob-ChMIq4mpqIGt8wIVhfdRCh3\\_9wUREAAYyAAEgJ\\_S\\_D\\_BwE](https://www.friendsinadoption.org/faqs-by-adoptive-parents/difference-between-open-and-closed-adoption/?gclid=EAIaIQob-ChMIq4mpqIGt8wIVhfdRCh3_9wUREAAYyAAEgJ_S_D_BwE) (last visited Mar. 11, 2023) (noting that in open adoptions “[t]he type and frequency of contact depends on what the birth parents and the adoptive family have agreed to. There are a lot of options for how such a relationship will work. An open adoption for one family could look very different from another.” Closed adoptions on the other hand are more straightforward given that “[t]here is no contact prior to or after the placement of the child.”).

others opt for more restrictive relationships.<sup>66</sup> Finding the right balance that satisfies all in the triad can be extremely complicated and divisive.<sup>67</sup>

A main issue in open adoptions is that parties are not typically required to expressly detail how the adoption will function, nor are they traditionally obligated to abide by the degree of openness detailed in their initial adoption plan.<sup>68</sup> These gaps often instigate a power struggle between the birth parents and adoptive parents over how, when, and to what extent the birth parent may be involved in the child's life.<sup>69</sup> Birth parents often find it difficult to balance the need to respect adoptive parent's boundaries with the desire to remain in the child's life and assert their presence.<sup>70</sup> Adoptive parents struggle to allow the child access to their biological family without succumbing to insecurities over how this relationship may threaten their positions as adoptive parents.<sup>71</sup> Adoptive parents also find it difficult to promote enough contact with the birth parents to bring the child security and strengthen their sense of identity, whilst ensuring it is not so much contact as to confuse or be disruptive to the child.<sup>72</sup> These internal struggles can foster resentment, breed uncertainty, and trigger fear that negatively impacts the triad's dynamic, and can place the adoptee in the middle of an unhealthy rivalry between their parents.<sup>73</sup>

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66. *Id.*; see generally Xiaojia Ge et al., *Bridging the Divide: Openness in Adoption and Post-adoption Psychosocial Adjustment among Birth and Adoptive Parents*, 22 J. FAM. PSYCH. 529, 529–540 (2008) (explaining there are varying “levels of openness” within open adoptions and that they may have an effect of parties’ views toward the adoption).

67. Boggess, *supra* note 56.

68. See Laurie A. Ames, *Open Adoptions: Truth Consequences Contributed Article*, 16 L. & PSYCH. REV. 137, 137–39 (noting that “...the actual practice of open adoption encompasses much more than merely the legal aspect. In most states today, open adoption is not a legally sanctioned process...Many of the states which have adjudicated the legality of open adoption agreements have held them to be unlawful.”).

69. Barbara Yngvesson, *Negotiating Motherhood: Identity and Difference in “Open” Adoptions*, 31 L. & SOC’Y REV. 31, 56–58 (1997).

70. *Id.*

71. *Id.* at 57–59; see also Annette Baran & Reuben Pannor, *Open Adoption*, in THE PSYCH. OF ADOPTION 316, 328–29 (David M. Brodzinsky ed. 1990).

72. Marianne Berry, *Risks and Benefits of Open Adoption*, 3 THE FUTURE OF CHILDREN 125, 128–29 (1993).

73. Yngvesson, *supra* note 69, at 57–59; see also Baran & Pannor, *supra* note 71, at 328–29.

Semi-open adoption is meant to be hybrid form of adoption in which there is some level of contact between the members of the adoption triad like in open adoptions, but that contact usually takes place through a third party, thereby removing direct access like in closed adoptions.<sup>74</sup> This said, semi-open adoption and open adoption tend to blend together in practice, with the level of contact being more dependent on parties' preferences than on the type of adoption chosen from the outset.<sup>75</sup> Given the malleability of this form of adoption, there is again the issue of uncertainty, which instigates contention.<sup>76</sup>

## 2. The Lack of Uniform Regulation

From this broad overview of US adoption, it is vital to analyze applicable laws that govern private agency adoption. Adoption is said to be a "creature of law," meaning it was constructed entirely by statute.<sup>77</sup> While the federal government provides a framework for adoption that states must comply with,<sup>78</sup> the system is principally regulated at the discretion of the states.<sup>79</sup> Moreover, *private* adoption is not governed by federal regulation whatsoever, and is largely unregulated by the states.<sup>80</sup> Private adoption has come to operate largely outside the realm of traditional family law, and instead seems to function under a "private ordering model—essentially a contract model" in which the players construct the transaction entirely free from the constraints of regulation.<sup>81</sup> This disjointed, underdeveloped system creates

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74. Julia Porter, *What is a Semi-Open Adoption?*, GLADNEY CTR. FOR ADOPTION (Apr. 15, 2020), <https://adoption.org/semi-open-adoption>.

75. *Id.*

76. See Berry, *supra* note 72, at 131–32.

77. Amanda C. Pustilnik, *Private Ordering, Legal Ordering, and the Getting of Children: A Counterhistory of Adoption Law*, 20 YALE L. & POL'Y REV. 263, 264–67 (2002).

78. The Adoption and Safe Families Act (ASFA) is the comprehensive federal law governing adoption. However, it covers only foster care adoption, adoption of children with special needs, and adoption by relatives. See 42 U.S.C.A. § 670.

79. See *Laws Related to Adoption*, US DEPT. OF HEALTH & HUM. SERVS., <https://www.childwelfare.gov/topics/adoption/laws/> (last visited Mar. 11, 2023).

80. See Root, *supra* note 28; Pustilnik, *supra* note 77, at 287 ("Moving into the present, adoption today remains predominantly privately ordered and minimally regulated for prospective adoptive parents who meet the normative model of the standard or 'traditional' parents.").

81. Pustilnik, *supra* note 77, at 263.

a wide range of possibilities for the structure of private adoption and the rights afforded to adoptive as well as birth parents.<sup>82</sup>

To get a better understanding of the impact of this disparity, this Note shall compare the policies of two states, one which tends to favor the rights of adoptive parents and another that prioritizes the rights of birth parents.<sup>83</sup> One side of the spectrum is New York, which has historically been more protective over birth parents' rights.<sup>84</sup> On the other side of the spectrum is Texas, which has been more favorable to adoptive parents.<sup>85</sup>

*i. New York*

In New York, an individual or couple over the age of twenty-one, regardless of sexual orientation, are eligible to become adoptive parents if they have not been convicted of certain crimes.<sup>86</sup> The adoptive parent(s) must then file a petition detailing their financial condition, marital status and history, physical and mental health, criminal history, and any previous filings to become qualified adoptive parents.<sup>87</sup> They must also undergo a pre-placement investigation, which includes interviews and home visits, to assess the prospective adoptive parents' qualifications and living conditions.<sup>88</sup>

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82. See Mirah Riben, *Is a "War on Adoption" Warranted?*, MIRAH MIRAH (Mar. 9, 2021), <https://mirahmirah.medium.com/is-the-war-on-adoption-warr-6e7ec7e7dc5a>.

83. See Marja E. Selmann, *For the Sake of the Child: Moving toward Uniformity in Adoption Law*, 61 WASH. L. REV. 841, 847 (1994). (explaining some states are friendlier than others in terms of adoption procedures).

84. Amanda Rodgers, *Birth Mother Rights After An Adoption In New York*, ADOPTION CHOICES OF N.Y. (May 5, 2021), <https://www.adoptionchoicesof-newyork.org/birth-mother-rights-after-an-adoption-in-new-york/#:~:text=Birth%20Mother%20and%20Preg-nant%20Women's%20Rights%20in%20New%20York&text=In%20New%20York%2C%20you%20cannot,placed%20with%20the%20adoptive%20family>.

85. Joan M. Cheever, *Lone Star State Legislators Prepare to Apply the Brakes on the So-Called Baby Train*, NAT'L L.J., Aug. 17, 1992, at 8. See Sandra Harper Lamgo, *8 Things to Know About Texas Adoption*, AdoptioninTexas.org (Feb. 22, 2018), <https://adoptionintexas.org/8-things-know-adoption-texas/>.

86. *Requirements to Adopt a Child in New York*, ADOPTIVE & FOSTER FAM COAL, <https://affcnyc.org/adoption-in-new-york/how-to-become-an-adoptive-parent/requirements-to-adopt-a-child-in-new-york/> (last visited Mar. 11, 2023).

87. N.Y. Dom. Rel. Law § 115-d (McKinney 2021).

88. *Id.*

Consent to adoption by both biological parents is generally required if the child was born in wedlock.<sup>89</sup> If a birth parent provides written consent in front of a judge that specifies it is irrevocable upon execution, such consent is immediately effective.<sup>90</sup> If the birth parent provides consent in any other context, such as at the hospital, it becomes effective forty-five days after execution unless the birth parent provides notice of revocation to the court within such time frame.<sup>91</sup> Despite these black letter requirements, courts do not mandate rigid compliance with these obligations.<sup>92</sup> Technical noncompliance, such as failing to adhere to time constraints for filing documentation, will not invalidate the biological parents' consent.<sup>93</sup>

Apart from adoptive parents and birth parents, New York's laws also illustrate how state regulations affect adoptees, agencies, and lawyers. For adoptees, their consent is required if they are over fourteen years old.<sup>94</sup> Notably, New York also recently unsealed birth records, allowing adoptees access to their OBC, which contains vital information about their birth parents, place of birth, and medical history.<sup>95</sup> For agencies and lawyers, it is important to note that New York is silent regarding advertisements for adoption, so institutions and individuals may lawfully promote adoption more commercially.<sup>96</sup>

This said, there are strict parameters for payment by adoptive parents to birth parents, which helps limit exploitation or

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89. For a child born out of wedlock, consent of only the mother is required unless the father meets certain conditions. *Id.* § 111.

90. *Id.* § 115-b.

91. *Id.*

92. *In re ELIYAHU*, 104 A.D.3d 488, 489 (N.Y. App. Div. 1<sup>st</sup> Dept. 2013).

93. *Id.*

94. N.Y. Dom. Rel. Law § 111 (McKinney 2021).

95. New York unsealed birth records in February of this year (2021). Michael Fitzgerald, *Adoption Secrecy Has Ended for Thousands Since New York Unsealed Birth Records*, THE IMPRINT (Feb. 17, 2021, 7:16 PM), <https://imprint-news.org/adoption/adoption-new-york-unsealed-birth-certificates/51893>.

96. Advertisements for adoption typically detail parents looking to adopt a child or birth parents looking to place a child for adoption. Different states have different guidelines regarding advertisements for adoption. Some prohibit the practice altogether while others regulate who can advertise/be advertised, the content of the advertisement, etc. *States Where Adoption Advertising is NOT Allowed: Updated for 2020*, OUR CHOSEN CHILD (2020), <https://www.ourchosen-child.com/tips-for-adoption-profiles/states-where-adoption-advertising-is-not-allowed-2020>.

impropriety.<sup>97</sup> Compensation of the birth mother must only cover pregnancy related expenses<sup>98</sup> and is limited to “three general categories: unreimbursed medical expenses of the mother and child, reasonable living expenses, and legal fees.”<sup>99</sup> These parameters alleviate concerns that a birth parent will choose adoption out of desperation to relieve financial strain or will otherwise be manipulated into adoption by money.<sup>100</sup> It also protects children from placement with an unsuitable family that was matched with them simply because that family was able to afford them.<sup>101</sup>

*ii. Texas*

Critics of Texas’s adoption system have referred to the state as the “Texas Baby Train.”<sup>102</sup> This reputation stems from several facets of its procedures.<sup>103</sup> Firstly, Texas has more adoption agencies than other large states like California and New York.<sup>104</sup> Secondly, the state offers less restrictions on financial support of the birth mother relative to other states.<sup>105</sup> Thirdly, Texas offers irrevocable relinquishment of parental rights.<sup>106</sup>

In Texas, there is no legal age requirement for prospective adoptive parents, though agencies may set their own

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97. N.Y. Soc. Serv. Law § 374(6) (Consol. 2021). Melinda Lucas, *Adoption: Distinguishing Between Gray Market and Black Market Activities*, 34 FAM. L.Q. 553, 561 (2000).

98. *In re Adoption of Stephen*, 168 Misc. 2d 943, 944-45 (1996).

99. Lucas, *supra* note 97, at 561.

100. See Candace M. Zierdt, *Compensation for Birth Mothers: A Challenge to the Adoption Laws*, 23 LOY. U. CHI. L.J. 25, 42-43 (1991) (arguing that when money is offered to incentivize a birth mother to choose adoption “[t]he next logical step is to attempt to influence pregnant women who have decided to keep their children instead of relinquish their babies for adoption, with the promise of money and material gain.”); see also Lucas, *supra* note 97, at 558-64 (noting that “New York’s strong public policy against the trafficking of children is evident” in its guidelines for payments in the adoption process).

101. See Zierdt, *supra* note 100, at 41 (noting “...a concern that children sold on an open market would go to the highest bidder and therefore to the wealthiest families, that there would be no consideration of the best interests of the child in the sale, that such a system would permit slavery, and that it would allow baby breeding.”).

102. Cheever, *supra* note 85, at 8.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*



requirements.<sup>107</sup> Like in New York, prospective parents who seek to adopt from Texas must undergo pre-placement adoption evaluations that involve home visits and interviews.<sup>108</sup> Texas also maintains reporting requirements so that any available health, social, education, and genetic history of the prospective adoptee must be documented to allow adoptive parents access to vital information.<sup>109</sup>

Consent to adoption is effective upon voluntary relinquishment of parental rights by the biological parents.<sup>110</sup> Voluntary relinquishment is affected by an affidavit that must be signed at least forty-eight hours after the birth of the child.<sup>111</sup> The affidavit is revocable unless it expressly states otherwise, but it cannot be made irrevocable for more than 60 days after execution.<sup>112</sup> This said, *Interest of Z.Q.N.*<sup>113</sup> suggests that even if a birth parent attempts to revoke this relinquishment through proper procedural methods, the court may nonetheless involuntarily terminate their rights if that is deemed best for the child.<sup>114</sup>

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107. *4 Texas Adoption Laws Every Parent Should Know*, AM. ADOPTIONS, <https://www.americanadoptions.com/texas-adoption/texas-adoption-laws> (last visited Mar. 11, 2023).

108. *See* TEX. FAM. CODE ANN. § 107.159 (West 2021).

109. *Id.* § 162.005 (West 2021).

110. *Id.* § 161.103 (West 2021).

111. *Id.* § 161.103(a)(1).

112. *Id.* § 161.103(e).

113. This case shows that even if a birth mother attempts to regain rights to her child through the proper channels and procedures, a Texas court can still deny her the rights to her child in favor of the adoptive parents. *See Interest of Z.Q.N.*, No. 14-17-00434-CV, 2019 WL 758377 (Tex. App. Houston (14<sup>th</sup> Dist.) 2019).

114. A birth mother attempted to regain parental rights, arguing she was pressured into signing an affidavit relinquishing such rights and that she revoked her relinquishment. The affidavit in question was irrevocable for 60 days, so the birth mother's first attempt to revoke relinquishment of her parental rights during this period was ineffective. Her second attempt to revoke relinquishment was after the period of irrevocability, so it should have been effective. Yet the court held that despite her two attempts to revoke relinquishment of her parental rights, the birth mother's parental rights could still be terminated on involuntary grounds. The Texas Family Code proscribes certain circumstances in which termination of the birth parents' rights is appropriate. The court may involuntarily terminate a parent's rights if they commit certain acts, including executing an irrevocable affidavit relinquishing their rights. The court may also terminate these rights if it is in the child's best interests. Here, the court terminated the birth mother's rights under the latter theory, citing her drug use and financial status as evidence. *See Interest of Z.Q.N.*,

Texas, unlike New York, prohibits advertisements for adoption and even categorizes the activity as a punishable criminal offense.<sup>115</sup> This said, the prohibition excludes licensed child-placing agencies that identify as such, so provided the agency follows specified guidelines, they may advertise for adoption to certain extents.<sup>116</sup> For children, it is important to note that Texas denies adoptees the unencumbered right to their OBCs.<sup>117</sup> Adoptees may apply for access to this document and are entitled to a non-certified copy without a court order if they know the identity of their birth parents.<sup>118</sup> Otherwise, they must file for a court order in the court in which the adopted was granted.<sup>119</sup>

These case studies reveal important distinctions across states that can have widespread effects on the system.<sup>120</sup> The differences in the New York and Texas codes may seem relatively insignificant, but a closer look at the specifics illustrate the effects these differences have on adoptive parents' decisions regarding where they choose to conduct the adoption process.<sup>121</sup> It also shows that birth mothers face disparate adoption laws with differing effects depending on where the adoption is consummated.<sup>122</sup> Texas allows access to vital informational reports regarding health, genetics, and history that can help assuage concerns regarding the child's future.<sup>123</sup> On the other hand, New York's spending guidelines protect birth parents from being

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2019 WL 758377; *see also* TEX. FAM. CODE ANN. § 161.001(b)(1)(K), (b)(2) (West 2021).

115. TEX. PENAL CODE § 25.09(a), (d).

116. *Id.* § 25.09(b).

117. *See* TEX. HEALTH & SAFETY CODE ANN. § 192.008(b).

118. *Id.* § 192.008I.

119. *Id.* § 192.008I(e).

120. Certain states achieve much higher numbers of adoptions than others given their different regulatory schemes. For example, Utah had more than more than 11 private domestic adoptions per 10,000 households in fiscal year 2014, which was more than double the national average. *See* Stephanie Horan, *Adoption Trends in America: Uncovering Its Prevalence and Cost*, SMARTASSET (Dec. 20, 2019), <https://smartasset.com/checking-account/adoption-trends-in-america-uncovering-its-prevalence-and-cost-2019>.

121. There are many forums and articles referencing “adoption-friendly states” where adoption is easier to achieve, meaning less hurdles and checks. *See Adoption Friendly States and Their Procedures*, CONSIDERING ADOPTION, <https://consideringadoption.com/adoption-friendly-states-and-their-procedures/> (last visited Mar. 24, 2023).

122. *Id.*

123. *See* TEX. FAM. CODE ANN. § 162.005 (West 2021).

manipulated into relinquishing their child for short-term financial relief.<sup>124</sup> Adoptive parents understandably consider these kinds of differences in states' regulations so that they can choose the state that best meets their needs and protects their interests.<sup>125</sup>

The disparity in state laws and its deleterious effects have prompted efforts toward greater uniformity in regulation.<sup>126</sup> The most notable push for consistency in state law came in 1994 when the National Conference of Commissioners on Uniform State Laws approved the Uniform Adoption Act.<sup>127</sup> The Uniform Adoption Act was intended to be a model for states and its main goal was to promote homogeneity in states' adoption laws.<sup>128</sup> Unfortunately, the Act has failed almost entirely largely because states are not bound to it.<sup>129</sup> Further, many critics believe the Act is unfairly preferential towards adoptive parents and provides inadequate protection for birth parents as well as children.<sup>130</sup>

## II. HOW THE UNITED STATES ADOPTION PROCESS HARMS PARTIES TO ADOPTION

### A. *The Interstate Compact on the Placement of Children*

The disparity between states' adoption laws highlights important issues that plague the US private adoption system. The first problems stems from the Interstate Compact on the Placement of Children (ICPC), which allows an adoptive parent from one state may adopt a child from any other state if both states approve such.<sup>131</sup> Though there are certainly benefits to this system, such as that it allows those who are willing and able to

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124. Lucas, *supra* note 97, at 561; *see also* Zierdt, *supra* note 100, at 41–43.

125. Zierdt, *supra* note 100, at 31.

126. *See generally* Behné, *supra* note 57.

127. *Id.* at 74–75.

128. *Id.* at 75.

129. To date, only Vermont has enacted the Uniform Adoption Act. *Id.*

130. *Id.*

131. The Interstate Compact on the Placement of Children, art. I (Am. Pub. Hum. Servs. Ass'n 1960) [hereinafter the ICPC]

adopt a child to do so without being impeded by location,<sup>132</sup> there are also significant drawbacks.

The first issue with the ICPC is that it creates additional steps for adoptive parents on top of an already extensive process, such as maintaining compliance with the laws governing the placement of children for the state in which the child lives in addition to the laws of the adoptive parents' own state.<sup>133</sup> This is admittedly alleviated by placement agencies taking over to conduct the process on the adoptive parents' behalf, but adoptive parents must nonetheless expend the time, effort, resources, and conduct extensive diligence to ensure all requirements are met by such agencies.<sup>134</sup> This also may serve to increase the already significant costs for adoptive parents to ensure compliance and to compensate agencies for this work.<sup>135</sup>

Another issue associated with the ICPC, and interstate adoption generally, is it encourages forum shopping by making it easier for parties from different states to contract for adoption.<sup>136</sup> Adoptive parents may want to find a state that makes it easiest to acquire a child and has the shortest period possible for termination of the birth parents' rights.<sup>137</sup> Birth parents may value states that give them greater say in the adoption process, reimburse greater expenses, or allow longer periods for consent.<sup>138</sup> With varying state laws and optionality over which ones the parties prefer to avail themselves to, "some states become baby markets while others are avoided" based upon the interests of the parents rather than of the child.<sup>139</sup>

Moreover, though theoretically birth parents are given this opportunity to forum shop just like the adoptive parents, in reality most birth parents simply cannot afford to do so given their

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132. See *Understanding interstate adoption*, ADOPTUSKIDS (July 25, 2019), <https://professionals.adoptuskids.org/understanding-interstate-adoption/>.

133. See ICPC, *supra* note 131, at art. III.

134. See *generally id.* at arts. I–III (There are many procedures to be followed by parties to the ICPC and penalties for failure to comply).

135. See Virginia Spence, *How Much Does it Cost to Adopt a Child?*, ADOPTION.COM (Feb. 11, 2019).

136. Selmann, *supra* note 83, at 847.

137. *Id.*

138. *Id.*

139. *Id.*

economic and/or social circumstances.<sup>140</sup> The idea that birth parents would know to forum shop and choose the best state for their interests assumes they have access to capital and counsel that they typically do not actually have.<sup>141</sup> This allows adoptive parents a substantial benefit that birth parents lack, as it forces birth parents to adhere to the system of their home state with no reasonable recourse while adoptive parents can choose the easiest avenue toward a child.<sup>142</sup>

*B. The Lack of Information and Regulation Surrounding Private Adoption*

Most of the countless issues plaguing the private adoption industry in the US stem from the lack of transparency by agencies, lawyers, and the government regarding this system.<sup>143</sup> It is incredibly difficult to find concrete statistics regarding private adoptions, partly because the federal government stopped requiring states to track these statistics in 1975.<sup>144</sup> The National Council for Adoption (NCFCA) attempts to provide estimates of total adoptions once every five years but often experiences difficulty obtaining this information from states.<sup>145</sup> The NCFCA's most recent *Adoption by the Numbers* study from 2017 reveals that twenty-nine states were contacted ten times or more by the NCFCA, and some of those states never provided these statistics.<sup>146</sup>

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140. Some of the main reasons that women give their child up for adoption is financial hardship and a lack of support from family, friends, etc. See generally CRADLE OF HOPE, *supra* note 4.

141. *Id.* See generally Amanda Tamayo, *A State Survey—Dual Representation in Adoption*, 27 J. AM. ACAD. MATRIM. L. 481, 484 (discussing that certain states allow dual representation of the birth parents and adoptive parents in adoption proceedings because “[d]ual representation is one of the only options that allow a birth parent to obtain legal representation that would otherwise be unaffordable.”).

142. *Id.*

143. See Root, *supra* note 28.

144. See Horan, *supra* note 120.

145. *Adoption By the Numbers*, NAT'L COUNCIL FOR ADOPTION SIDEBAR 8 (2017), [https://adoptioncouncil.org/themencode-pdf-viewer-sc/?tnc\\_pvfw=ZmlsZT1odHRwczovL2Fkb3B0aW9uY291bmNpbC5vcmcvY29udGVudC91cGxvYWRzLzIwMjE5MTA-vQnktdGhlLU51bWJlcnMtMjAxNy5wZGYmc2V0dGluZ3M9MTEwMDEwMTAxMDAxMDAxMDAwMCZsYW5nPWVuLVVT#page=&zoom=page-height&pagemode=thumbs](https://adoptioncouncil.org/themencode-pdf-viewer-sc/?tnc_pvfw=ZmlsZT1odHRwczovL2Fkb3B0aW9uY291bmNpbC5vcmcvY29udGVudC91cGxvYWRzLzIwMjE5MTA-vQnktdGhlLU51bWJlcnMtMjAxNy5wZGYmc2V0dGluZ3M9MTEwMDEwMTAxMDAxMDAxMDAwMCZsYW5nPWVuLVVT#page=&zoom=page-height&pagemode=thumbs).

146. *Id.* at SIDEBAR 23-31.

Another possible explanation for this lack of data is the number of players involved in this process.<sup>147</sup> Public agencies, private agencies, and lawyers often work in tandem to facilitate the adoption process, which makes it difficult to track and/or difficult to label the adoption as public or private.<sup>148</sup> Given these complications and the fact that states are not required to track this information regardless, it is easier for states to opt to withhold vital information concerning where these children are going and how they got there.<sup>149</sup>

The lack of publicly available information, driven by deficient government regulation has far-reaching consequences for children.<sup>150</sup> With a secretive, scarcely regulatory system driven by profit, children are being treated as products to be bought, sold, and bargained-for.<sup>151</sup> The adoption triad was intended to revolve around children, yet that triad seems to have become a tetrad that revolves around financial gain.<sup>152</sup> Sources cite varying figures regarding the size of the adoption industry's profits, but the data is impossible to verify with certainty given the lack of transparency previously described above. The most recent figures set adoption agencies' average gross revenue at over \$3.5 million.<sup>153</sup> For the industry as a whole, some sources suggest it has ballooned into a multi-billion dollar industry.<sup>154</sup> Regarding costs, some data hypothesizes that private adoption costs adoptive parents anywhere from \$30,500 to \$48,500.<sup>155</sup>

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147. *Id.* at SIDEBAR 8.

148. In private adoptions, lawyers almost invariably work with private agencies throughout the adoption process and if the adoption takes place across state lines, then the sending state and the receiving state must also be involved. *Id.*

149. *Id.*

150. See Nev Moore, *ADOPTION BONUSES: THE MONEY BEHIND THE MADNESS*, GLOB. ADOPTION NEWS (June 11, 2016), <https://adoptionland.org/5101/adoption-bonuses-the-money-behind-the-madness/>.

151. *Id.*

152. *The Truth About the Adoption Industry*, ADOPTION & BIRTH MOTHERS (Nov. 6, 2012), <http://www.adoptionbirthmothers.com/adoption-truth/adoption-industry/>.

153. Daniel Nehrbass, *Where Does All the Money Go?*, NAT'L COUNCIL FOR ADOPTION (Sept. 28, 2018), <https://adoptioncouncil.org/blog/where-does-all-the-money-go/>.

154. See Riben, *supra* note 82; see also Moore, *supra* note 150; ADOPTION & BIRTH MOTHERS, *supra* note 152.

155. Jones, *supra* note 14.

The lack of regulation, whether a cause or effect of the for-profit private adoption system, has also led to heinous activities such as commission schemes, shady advertising practices, adoption via the internet, and coercion of impoverished mothers into adoption.<sup>156</sup> Children are being marketed as shiny new toys, with unique price tags based on their race and age.<sup>157</sup> This system allows businesses to prey on both desperate adoptive parents vying for parenthood and desperate birth parents striving to give their child a good life, all in the name of a check.<sup>158</sup> Further, the system is plagued by discrimination, which prevents children from finding suitable homes, impedes adoptive parents in their quest to have children, and leaves birth parents particularly vulnerable to exploitation.<sup>159</sup>

### C. Adoption Trauma

Beginning with the child, separation from a birth parent is a traumatic event in and of itself that leaves lasting impacts on the child right from birth.<sup>160</sup> Adoptees often exhibit feelings of loss, rejection, guilt, shame, and experience intimacy issues.<sup>161</sup> Studies suggest adoptees perform worse in school than other children and display greater behavioral issues in the classroom.<sup>162</sup> Adoptees appear more prone to emotional disturbance

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156. See Riben, *supra* note 82.

157. Morning Edition, *Six Words: 'Black Babies Cost Less To Adopt'*, NPR, (June 27, 2013, 2:55 AM), <https://www.npr.org/2013/06/27/195967886/six-words-black-babies-cost-less-to-adopt>.

158. See Root, *supra* note 28.

159. Morning Edition, *supra* note 157; *TEN STATES HAVE PASSED DISCRIMINATORY ADOPTION AND FOSTER CARE LAWS THAT HARM CHILDREN*, EVERY CHILD DESERVES A FAMILY, <https://everychilddeservesafamily.com/state-bills> (last visited Mar. 11, 2023); Miriam Mack, *THE WHITE SUPREMACY HYDRA: HOW THE FAMILY FIRST PREVENTION SERVICES ACT REIFIES PATHOLOGY, CONTROL, AND PUNISHMENT IN THE FAMILY REGULATION SYSTEM*, 11 COLUM. J. RACE & L. 767, 767–70.

160. Jessica Heesch, *Can an Adopted Newborn Have Adoption-Related Trauma?*, GLADNEY CTR. FOR ADOPTION (Apr. 21, 2019), <https://adoption.org/can-adopted-newborn-adoption-related-trauma>.

161. *Id.*

162. Nicholas Zill, *The Paradox of Adoption*, INST. FOR FAM. STUD. (Oct. 7, 2015), <https://ifstudies.org/blog/the-paradox-of-adoption/>.



and psychological illness as well.<sup>163</sup> Further, adoptees are estimated to be four times more likely to attempt suicide.<sup>164</sup> Overall, these children often experience trauma and loss from the very start of their life, leading to many long-term effects.<sup>165</sup> These figures are not presented to negate the truth that adoption is often the best option, as remaining with birth parents can lead to even worse effects or may not be an option.<sup>166</sup> Adoption is certainly a generally positive, fulfilling experience for many adoptees and there are undoubtedly adoptees who do not face these struggles, but it is irresponsible to ignore these harsh realities merely because they often work out in the end.<sup>167</sup>

Adoptive parents experience their fair share of problems as well beyond financial strains.<sup>168</sup> These parents worry about bonding with their child, if they were truly the best option for their child, and the potential health issues their child may experience given that they often receive limited health information.<sup>169</sup> They also worry about the way the people in their lives will react.<sup>170</sup> Adoptive parents also seem to fear going through the entire adoption process along with its financial and emotional costs only to end up childless in the end.<sup>171</sup> This fear is exacerbated by the litany of anecdotes detailing the loss of a child after months of promises and tens of thousands of dollars spent.<sup>172</sup> That distress is worsened further by an unregulated

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163. *Infant Adoption – What They Knew and Didn’t Tell Us*, ADOPTION HEALING, [https://adoptionhealing.com/what\\_they\\_knew\\_&\\_didn\\_t\\_tell\\_us.html](https://adoptionhealing.com/what_they_knew_&_didn_t_tell_us.html) (last visited Mar. 11, 2023).

164. Jenni Laidman, *Adoptees 4 Times More Likely to Attempt Suicide*, MEDSCAPE (Sept. 9, 2013), <https://www.medscape.com/viewarticle/810625>.

165. ADOPTION HEALING, *supra* note 163.

166. Dana E. Johnson, *Adoption and the effect on children’s development*, 68 EARLY HUM. DEV. 39, 39–54.

167. *Id.*

168. For example, one concern that has arisen for prospective adoptive parents is the rise of the internet. See Julia Scheeres, *Looking to Adopt? Beware the Web*, WIRED (May 21, 2001, 2:00 AM), <https://www.wired.com/2001/05/looking-to-adopt-beware-the-web/>.

169. *Fears Regarding Adoption*, MENTALHELP.NET, <https://www.mentalhelp.net/adoption/fears/> (last visited Mar. 11, 2023).

170. *Id.*

171. Yngvesson, *supra* note 69, at 57–58. Berry, *supra* note 72, at 128; see also Baran & Pannor, *supra* note 71, at 328.

172. Scheeres, *supra* note 168. Yngvesson, *supra* note 69, at 57–58. Berry, *supra* note 72, at 128.

industry that enables unscrupulous people who take advantage of and swindle hopeful parents.<sup>173</sup>

Additionally, many birth parents experience horrific consequences from these private adoption systems.<sup>174</sup> Birth parents often fall prey to predatory practices of adoption agencies that coerce them into relinquishing their child by capitalizing on their fears and circumstances.<sup>175</sup> Many women turn to adoption as a last resort and initially find comfort in adoption, but develop fears and doubts throughout the process.<sup>176</sup> Agencies then further prey on birth mothers' fears by perpetuating the notion that they are worst option for their child, and may even suggest the threat legal action by adoptive parents for costs already incurred.<sup>177</sup> Birth mothers often experience regret, grief, and loss following adoption; they mourn a life and child that never came to fruition for them.<sup>178</sup> Many outlets try to disregard these feelings as normal, passing thoughts that are usurped by gratefulness that the adoptee is living a better life.<sup>179</sup> This narrative ignores their trauma by resorting back to preying on these people's deepest insecurities to exploit and quiet them.<sup>180</sup>

### III. THE DOMESTIC ADOPTION PROCESSES OF EUROPEAN COUNTRIES

#### A. *The Domestic Adoption Process in France*

France refers to adoption through the termination of the relationship between the birth parent and the adoptee as plenary adoption ("*adoption plénière*").<sup>181</sup> A prospective parent seeking to adopt individually must be at least twenty-eight years old and if

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173. See Riben, *supra* note 82.

174. See generally Gallagher, *supra* note 13.

175. *Id.*

176. See Root, *supra* note 28.

177. See *id.*

178. *Long-Term Issues for Birthmothers After Adoption*, MENTALHELP.net, <https://www.mentalhelp.net/adoption/long-term-issues-for-birthmothers/> (last visited Mar. 11, 2023).

179. Heather Featherston, *Birth Mother Adoption Regret*, LIFETIME ADOPTION (Aug. 7, 2020), <https://lifetimeadoption.com/birthmothers-birth-mother-adoption-regret/>.

180. See Root, *supra* note 28.

181. *Overview of French Adoption Law*, CTR. FOR ADOPTION POL'Y SIDEBAR 1 (n.d.), <http://www.adoptionpolicy.org/pdf/eu-france.pdf>.

the individual is married, they must obtain consent from their spouse.<sup>182</sup> Those seeking to adopt jointly must have been married for over two years or must both satisfy the minimum age requirement of twenty-eight.<sup>183</sup> Civil partners and unmarried couples are precluded from joint adoptions in France, meaning these groups must seek an individual adoption by one of the partners.<sup>184</sup> Additionally, France typically requires the prospective adoptive parent(s) to be a minimum of fifteen years older than the protective adoptee.<sup>185</sup> The prospective parents may seek for the court to allow an exception regarding the age gap, but its allowance is at the discretion of the judge.<sup>186</sup>

France maintains restrictions regarding children who are eligible for plenary adoptions as well.<sup>187</sup> Children are only eligible for adoption if: (1) the valid consent of their parents or the family court<sup>188</sup> has been obtained; (2) the child is legally a ward of the state with unknown family; or (3) the child is legally declared to have been abandoned.<sup>189</sup> The provision allowing for eligibility via parental consent requires the consent of both parents unless one or both parents are deceased.<sup>190</sup> The child must also be under the age of fifteen, subject to certain exceptions as approved by the court,<sup>191</sup> and must be living with the prospective adoptive parents for a minimum of six months before the adoption can be

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182. Code civil [C. civ.] [Civil Code] arts. 343-1 (Fr.).

183. *Id.* at art. 343.

184. *Id.* at art. 346; *see also*, NOTAIRES DE FRANCE, *supra* note 24.

185. *Id.* at art. 344.

186. *Id.*

187. Code civil [C. civ.] [Civil Code] art. 347 (Fr.).

188. The family court (tribunal de famille) adjudicates all matters pertaining to the family and domestic relations. *French Family Law*, LAWYERSFRANCE.EU (Apr. 8, 2021), <https://www.lawyersfrance.eu/family-law-in-france>.

189. Code civil [C. civ.] [Civil Code] art. 347 (Fr.); *see also* Code civil [C. civ.] [Civil Code] art. 348-3 (Fr.) (detailing the process by which consent can validly be given).

190. The exceptions to this age requirement are: (1) If the child was with caretakers who failed to meet the statutory adoption requirements before they turned fifteen; or (2) if the child was the subject of an ordinary adoption before they turned fifteen, then the prospective parents may apply for plenary adoption as long as they meet the other requirements and file such application while the child is still a minor and within two years of the age of majority. Code civil [C. civ.] [Civil Code] art. 348 (Fr.).

191. *Id.* at art. 345.

finalized.<sup>192</sup> Further, if a child is over the age of thirteen, they must consent to their adoption.<sup>193</sup>

France also provides birth parents, or the family council under certain conditions, with protections regarding consent to adoption.<sup>194</sup> The party consenting to adoption, typically the birth parents, must do so "before the clerk in chief," within the relevant jurisdiction and consent may be withdrawn up to two months after being given.<sup>195</sup> Verbal withdrawal of consent to the adoption is sufficient and withdrawal of consent may still be requested after expiration of this two-month period in certain circumstances.<sup>196</sup> The court will make all determinations regarding consent, withdrawal of consent, and finalization of adoption while prioritizing the welfare of the child.<sup>197</sup> The court also gives preference to family or blood-relatives of the child for adoption purposes, allowing the child to remain connected with his biological relatives and the birth parents to retain contact.<sup>198</sup>

There is one other form of adoption in France, referred to as simple or ordinary adoption ("*adoption simple*"), in which the child retains some legal relationship with their biological family in addition to the adoptive parents gaining a legal relationship with the child.<sup>199</sup> Simple adoption demands extenuating circumstances to be granted by the court, and may be executed regardless of the child's age, except that the child must consent if they are over the age of thirteen.<sup>200</sup> The child is typically given both their biological parents surname as well as the adoptive parents surname, and may in some cases only keep the birth parents name.<sup>201</sup> This form of adoption allows parents to retain rights to the child while still consenting to adoption, incentivizing courts, biological parents, and adoptive parents to act according to the

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192. *Id.*

193. *Id.*

194. Code civil [C. civ.] [Civil Code] arts. 348-3 (Fr.).

195. *Id.*

196. Parents may withdraw consent after the expiration of the two-month period if the child has not yet been placed for adoption by that point. However, if the child's caregivers refuse to return the child, the court will adjudicate the matter according to the child's best interests. *Id.*

197. *Id.*

198. Code civil [C. civ.] [Civil Code] arts. 348-5 (Fr.).

199. *Id.* arts. 360-69 (Fr.).

200. *Id.* at art. 360 (Fr.).

201. *Id.* at art. 363 (Fr.).

best interests of the child without as much fear of losing access to a child entirely.<sup>202</sup>

The process itself for both forms of adoption involves two-steps: (1) an administrative procedure for purposes of granting and accepting consent to the adoption, and (2) a judicial procedure for purposes of finalizing the adoption through an adoption order.<sup>203</sup> Administrative procedures center around assessing whether the adoption is reasonable and preferable given the totality of circumstances, which involves rigorous investigation of and interviews regarding social, economic, medical, and educational criteria for the applicants.<sup>204</sup> After these extensive background checks and interviews, the Assent Committee submits an opinion pertaining to the adoption proposal of the prospective parents, who are notified of the decision within nine months of initial registration.<sup>205</sup> If the adoption proposal is approved, it is valid for five years and the applicant may move to the judicial proceedings.<sup>206</sup> The court will assess all aspects of the request for adoption and may refuse or grant an adoption order in its sole discretion.<sup>207</sup> The judicial inquiry centers around the best interest of the child and may seek many assurances to confirm the matter.<sup>208</sup>

There is a long waiting list of French citizens seeking to adopt in France, with few children eligible for adoption and even fewer eligible for adoption by non-French citizens.<sup>209</sup> Many French citizens seek to adopt from other countries, but France is a party to Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, so there are still safeguards

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202. *Id.* at arts. 360-69 (Fr.).

203. *Id.* at arts. 351-54 (Fr.); *see also* CTR. FOR ADOPTION POL'Y, *supra* note 181, at SIDEBAR 4.

204. CTR. FOR ADOPTION POL'Y, *supra* note 181, at SIDEBAR 4.

205. The Assent Committee reviews interviews and any available medical, financial, and/or other relevant information to advise the court on the nature as well as advisability of adoption for each child. *Id.* at SIDEBAR 4–5.

206. *Id.* at SIDEBAR 5.

207. It may also grant a simple adoption, even if the applicants were seeking a plenary adoption. *Id.* at SIDEBAR 5

208. *Id.*

209. U.S. Dep't of State, *French Intercountry Adoption Information*, TRAVEL.STATE.GOV, <https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-Country-Information/France.html#:~:text=France%20is%20not%20considered%20a,who%20adopt%20in%20third%20countries> (last visited Mar. 11, 2023).

to ensure proper handling of adoption procedures.<sup>210</sup> France's domestic adoption procedures involve a higher age requirement for adoptive parents, a longer period for consent and withdrawal of consent to adoption, a longer period before finalizing the adoption, more rigorous procedures, and overall more protective measures for all parties than the US provides in private agency adoptions.<sup>211</sup> The offering of a simple adoption that permits birth parents to retain rights to the child also allows a more nuanced form of adoption that provides all parties with access to the child.<sup>212</sup> France's adoption system is more heavily regulated than the US's adoption system, because the French system is not profit-driven or profit-based like the US's system.<sup>213</sup> France does not have a rampant private industry perpetuating underhanded adoption practices to boost the availability of children and raid prospective adoptive parents' wallets.<sup>214</sup> This has allowed France to maintain ethical procedures that focus on the child.<sup>215</sup>

#### B. *The Domestic Adoption Process in Germany*

Federal law governs adoption in Germany and its basic framework is outlined in the German Civil Code (Bürgerliches Gesetzbuch) and the Adoption Agencies Act (Adoptionsvermittlungsgesetz).<sup>216</sup> Title 7 of Germany's Civil Code covers the laws pertaining to adoption and begins with the assertion that adoption is admissible only if it is in the best interest of the child and if a parent-child relationship is anticipated with the prospective adoptive parents.<sup>217</sup> Married couples must adopt jointly, unless: (1) a spouse is seeking to adopt their spouses child; (2)

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210. The United States is also a party to this Convention but given this Note pertains to private domestic adoption, the Convention will not be described in detail. Hague Conference on Private International Law, *HCCH Members*, HCCH.NET, <https://www.hcch.net/en/states/hcch-members> (last visited Mar. 11, 2023).

211. Code civil [C. civ.] [Civil Code] arts. 351-69 (Fr.).

212. *Id.* arts. 363-69 (Fr.).

213. *See generally* ADOPTION & BIRTH MOTHERS, *supra* note 152.

214. *Id.*

215. *See* AstridBeeMom, *supra* note 37.

216. *Overview of German Adoption Law*, CTR. FOR ADOPTION POL'Y SIDEBAR 1 (n.d), <http://www.adoptionpolicy.org/pdf/eu-germany.pdf> [hereinafter German Adoption Overview].

217. Bürgerliches Gesetzbuch [BGB] [Civil Code], § 1741, para. 1, sent. 1, translation at [https://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p5935](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p5935) (Ger.).

one spouse is unable to contract in the matter; or (3) one spouse is under twenty-one years old.<sup>218</sup> Unmarried couples or individuals may not adopt jointly, and may only adopt the child of their partner if it is a “solidified partnership.”<sup>219</sup> Adoptive parents must typically also be at least twenty-five years old, with a limited exception for joint adoptions.<sup>220</sup>

The child must consent if they are over the age of fourteen, and such consent is revocable until the adoption is finalized.<sup>221</sup> Consent of their legal representative must be given if the child falls below this age requirement.<sup>222</sup> Generally, the biological parents must also both consent to the adoption and may only do so once the child is at least eight weeks old.<sup>223</sup> Consent must be validly declared by the biological parents themselves before the family court, at which point the consent becomes irrevocable.<sup>224</sup> Adoptive parents must also have the prospective adoptee living with them for a reasonable probationary period before the adoption will be pronounced by the court.<sup>225</sup>

All adoptions in Germany are subject to approval by the guardianship court (“*Vormundschaftsgericht*”), but the process is largely handled by agencies.<sup>226</sup> These types of agencies in Germany are heavily regulated by The Adoption Placement Act.<sup>227</sup> The youth welfare offices are generally responsible for adoption placement, so most adoption agencies are public entities

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218. Spouses essentially both must *want* to engage in the adoption, so individual adoption is only permitted if one spouse is incapable of joining, such as if the spouse lacks mental capacity. *Id.* §§ 104, 1741, para. 2, sent. 1-4.

219. The couple must have lived together for a minimum of four years in a “marriage-like manner” or already has a child together. Dr. Daniela Kreidler-Pleus et al., *Family Law in Germany: overview*, COUNTRY Q&A (Sept. 1, 2020).

220. If a spouse reaches the age requirement, the other spouse may join the adoption if younger, but they must be at least 21 years old. Bürgerliches Gesetzbuch [BGB] [Civil Code], § 1743, [https://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p5935](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p5935) (Ger.).

221. *Id.* § 1746, paras. 1–2.

222. *Id.*

223. *Id.* § 1747; *see also* Kreidler-Pleus et al., *supra* note 219.

224. *Id.* § 1750.

225. *Id.* § 1744.

226. German Adoption Overview, *supra* note 216.

227. Adoptionsvermittlungsgesetz [AdVermiG] [Adoption Placement Act], July 2, 1976, BGBl I, as amended (Ger.), <https://germanlawarchive.iuscomp.org/?p=766#s1>.



organized by state and local agencies.<sup>228</sup> Some non-profit institutions are eligible adoption agencies under this act as well, largely established welfare organizations and churches.<sup>229</sup> These institutions must be recognized by the central adoption office of the Land Youth Welfare Offices to qualify as adoption placement agencies.<sup>230</sup>

The Adoption Placement Act promulgates stringent guidelines for agencies' adoption procedures including mandates that they thoroughly investigate prospective adoptive parents, closely consult with birth parents, and maintain proper documentation regarding all adoption procedures.<sup>231</sup> Agencies must also maintain an adequate staff, all of whom must be competent in these matters as well.<sup>232</sup> Notably, searching for or offering a child for adoption by public statement is also strictly prohibited by the Adoption Placement Act unless the statement indicates all inquiries go to authorized offices and private addresses are omitted.<sup>233</sup> This section effectively outlaws advertisements for adoption in Germany.<sup>234</sup>

Germany, like France and unlike the US, places strict guidelines upon prospective adoptive parents, birth parents, and agencies to adequately protect the interests of the child.<sup>235</sup> The implementation of legislation specifically aimed at monitoring the activities and structure of agencies that are responsible for adoption allows Germany to maintain ethical, uniform practices for adoption procedures.<sup>236</sup> The US lacks of this type of oversight and these clear guidelines, which allows misconduct by the parties that are meant to protecting children.<sup>237</sup> Germany's regulation of the timeframe for consent to adoption also allows birth parents to consider this monumental decision after the effects of pregnancy, labor, and birth have subsided to a degree.<sup>238</sup> States

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228. *Id.* at §2(1); *see also* German Adoption Overview, *supra* note 216, at SIDEBAR 4.

229. German Adoption Overview, *supra* note 211, at SIDEBAR 4.

230. Adoption Placement Act, *supra* note 227, at §2(2).

231. *Id.* §7–9(d).

232. *Id.* §3.

233. *Id.* §6(1).

234. *Id.*

235. *See generally* German Adoption Overview, *supra* note 216.

236. *Id.*

237. *See* Selmann, *supra* note 83, at 844.

238. Bürgerliches Gesetzbuch [BGB] [Civil Code], § 1747, [https://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p5935](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p5935) (Ger.).

in the US often allow for birth mothers to consent before birth or just after, which can heighten the likelihood they will regret the decision and even seek to reobtain their rights.<sup>239</sup>

### C. *The Domestic Adoption Process in Italy*

As was the case with many European countries, Italy's adoption process was initially a means of allowing childless individuals to create heirs that would continue their name and estate, so adult adoption was the standard.<sup>240</sup> Unlike other European countries, however, this standard did not shift to a focus on adoption of minors until 1983.<sup>241</sup> Now governed by Law No. 184, adoption of a minor in Italy creates a new parent-child relationship between the adoptive parents and the child that replaces the child's relation to the birth family.<sup>242</sup> Prospective adoptive parents must be over the age of eighteen and below the age of forty-five to adopt a child in Italy.<sup>243</sup> Additionally, adoption is only permitted for spouses that have been married for at least three years, or who have lived together for at least three years prior to marriage.<sup>244</sup> In the latter case, couples are subject to the evaluation of the juvenile court ("*tribunale per il minorenni*") regarding the continuity and stability of their relationship, which will dictate their eligibility to become adoptive parents.<sup>245</sup> The idea behind this requirement is to better ensure the child will have stability in their home life.<sup>246</sup>

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239. Kimberly McKee, Adoption as a Reproductive Justice Issue, 6 *Adoption & Culture* 74, 86. *See generally* Selmann, *supra* note 83.

240. *Overview of Italian Adoption Law*, CTR. FOR ADOPTION POL'Y SIDEBAR 1 (n.d), <http://www.adoptionpolicy.org/pdf/eu-italy.pdf> [hereinafter *Italian Adoption L Overview*]; *see generally* Pustilnik, *supra* note 77, at 266 ("Legal histories of adoption generally assert that, before the inauguration of affective adoption in the United States, the primary purpose of Western adoption was to provide adopting parents with an heir.").

241. *Overview of Italian Adoption Law*, CTR. FOR ADOPTION POL'Y SIDEBAR 1 (n.d), <http://www.adoptionpolicy.org/pdf/eu-italy.pdf> (last visited Apr. 15, 2023).

242. The child also gets the adoptive parents' surname to signify the legitimate relationship. Legge 4 Maggio 1983, n.184, G.U. may. 17, 1983, n.133 (It.).

243. L. n. 184/1983, art. 6 (It.).

244. *Id.*

245. *Italian Adoption Overview*, *supra* note 240, at SIDEBAR 2.

246. *Id.*

It is important to note that unmarried couples are not permitted to adopt in Italy,<sup>247</sup> and that Italy currently only allows civil unions for same-sex couples,<sup>248</sup> meaning that they may not currently adopt domestically in Italy.<sup>249</sup> In March 2021, Italy's highest court ("*the Cassazione*") ruled that a child adopted from another country by a same-sex couple with Italian heritage can be registered as Italian if it did not involve a surrogate mother, but this is a relatively narrow ruling that has not been extended to domestic adoptions.<sup>250</sup> Overall, the development has been incredibly slow for adoption rights (and rights generally) of same-sex couples.<sup>251</sup>

The adoption process in Italy is facilitated entirely by the juvenile courts and though they may gain assistance from local or social institutions, the courts oversee each step of the process.<sup>252</sup> Public as well as private agencies must generally report on all children in their care at least twice annually, and these reports are then used by public prosecutors to file petitions of adoptability for eligible children.<sup>253</sup> A child must be formally declared as adoptable by the courts before any proceedings can begin.<sup>254</sup> The courts open proceedings upon receipt of these petitions, inform the child's biological parents or certain relatives if they are ascertainable, and instruct them on finding adequate counsel for a hearing on the matter.<sup>255</sup> Notably, if the court responsible for the proceeding is outside of the district in which the child's family resides, the hearing can be switched to the court that covers their residential district.<sup>256</sup> Therefore, unlike in the US where adoptive parents enjoy greater power to pick a favorable

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247. Subject to very limited exceptions that still involve having been married at some point through the process, such as death of one spouse before the adoption is finalized. *Id.*

248. D.P.C.M. 20 Maggio 2016, n.374, G.U. July 23, 2016, n.144 (It.).

249. Italian Adoption Overview, *supra* note 240, at SIDEBAR 3.

250. Cass., sez. Un., 31 marzo 2021, n. 9006 (It.).

251. *See generally* Italy court urges more rights for children of gay couples, FRANCE24 (Sept. 3, 2021, 7:54 PM), <https://www.france24.com/en/live-news/20210309-italy-court-urges-more-rights-for-children-of-gay-couples>; *see also* Anthony Faiola, *Europe's deepening divide on gay rights*, THE WASH. POST (Nov. 3, 2021, 12:01 AM), <https://www.washingtonpost.com/world/2021/11/03/europe-pink-divide-analysis/>.

252. Italian Adoption Overview, *supra* note 240, at SIDEBAR 3, 4.

253. *Id.* at SIDEBAR 4.

254. *Supra* note 242, arts. 8–11.

255. *Id.*; Italian Adoption Overview, *supra* note 240, at SIDEBAR 4.

256. L. n. 184/1983, art. 12 (It.).

forum,<sup>257</sup> Italy only grants the child's biological family any power in its forum guidelines.<sup>258</sup>

After further investigations and a hearing by the court, the judge will issue a declaration of adoptability where appropriate, but the court may revoke such declaration if it later determines that adoption is not in the child's best interest.<sup>259</sup> The custodial rights of the biological parents are suspended once the decision regarding the child's adoptability is finalized, at which point the court assigns the child a guardian.<sup>260</sup> This process effectively eliminates the consent process seen in other countries, as the child is being considered for adoption *after* legitimate governmental authorities have confirmed that adoption is the best option for the relevant child.<sup>261</sup> In Italy, the only party to the adoption with explicit rights of consent is the child.<sup>262</sup> If a potential adoptee is over the age of fourteen, the child themselves must consent to being adopted.<sup>263</sup> For a child that is at least twelve, they must be heard personally to analyze their assessment of their circumstances.<sup>264</sup> Even children younger than twelve are still given the opportunity to be heard, and the court simply notes the child's abilities of discernment for deliberation.<sup>265</sup> The child's interest are the chief concern of the juvenile courts when considering adoption, so they have structured the system effectively entirely around them.<sup>266</sup>

The child is also placed with the adoptive parent for a probationary period known as "pre-adoptive placement" to ensure not only is the child a good candidate for adoption, but also that the adoptive parents are the proper fit.<sup>267</sup> Prospective parents must apply for this placement to initiate the adoption process,

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257. Selmann, *supra* note 83, at 847.

258. L. n. 184/1983, art. 12 (It.).

259. Biological parents may appeal this decision. *Id.* at art. 15. Italian Adoption Overview, *supra* note 240, at SIDEBAR 4.

260. Italian Adoption Overview, *supra* note 240, at SIDEBAR 4.

261. *Id.*

262. Consent of the child is not always required, such as if the child is too young. *See supra* note 242, arts. 7, 22, 25.

263. *Id.*

264. *Id.* at art. 7

265. *Id.*

266. *See id.*; *see also* Italian Adoption Overview, *supra* note 240, at SIDEBAR 4–5.

267. *See supra* note 237, arts. 22–24; *see also* Italian Adoption Overview, *supra* note 240, at SIDEBAR 4.

meaning they are not applying to adopt a particular child.<sup>268</sup> The entire process is largely out of adoptive parents' hands beyond specifying basic guidelines, such as willingness to adopt multiple siblings.<sup>269</sup> The court, with the help of public organizations, comprehensively assess whether the prospective adoptive parents who meet the formal requirements previously discussed are suitable candidates in terms of their economic, social, medical, familial, and personal circumstances.<sup>270</sup> This process can take upwards of 120 days, but those willing to adopt "handicapped" children or children over the age of five are given preference in the review process.<sup>271</sup> Upon completion of this review process, the court will specifically select a couple for a particular child that is best-suited to properly meet the child's needs, rather than basing decisions off of the adoptive or biological parents preferences.<sup>272</sup>

Though Italy has some clear issues with its adoption system regarding the rights of same-sex couples,<sup>273</sup> the adoption procedures are solely focused on the child while the US often accounts for and caters to many competing interests that eclipse the child's interests.<sup>274</sup> The heavy involvement of the Italian courts fosters an adoption system that is better equipped to make decisions in the child's interest.<sup>275</sup> This contrasts the profit model of the US where courts are minimally involved while private actors structure the transactions fairly freely.<sup>276</sup> Italy's policy of greater government involvement ensures ethical procedures that are not stunted by for-profit institutions lobbying to impair the process.<sup>277</sup> This facilitates a better outcome for all parties involved,

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268. Italian Adoption Overview, *supra* note 240, at SIDEBAR 4–5.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*; see also *supra* note 242, at art. 22.

273. See Lorenzo Tondo, *'Disgraceful': Italy's senate votes down anti-homophobic violence bill*, THE GUARDIAN (Oct. 27, 2021 12:15 PM), <https://www.theguardian.com/world/2021/oct/27/italy-senate-votes-down-anti-homophobic-violence-bill>.

274. See Selmann, *supra* note 83, at 843–47.

275. Italian Adoption Overview, *supra* note 240, at SIDEBAR 4.

276. Pustilnik, *supra* note 77, at 263; see also Claudia Corrigan Darcy, *The Non Profit Adoption Agency Myth*, MUSINGS OF THE LAME (Aug. 4, 2014), <https://www.adoptionbirthmothers.com/the-non-profit-adoption-agency-myth/>.

277. *Id.*

but most importantly the child, by taking all steps necessary to put children in the homes that are truly best for them.<sup>278</sup> For example, by determining a child's adoptability *before* the adoptive parents are even involved allows the courts to impartially assess the child's situation without anyone else's preferences impeding the process.<sup>279</sup>

Though biological parents' consent is an important facet of adoption, the Italian system is centered around what the child needs above all else.<sup>280</sup> Italy accounts for biological parents input through its system while using extensive research and resources to make the best decision for the child.<sup>281</sup> It is an unfortunate reality that though many people may *want* to keep their biological child, that may not be the best option for that child.<sup>282</sup> Italy's system seeks to maintain fairness in this respect while understanding this unfortunate truth.<sup>283</sup>

#### IV. SOLUTIONS TO THE PROBLEMS PLAGUING THE US ADOPTION SYSTEM

The root of the problems plaguing the US private agency adoption system is that it has eroded adoption's purpose of providing a loving, stable home to a child in need and replaced it with a purpose of putting money in agencies' pockets.<sup>284</sup> Agencies have become "baby brokers" who must constantly fuel the market with children by coercing fearful, often impoverished, birth parents into relinquishing their children.<sup>285</sup> The agencies then find buyers for these babies by preying upon the desperation of families who cannot have biological children, convincing them to pay tens of thousands of dollars for the gift of parenthood.<sup>286</sup> These agencies have turned adoption into an extremely profitable industry that is fueled by greed and is apathetic to the plight it

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278. *Id.*

279. *Id.* at SIDEBAR 5.

280. Riben, *supra* note 82.

281. *See generally* Italian Adoption Overview, *supra* note 240.

282. Ashley Greeno, *5 Reasons Why Adoption Is SO Important*, ADOPTION.COM (Mar. 18, 2020), <https://adoption.com/5-reasons-why-adoption-is-so-important/>.

283. Italian Adoption Overview, *supra* note 240, at SIDEBAR 4.

284. *See* Root, *supra* note 28.

285. *See id.*

286. Riben, *supra* note 82.

has created for adoptive parents, birth parents, and children alike.<sup>287</sup> The extent as well as effects of these profits are not even fully known, and demands for greater transparency have largely been ignored.<sup>288</sup>

Many believe private adoption should be abolished altogether, but this is a drastic proposal that discredits the positive outcomes that have undeniably come from private adoptions.<sup>289</sup> Many parties to adoption have been grateful for the results, even if they were disenchanted by the process.<sup>290</sup> Implementing some of France, Germany, and Italy's methods into the US adoption system is a nuanced, favorable option that will enable agencies to better assist all parties to adoption and force agencies to institute better practices. It is important to acknowledge that these countries' systems are public systems, so it is not a perfectly direct or fair comparison, but there are nonetheless facets of each of these systems that can be adopted to correct defects in the US's private system.<sup>291</sup> It is also notable that these countries do not have domestic private agency systems of their own to compare with the US, as this signals that these countries may have found the deficiencies plaguing privatized child adoption to be so extensive that it was not favorable to implement despite the potential monetary gain.<sup>292</sup>

The US government first must regain control of this industry by engaging in much more oversight of the adoption process.<sup>293</sup> Implementing legislation comparable to that of Germany's Adoption Placement Act would employ much-needed restrictions and requirements for agencies to regulate their conduct.<sup>294</sup> This would also allow the government to monitor agencies and respond accordingly if needed to correct any poor behavior, such as unethical advertising or pricing schemes.<sup>295</sup> The US may not desire to structure agencies to be arms of the state in the same

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287. *See id.*

288. *See Root, supra* note 28.

289. *See* Emily Matchar, *Meet the New Anti-Adoption Movement: The surprising next frontier in reproductive justice*, THE NEW REPUBLIC (Sept. 1, 2013), <https://newrepublic.com/article/114505/anti-adoption-movement-next-reproductive-justice-frontier>.

290. Swinarski, *supra* note 14.

291. *See* AstridBeeMom, *supra* note 37.

292. *See generally id.*

293. Selmann, *supra* note 83, at 843–47.

294. *See* AstridBeeMom, *supra* note 37.

295. *Id.*; *see also* Root, *supra* note 28.



manner as Germany, but can certainly implement more stringent protocols for staffing, training, and procedures like that used by Germany to ensure more ethical adoptions.<sup>296</sup> The US would also benefit from implementing restrictions regarding advertisement practices comparable to that of Germany.<sup>297</sup> In the US, people can look to social media platforms like Facebook to put their child up for adoption or to find a child to adopt.<sup>298</sup> This clearly creates ethical concerns, encourages dishonest practices, and in some cases allows the exchange of a baby for money with little to no checks by the government.<sup>299</sup> The US must act to restrict this corruption to end its dangerous effects, and should model a system like Germany's to curb unethical advertisements for adoption.

The US should also consider restructuring open and closed adoptions to function more like France's simple and plenary adoptions. In the US, open adoptions may appear attractive in that this structure suggests that the birth parent maintains some level of a relationship with the child,<sup>300</sup> but this is misleading. Many open adoptions are plagued by power struggles between adoptive and birth parents, with often unequal power dynamics.<sup>301</sup> Adoptive parents become fearful that birth parents will change their minds and seek to reobtain custody, while birth parents battle the concern that they will lose access to the child by pushing too hard for contact with the desire to maintain a relationship with the triad.<sup>302</sup> Employing France's structure can help alleviate these issues without the degree of ambiguity that exists in the US system.<sup>303</sup>

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296. See AstridBeeMom, *supra* note 37.

297. *Id.*

298. Samantha M. Shapiro, *Adoption Moved to Facebook and a War Began*, WIRED (Mar. 4, 2021 7:00 AM), <https://www.wired.com/story/adoption-moved-to-facebook-and-a-war-began/>; see also Pustilnik, *supra* note 77, at 263.

299. *Id.*

300. See Gilmore, *supra* note 15.

301. Yngvesson, *supra* note 69, at 56–58 (1997). See Boggess, *supra* note 56; see also Ashley Fetters, *The Hardship of a Very Open Adoption*, THE ATLANTIC (Feb. 2, 2019), <https://www.theatlantic.com/family/archive/2019/02/rock-needs-river-open-adoption/581851/>.

302. Yngvesson, *supra* note 69, at 56–58 (1997).

303. See Berry, *supra* note 72, at 131–32 (noting that “[t]he key predictor of adoptive parents’ comfort with open adoption was that these parents had planned for openness from the beginning of the placement, which suggests that certainty, stability, and preparedness contributes to a positive relationship between members of the adoption triad.”).

Structuring open adoptions like France's simple adoptions to give priority to the biological family first would allow birth parents to retain a level of connection with the child, allow the child to remain connected to their biological family, and allow adoptive parents a sense of comfort as well as a biological connection to the child.<sup>304</sup> When this is not an option, open adoptions can still mirror simple adoptions in certain ways, such as by prescribing certain methods for maintaining a connection between the biological parents and the adoptees, rather than leaving it entirely to the discretion of the parties.<sup>305</sup> For example, the government can require calls or visits to occur with certain frequency.<sup>306</sup> This will create a level of certainty that can assuage parents' concerns and create stability for the adoptee with predictability.<sup>307</sup> This will also enable all parties to maintain access to important medical, psychological, and economic information that is so often lacking in US adoptions.<sup>308</sup>

If that degree of personal connection is not something the birth or adoptive parents want, they can still choose a form of adoption like plenary adoption should the US properly structure such.<sup>309</sup> The US system can modify their closed adoption system to be more intensive and focused on the child like France's plenary adoption process.<sup>310</sup> Implementing better mechanisms to assure proper consent, allowing the government to be more involved, and assessing the fitness of adoptive parents for the needs of the relevant adoptee are all facets of the French system that could assist the US.<sup>311</sup>

The US should consider implementing more judicial oversight like that of Italy as well. In Italy, the courts are involved in the adoption process from start to finish, which fosters necessary oversight and incentivizes all parties to behave according to stringent requirements.<sup>312</sup> If the US courts oversaw adoption

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304. *See supra* Part III.A.

305. *See id.*

306. *See generally* Selmann, *supra* note 83 (arguing that the government should create uniformity in adoption law to create a reliable, efficient process with concrete expectations).

307. *See generally id.* *See* Berry, *supra* note 72, at 131–32. *See* Yngvesson, *supra* note 69, at 56–58 (1997).

308. *See* Root, *supra* note 28.

309. *See supra* Part III.A.

310. *Id.*

311. *Id.*

312. Italian Adoption Overview, *supra* note 240, at SIDEBAR 3.

proceedings more directly, then the government could better guarantee that adoption is in the best interests of the child, that all requirements have been met, and that the child is best suited for the adoptive family they are intended for.<sup>313</sup> Though this will be costly and resource-intensive, the safety and welfare of children should be of paramount importance to the US government.<sup>314</sup> Further, adoptive families are already paying tens of thousands of dollars to agencies or others who are supposed to engage in this type of oversight.<sup>315</sup> Those resources could be re-directed toward the government through court fees, which would likely be negligible compared to the overall agency fees and would potentially prevent much more costly litigation in the future if a birth parent made a rash decision they later regret.

The US would also benefit from implementing a longer period before finalizing adoptions and can look to any of these countries for a better model. Adoption in the US is typically finalized before or just after the birth of the child, usually before the birth mother even leaves the hospital.<sup>316</sup> This leads to pressure on the birth family, stress on the adoptive family, and unnecessarily prevents the child from spending important time with their birth mother.<sup>317</sup> France, Germany, and Italy all require longer periods for finalization, which mitigates the risk of coercing the birth mother when they are most vulnerable and of depriving the child of crucial time with their biological parents.<sup>318</sup> It also allows adoptive parents time to reflect and prepare for a very monumental change in their lives.<sup>319</sup> Alternatively, the US could implement a system like Italy in which the child's adoptability is finalized before adoptive parents become involved.<sup>320</sup> This will help ensure adoptive parents are not going through a lengthy, costly process only to go home childless.<sup>321</sup> It will also assuage concerns that the biological parents made a hasty decision because of manipulation.<sup>322</sup>

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313. See Riben, *supra* note 82; see generally Selmann, *supra* note 83.

314. See Selmann, *supra* note 83, at 842–45.

315. See Root, *supra* note 28.

316. See *supra* Part I.B.

317. Riben, *supra* note 82.

318. See *infra* Part III.A–C.

319. See David Brodzinsky & Loreen Huffman, *Transition to Adoptive Parenthood*, 12 MARRIAGE & FAM. REV. 267, 267–68 (2008).

320. See *infra* Part III.C

321. See Shapiro, *supra* note 298.

322. See Zierdt, *supra* note 100, at 56.

## CONCLUSION

The US has allowed private agency adoption to become a full-blown business, which had inevitably led to a heavy focus on profits and allowed the interests of the child to be overlooked far too frequently.<sup>323</sup> Implementing more oversight over agencies in a manner like Germany would allow the US to implement and ensure compliance with more stringent, appropriate regulations.<sup>324</sup> Modifying open and closed adoptions in the US to function more like France's simple and plenary adoptions would also facilitate more ethical adoption practices by giving all parties to adoption more optionality.<sup>325</sup> This will also allow all parties to exercise more effective control over their circumstances.<sup>326</sup> Exercising more judicial oversight in the US in a manner like Italy will ensure a more effective, just system as well.<sup>327</sup> The US could mandate court approval prior to finalizing adoption, as in before granting the adoptive parents' custody of the child and before revoking the rights of the birth parents. This would help ensure that all the proper steps as well as precautions are followed, that all parties are fully aware of and able to fulfill their role in the adoption, and that the adoption itself is in the child's best interest.<sup>328</sup> Lastly, France, Germany, and Italy each retain longer periods than the US before finalizing adoption proceedings.<sup>329</sup> The US should consider this update as well, as this rush to finalize adoption just after the baby's birth is both unfair and unnecessary.<sup>330</sup>

The US adoption system is not beyond saving, and it often results in the formation of happy families through birth parents' selfless act of love to give their child a better life.<sup>331</sup> Stronger safeguards against exploitation, manipulation, and coercion will promote greater comfort for all parties that can make the choice

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323. Riben, *supra* note 82; *see also* Mack, *supra* note 159, at 806.

324. *See supra* Part III.B.

325. *See id.* at Part III.A.

326. *See id.*

327. *See id.* at Part III.C.

328. *See id.* at Part IV.

329. *See id.* at Part III.A–C.

330. Sam Winograd, *Consent in Adoption*, 2 N.Y.L. SCH. STUDENT L. REV. 102, 109 (1953).

331. *See generally* Kathy S. Stolley, *Statistics on Adoption in the United States*, 3 THE FUTURE OF CHILDREN 26 (1993).

of adoption even more beneficial to the triad.<sup>332</sup> It will also ensure security in concrete expectations and allow the child a greater chance to spend their lives with the most suitable family for their needs.<sup>333</sup> The child's interests must be the paramount concern in all adoptions, and the US system allows for their needs to go neglected in certain aspects of the adoption process. Therefore, the US system must be updated to implement greater protective measures for all parties.

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332. *See generally* Selmann, *supra* note 83.

333. *See generally id.*

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