
Social Costs of *Dobbs*' Pro-Adoption Agenda

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Abortion opponents have long claimed that women denied access to abortion can simply give their children up for adoption. Justice Alito repeated this argument in Dobbs v. Jackson Women's Health. Of course, this claim assumes away the burdens of the pregnancy itself, which can result in economic strife, domestic violence, health risks, and potentially death in childbirth. But even on its own terms, the argument that adoption is an adequate substitute for abortion access makes normative assumptions about adoption as a social good in and of itself, ignoring the social costs of adoption for birth parents and adoptees. Idealizing adoption then influences decisions about what constitutes a valid adoption, with courts minimizing the requirements for voluntary consent. In a new post-Roe landscape that narrows choices for those facing an unplanned or unwanted pregnancy, what reforms are necessary to ensure that birth parents are not coerced into adoptions they do not want?

First, this Article looks to patterns of adoption placement before and after Roe v. Wade legalized abortion, and relies on newly available empirical data since Dobbs, to paint a picture of the adoption landscape in a post-Roe world. It concludes that the Dobbs ruling will not appreciably increase the "domestic supply of infants" for adoption that Justice Alito predicts, leaving intact the highly-competitive market for adoptable infants that creates such fertile ground for coercion. Second, drawing upon insights from psychosocial

* Copyright © 2023 Malinda L. Seymore. Professor of Law, Texas A & M University School of Law. As should be the case for all those who opine about adoption, I wish to note my position in the adoption triad. I am an adoptive parent who adopted internationally. As is all my work, this article is dedicated to my children's birth parents, who faced circumstances no parent should have to face and made choices that no parent should have to make.

literature the Article explains how pregnant persons make the decision about adoption, who relinquishes for adoption, and the salience of abortion to that decision; thus informing our understanding of laws and practices of consent in adoption. Third, the Article outlines many of the potentially coercive tactics that have been employed by adoption professionals to persuade birth parents to relinquish their constitutionally protected parental rights, including high-tech targeting of potential birth parents, the use of crisis pregnancy centers to steer pregnant persons to adoption, manipulating the emotional stress of pregnancy to procure consent, and taking advantage of the duress of circumstances of poverty. Fourth, the Article proposes reforms to adoption that give enhanced meaning to the requirement of consent: increased regulation of adoption agencies, independent options counseling, recognition of duress of circumstances as vitiating consent, greater procedural protection to include appointment of counsel, and judicial education about the realities of adoption.

In a world of coerced pregnancy, we have moved closer to a dystopian future of children created in order to be placed with strangers. Instead of adoption as a child welfare measure, where children without family are provided one, it becomes an operation to produce children to satisfy the wants of prospective adoptive parents. There are social costs in the commodification of children in this manner. In this environment, it is more important than ever for courts to carefully scrutinize consent in adoption cases in order to ensure meaningful choice.

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*“[B]oth Roe and Casey emphasize the burdens of parenting
Why don’t the safe haven laws [adoption] take care of that problem?”*
— Justice Amy Coney Barrett¹

*“Adoption simply cannot function as a stand-in for abortion. . . . Put
simply, there is no way other than abortion to have an abortion.”*
— Lindsey Porter, *Adoption Is Not Abortion-Lite*²

*“Navigating abortion and adoption as someone who has experienced
both shines a light on how those of us who have lived the very things
bandied about as political talking-points are rarely consulted and our
voices are almost never amplified.”*
— Michele Merritt, *My Adoption, My Abortion*³

INTRODUCTION

After *Dobbs v. Jackson Women’s Health*⁴ made the demise of *Roe v. Wade*⁵ official, the internet began to illustrate one aspect of *Roe*’s death. A photo of a young (white) couple holding a sign that said, “We Will Adopt Your Baby,” in the manner of one looking for Taylor Swift tickets,

¹ Transcript of Oral Argument at 56, *Dobbs v. Jackson’s Women’s Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392).

² Lindsey Porter, *Adoption Is Not Abortion-Lite*, 29 J. APPLIED PHIL. 63, 63 (2012).

³ Michele Merritt, *My Adoption, My Abortion: Getting Clear About What Counts as a Reproductive Choice*, 10 ADOPTION & CULTURE 203, 207 (2022).

⁴ *Dobbs*, 142 S. Ct.

⁵ *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct.

started to pop up everywhere.⁶ The couple seemed to be taking up Justice Alito's suggestion in *Dobbs* that adoption is an alternative to abortion, and one that makes access to abortion unnecessary: "States have increasingly adopted 'safe haven' laws, which generally allow women to drop off babies anonymously; and that a woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home."⁷ The couple also illustrates the footnote Justice Alito dropped, citing a CDC report decrying, in terms that commodify adopted persons, the fact that "the domestic supply of infants relinquished at birth or within the first month of life and available to be adopted had become virtually nonexistent,"⁸ which has led to increasingly competitive behavior from prospective adoptive parents. Immediately after *Dobbs* was issued, the *Christian Post* published its prescription to "reset and revive the adoption alternative," starting with:

⁶ The original photo, and all the memes it inspired, are preserved on the Twitter feed of We Will Adopt Your Baby (@WeWillAdoptYB), TWITTER, <https://twitter.com/WeWillAdoptYB> (last visited July 30, 2023) [<https://perma.cc/YL2J-42JP>].

⁷ *Dobbs*, 142 S. Ct. at 2259. Justice Amy Coney Barrett made the same suggestion about adoption during oral argument in the *Dobbs* case. She posited:

In all 50 states, you can terminate parental rights by relinquishing a child after abortion, and I think the shortest period might have been 48 hours if I'm remembering the data correctly.

So it seems to me, seen in that light, both *Roe* and *Casey* emphasize the burdens of parenting, and insofar as you and many of your amici focus on the ways in which forced parenting, forced motherhood, would hinder women's access to the workplace and to equal opportunities, it's also focused on the consequences of parenting and the obligations of motherhood that flow from pregnancy.

Why don't the safe haven laws take care of that problem?

Transcript of Oral Argument, *supra* note 1, at 56. Her contentions about safe haven laws and adoption discount the burdens of pregnancy and the difficulties that birth mothers have because of decisions about relinquishment for adoption.

⁸ *Dobbs*, 142 S. Ct. at 2259 & n.46 (quoting Jo Jones, *Adoption Experiences of Women and Men and Demand for Children to Adopt by Women Ages 18-44 in the United States, 2002*, in 23 VITAL & HEALTH STAT. 1, 16 (Nat'l Ctr. for Health Stat. ed., 2008)). Here we see making abortion illegal as a way to increase the "domestic supply of infants," when adoption should really be about finding families for needy children rather than creating children to satisfy the needs of prospective adoptive parents.

SATURATE our culture, first, with a massive national marketing campaign to elevate the sacrificial love and benefit for heroic women and girls who choose adoption. Engage famous adoptive parents or famous pro-life individuals in sports and film to make expert, engaging commercials, and advertising to draw positive attention to the adoption option. Adoption marketing must consistently run like a product or political advertising campaign.⁹

Marketing adoption “like a product” seems awfully similar to marketing the child for adoption — another commodification reference.

Adoption and abortion have been linked for some time, used by anti-abortion advocates as a preferential choice to abortion and by pro-choice advocates as a reproductive right of sorts. Yet both sides of the argument seem to discount the stark differences — abortion is a decision about continuing or terminating a pregnancy, while adoption is a decision about parenting. Yet there still persists the idea that the ruling in *Dobbs* will affect the adoption of children in significant ways. Justice Alito and others seem to think *Dobbs* will make a difference, increasing the “domestic supply of infants” available for adoption.¹⁰ Some argue that the result of lack of abortion access will be more pregnant persons parenting children they would have otherwise

⁹ Arlene Bridges Samuels, *Resetting the Arc of Our Nation with the Adoption Option*, CHRISTIAN POST (June 26, 2022), <https://www.christianpost.com/voices/resetting-the-arc-of-our-nation-with-the-adoption-option.html> [<https://perma.cc/ES7Y-VQ9V>] (emphasis in original). The theme of sacrifice and heroism on the part of relinquishing birth mothers is a common one in anti-abortion rhetoric.

¹⁰ *But see* Marshall H. Medoff, *The Effect of Abortion Costs on Adoption in the USA*, 35 INT’L J. SOC. ECON. 188, 199 (2008) (finding that higher abortion prices — both direct costs and indirect costs imposed by increased abortion restrictions, including parental consent requirements for minors — *reduces* the number of infants relinquished). Interestingly, one adoption agency worker noted the same thing anecdotally about the passage of Texas’ SB 8, which banned abortion after 6 weeks, “Every time the state of Texas has restricted abortion access, or implemented laws that were intended to promote adoption, it seems to have the opposite effect.” Amanda Henderson, “*So Many Families Waiting to Adopt*”: Agencies Prepared if Adoption Interest Goes Up Soon, NEWS4SANANTONIO (Sept. 8, 2021, 7:47 PM PDT), <https://news4sanantonio.com/news/local/so-many-families-waiting-to-adopt-agencies-are-prepared-if-adoption-interest-goes-up> [<https://perma.cc/SK3Q-QVKB>].

aborted.¹¹ Others see lack of abortion access as a boon for infertile, gay and lesbian persons who desire to parent as expectant parents place “unwanted” children for adoption.¹² Still others envision a post-*Dobbs* world of forced pregnancy where children and families live in stark poverty and hopelessness, with children eventually being placed into the foster care system because of abuse and neglect.¹³ Or, perhaps, *Dobbs* will have little effect on adoption¹⁴ as pregnant persons still secure their wanted abortions in other ways, including medication abortions via pills shipped directly to their homes.¹⁵

¹¹ See Katrina Kimport, *Abortion After Dobbs: Defendants, Denials, and Delays*, 8 SCI. ADVANCES, Sept. 2022, at 1, 2 (noting that most expectant parents denied an abortion will parent their children).

¹² See Trudy Ring, *Matt Gaetz: LGBTQ+ Folks Should Oppose Abortion So They Can Adopt Kids*, ADVOCATE (July 14, 2022), <https://www.advocate.com/politics/2022/7/14/matt-gaetz-lgbtq-folks-should-oppose-abortion-so-they-can-adopt-kids> [https://perma.cc/PGB2-4BAK] (reporting that Congressman Matt Gaetz argues that abortion access deprives gay parents of the ability to adopt). Justice Alito’s argument about the dearth of the domestic supply of infants for adoption by the millions of couples seeking to adopt reflects the belief that *Dobbs* will be a boon for infertile couples.

¹³ See Laura Rena Murray, *The Truth About the Adoption Option*, MS. MAG. (Apr. 5, 2023), <https://msmagazine.com/2023/04/05/adoption-abortion-forced-birth-supreme-court/> [https://perma.cc/GS9M-DWHE] (“[W]omen who would have chosen abortion for monetary reasons are unlikely to place their infants for adoption, but they may end up losing those children anyway—along with any other kids they already had.”); Katie Kindelan, *6 Months Since Roe Ruling, How the Adoption Landscape Has Changed*, GOOD MORNING AM., <https://www.goodmorningamerica.com/news/story/6-months-roe-ruling-adoption-landscape-changed-93445265> (last visited July 21, 2023) [https://perma.cc/U7CS-6CLW] (“All three adoption providers said that while the impact of abortion restrictions on the adoption industry continues to play out, they are equally concerned about the increase in people who may choose to parent, only to potentially struggle later on,” with children ending up in the foster care system).

¹⁴ See Sean Salai, *No Baby Boom Expected for Adoption Agencies After Roe v. Wade Reversal*, WASH. TIMES (Nov. 23, 2022), <https://www.washingtontimes.com/news/2022/nov/23/end-roe-v-wade-unlikely-affect-adoptions-agencies/> [https://perma.cc/7TBH-N9U6] (“[A]doption agencies and advocates say they do not expect a baby boom as abortions decline following the end of *Roe v. Wade*.”).

¹⁵ See SOC’Y OF FAM. PLAN., #WECOUNT REPORT: APRIL 2022 TO DECEMBER 2022, at 6-7 (2023) (noting that since *Dobbs*, “the number of requests to Aid Access for abortion medications were about 6,500 per month. However, it is unknown how many of these requests were fulfilled, how many were received, or how many were actually taken”).

Anti-abortion activists seem to believe that *Dobbs* will return us to the post-World War II period before *Roe*, where single women relinquished newborns for adoption in record numbers.¹⁶ It is always difficult to find reliable statistics about adoption, as it is often done in closed hearings with sealed records, without required reporting and no centralized registry of the fifty states' adoptions.¹⁷ But some estimate that as many as 1.5 million babies were relinquished for adoption in the period between World War II's end and *Roe*'s release in 1973.¹⁸ In one report, the number of adoptions by unrelated petitioners (excluding stepparent adoptions, etc.) hit a high of 89,200 in 1970 before falling to 47,700 in 1975.¹⁹ Today, annual private adoption estimates can range widely. In one study, the researchers used as their base annual unwed births, and assumed that the relinquishment rate remained unchanged at nine percent, resulting in an annual estimate of 14,000.²⁰ In another study, the base used was all births, not just unwed births, and an assumption that adoption relinquishments had declined annually to .5%, calculated to 20,000 adoption placements annually.²¹ Women are less interested in

¹⁶ Malinda L. Seymore, *Originalism: Erasing Women from the Body Politic*, 10 ADOPTION & CULTURE 214, 216 (2022) (“Justice Alito’s *Dobbs* opinion, relying on an originalist method that erases women, seeks to return us to a pre-*Roe* time when women were shamed by the transgressive act of becoming pregnant outside of marriage, required by shame to hide the pregnancy and disappear the child through adoption relinquishment.”).

¹⁷ Gretchen Sisson, *Estimating the Annual Domestic Adoption Rate and Lifetime Incidence of Infant Relinquishment in the United States*, 105 CONTRACEPTION 14, 14 (2022) [hereinafter *Estimating the Annual Domestic Adoption Rate*] (noting the lack of comprehensive adoption data in the US).

¹⁸ ANN FESSLER, *THE GIRLS WHO WENT AWAY: THE HIDDEN HISTORY OF WOMEN WHO SURRENDERED CHILDREN FOR ADOPTION IN THE DECADES BEFORE ROE V. WADE* 8 (2006).

¹⁹ Penelope L. Maza, *Adoption Trends: 1944–1975*, THE ADOPTION HIST. PROJECT, <https://pages.uoregon.edu/adoption/archive/MazaAT.htm> (last visited July 21, 2023) [<https://perma.cc/RNC7-5FQN>].

²⁰ Anjani Chandra, Joyce Abma, Penelope Maza & Christine Bachrach, *Adoption, Adoption Seeking, and Relinquishment for Adoption in the United States*, in 306 ADVANCE DATA FROM VITAL AND HEALTH STATISTICS 1, 9 (Nat’l Ctr. For Health & Stat. ed., 1999). This estimate is based on an assumption that the annual rate of adoption relinquishment — .9% — continued unchanged and should be appropriately applied to the total yearly incidence of unwed births. *Id.*

²¹ Sisson, *Estimating the Annual Domestic Adoption*, *supra* note 17, at 17. This higher estimate assumes that the annual rate of adoption relinquishment has declined annually,

placing their child for adoption today than ever before. In fact, in one study, when women²² were denied access to abortion for an unplanned pregnancy, ninety-one percent parented rather than relinquished for adoption.²³ While adoption placement rates were low for this cohort, it was still higher than the rate of adoption placement when abortion is available — estimated to be only .5% of annual births.²⁴

On the demand side, “There are no reliable figures that quantify the number of couples waiting to adopt. Some estimate it to be in the millions. Other estimates say that for every baby placed in adoption, there are 36 couples waiting to adopt.”²⁵ This motivated Justice Alito’s statement in *Dobbs* that “a woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home.”²⁶ The figures about the number of prospective adoptive parents per infant relinquished has long been an anti-abortion talking point.²⁷ Indeed, when Angel Dillard sent a letter to an abortion provider that the federal government alleged threatened death, she included this

falling to .5%, and should be applied, however, to a higher number — all births, rather than unwed births.

²² In this article, I will most often refer to persons who are pregnant as women. I recognize that pregnant persons encompass a larger category, to include nonbinary and transgender persons. However, most of the psychosocial studies I refer to here describe their subjects as women. For that reason, I can only assess the results of those studies as they might apply to women who are pregnant, not to other persons who are pregnant. It is important to recognize that pregnancy and abortion are experienced by persons other than women, but there is little data from which to draw conclusions about how that experience relates to the experience of women.

²³ Gretchen Sisson, Lauren Ralph, Heather Gould & Diana Greene Foster, *Adoption Decision Making Among Women Seeking Abortion*, 27 *WOMEN’S HEALTH ISSUES* 136, 141-42 (2017) [hereinafter *Adoption Decision Making*].

²⁴ Sisson, *Estimating the Annual Domestic Adoption*, *supra* note 17, at 17.

²⁵ Ashley McGuire, *Cultivating a Pro-Adoption Culture*, *INST. FOR FAM. STUD.* (June 17, 2019), <https://ifstudies.org/blog/cultivating-a-pro-adoption-culture> [https://perma.cc/J8H6-EWUL].

²⁶ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2259 & n.46 (2022).

²⁷ See, e.g., Keith Riler, *Thirty-Six Couples Wait for Every One Baby Who Is Adopted*, *LIFENEWS* (July 9, 2012, 1:09 PM), <https://www.lifenews.com/2012/07/09/thirty-six-couples-wait-for-every-one-baby-who-is-adopted/> [https://perma.cc/3VDN-NXMT] (conservative website reporting aforementioned statistic).

statistic.²⁸ Of course, the purported statistic, even if true, is far more nuanced than the numbers suggest.

There may well be a mismatch between children available for adoption and the characteristics adoptive parents desire in a child to adopt. Adoptive parents are overwhelmingly white,²⁹ and desire to adopt a child who is white, healthy, and as young as possible. The racial preference has long been known, and adoption agencies will often offer Black babies at reduced rates to incentivize their adoption.³⁰ “Consider the following: couples may spend upward of fifty thousand dollars to adopt a healthy white infant. Black infants, however, are adopted for as little as four thousand dollars.”³¹ Preferences were strong in this regard, with fifty-one percent of white women saying they preferred to adopt a white child, sixty percent saying they preferred to adopt a child under age two, and fifty-four percent would prefer to adopt a nondisabled child.³² Only thirty-seven percent would accept a child over twelve, and only thirty-three percent would accept a severely disabled child.³³ Few adoptive parents are interested in adopting children from foster care, who tend to be older and may have disabilities. Only seventeen percent of foster children are adopted by persons with no prior connection to

²⁸ Brief for the United States as Appellant-Cross-Appellee at 12, *United States v. Dillard*, 795 F.3d 1191 (10th Cir. 2015) (Nos. 13-3253, 13-3266). Along with references to Dr. Tiller, who was murdered by an anti-abortion activist, the letter made suggestions that the doctor should check under her car for explosives, and included the “36 couples” statistic: “Fewer people than ever before are pro-abortion, quality physicians wouldn’t even consider associating themselves with it, and more Americans than ever are unwilling to turn a blind eye to the killing of a baby when the ratio for adoption is 36 couples to 1 baby.” *Id.*

²⁹ ROSE M. KREIDER & DAPHNE A. LOFQUIST, U.S. CENSUS BUREAU, *ADOPTED CHILDREN AND STEPCHILDREN: 2010*, at 15 (2014) (finding that 78.4% of adoptive parents are white).

³⁰ Yes, that is as offensive as it sounds — it is racist, smacks of baby-selling, and reinforces white supremacy. Michele Goodwin points out that the usual justification for a two-tiered fee structure based on race is that it is easier to place white children and more difficult to place black children; Goodwin points out if the fees are based on the amount of work it takes to place a child, rather than any intrinsic value of a child, black children should cost more, not less. Michele Bratcher Goodwin, *Baby Markets*, in *BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES* 2, 6 (Michele Bratcher Goodwin ed., 2010).

³¹ *Id.*

³² Chandra et al., *supra* note 20, at 8 tbls.4, 9.

³³ *Id.*

them; the vast majority are adopted by their relatives or their foster parents.³⁴

As demand for children to adopt outstripped the supply of white infants, some attitudes toward adopting Black children changed. Transracial adoptions today represent a far more robust portion of adoptions than in the past. In one study, transracial adoptions represented twenty-one percent to twenty-four percent of adoptions between 2000 and 2012.³⁵ In a government report based on the 2007 National Survey of Adoptive Parents, forty percent of adoptions were transracial.³⁶ In another study, data revealed that “90% of Asian adoptees, 64% of multiracial adoptees, 62% of Hispanic adoptees, and 55% of black adoptees” were being raised in transracial placements in 2011.³⁷ There still persists the preference for white children, as evidenced by the discount pricing to adopt a Black child.

Even if *Dobbs* results in more children available for adoption it is not likely to satisfy the demands of millions of prospective adoptive parents. The competition for healthy white newborns to adopt is likely to continue, as well as the competition to adopt any infant. And that environment is ripe for a return to the potentially coercive tactics of the pre-*Roe* era to persuade pregnant persons to relinquish for adoption. Indeed, given the changed circumstances for those pregnant outside of marriage — the reduced stigma, the enhanced job opportunities for women to support themselves and a child³⁸ — even more sophisticated

³⁴ Julie Boatright Wilson, Jeff Katz & Robert Geen, *Listening to Parents: Overcoming Barriers to the Adoption of Children from Foster Care* 13 (Harv. Univ. John F. Kennedy Sch. of Gov't Fac. Working Papers Series, Working Paper No. RWPO5-005, 2005).

³⁵ Elisha Marr, *U.S. Transracial Adoption Trends in the 21st Century*, 20 *ADOPTION Q.* 222, 234 (2017).

³⁶ Sharon Vandivere, Karin Malm & Laura Radel, *ADOPTION USA: A CHARTBOOK BASED ON THE 2007 NATIONAL SURVEY OF ADOPTIVE PARENTS* 14 fig.7 (2009).

³⁷ Nicholas Zill, *The Changing Face of Adoption in the United States*, *INST. FOR FAM. STUD.* (Aug. 8, 2017), <https://ifstudies.org/blog/the-changing-face-of-adoption-in-the-united-states> [https://perma.cc/B66E-QQ4W].

³⁸ See Laura Briggs, *Making Abortion Illegal Does Not Lead to More Adoptions*, 10 *ADOPTION & CULTURE* 251, 252 (2022) (noting that the decline in adoptable white infants preceded *Roe v. Wade*, and concluding that “it was the ability of single mothers to earn the wages to support their babies more than abortion rights that drove adoption rates”).

and coercive tactics may be necessary to separate parents from their children.

The precipitous decline of adoption placements since *Roe v. Wade* illustrates that when pregnant persons have choices, including the choice to terminate a pregnancy, they are less likely to choose adoption. Adoption requires a choice — voluntary consent by the birth parents. Banning abortion restricts women's choices such that it is difficult to contemplate voluntary consent. Having no other choices makes consent meaningless. As one of the options for women — abortion — is taken off the table, courts need to pay close attention to whether adoption consent is valid. Under adoption law, consent is a crabbed concept that does not adequately protect a prospective birth parent's interest in parenting. It does not account for the circumstances in which women relinquish a child, ignoring the role of poverty, the lack of support for parenting, and the continuing, though reduced, stigma of single parenting. Discussions of consent in adoption often take as a starting point that adoption is always a win-win-win decision benefiting the too-young mother of an unwanted child, saved from abortion, who will find a better family in adoptive parents yearning for a child. This view of adoption seems to grant permission to practitioners to use manipulative and potentially coercive tactics to procure adoption consent; after all, when the result is such a moral good, how can it matter how we get there? Once we unpack these assumptions about adoption, the view of consent may be very different.

In Part I of this article, I will discuss the currently known landscape of adoption and abortion, seeking to tease out the effect of wider abortion bans and restrictions, as permitted under *Dobbs*, on adoption placements. I will discuss patterns of adoption placement before and after *Roe v. Wade* legalized adoption, and, by relying on available empirical data, paint a picture of the possibilities in the post-*Dobbs* world of adoption. Part II considers the insights from psychosocial literature on how women make the decision about adoption, who relinquishes for adoption, and the salience of abortion to that decision. Understanding the real relation between adoption and abortion can help policymakers in deciding what interventions would best meet their goals in this area and informs our normative understanding of reproductive and parenting choices. I will also explore the emotional

and psychological effects of adoption placement on birth mothers, as a way to replace myths of the indubitable good of adoption with data that shows a darker side. Part III examines laws and practices of consent in adoption, reviewing some of the potentially coercive tactics that have been employed by adoption professionals, including geo-fencing abortion clinics to send targeted ads about adoption; false promises of open adoption that are, in fact, unenforceable; and the role of pre-birth matching of hopeful adoptive parents and potential birth mothers, which tends to exacerbate the coercive effects of money in adoption. Part IV proposes reforms of adoption that give enhanced meaning to the requirement of consent that should apply in adoption, one that enhances choice by considering the real circumstances in which women make the decision to place a child for adoption rather than parenting the child.

I. THE LANDSCAPE OF ABORTION AND ADOPTION

There are three distinct periods of adoption in America after World War II. The first period, before abortion became legal with the ruling in *Roe v. Wade*, is often called the Baby Scoop Era because of the number of unmarried women and girls who lost their newborns to adoption.³⁹ The second period, after abortion became legal, yet not always accessible, is marked by a decline in adoption placements. While it is tempting to claim that it was merely the legalization of abortion that led to this decline, there were many more changes occurring at this same time: the growth of the women's movement, increasing the ability of single mothers to support their children; improved contraceptives, including the Pill; lessening stigma about sex out of wedlock and single parenting; and the growth of divorce, showing that marriage was no

³⁹ See generally RICKIE SOLINGER, WAKE UP LITTLE SUZI: SINGLE PREGNANCY AND RACE BEFORE *ROE V. WADE* 152-161 (2d ed. 2000) (describing the Post-War era of single motherhood leading to maternity homes and adoption placements with infertile couples eager for a complete family); KAREN WILSON-BUTERBAUGH, THE BABY SCOOP ERA: UNWED MOTHERS, INFANT ADOPTION, AND FORCED SURRENDER (2017) (describing the coercive actions of social workers and others used to separate unwed mothers from their infants during the period after World War II and before *Roe v. Wade*). During the time period between 1945 and 1972, it is estimated that 1.5 million infants were surrendered for adoption. FESSLER, *supra* note 18, at 8.

guarantee of a partner in childrearing.⁴⁰ The third period is the post-*Dobbs* future, an imaginarium of some uncertainty about whether and how adoption will be affected by significant restrictions on abortion. Looking at the past may help us see that future more clearly, as will the limited empirical data currently extant predicting additional births after *Dobbs*.

A. Adoption Prior to Roe — The Baby-Scoop Era

At one time, social reformers who ran maternity homes encouraged single pregnant women to keep and parent their children, rather than place them for adoption.⁴¹ Several states enacted legislation designed to discourage the separation of mother and infant,⁴² including mandatory breast-feeding laws that required unwed mothers in maternity homes to remain with their children for a number of months before the children could be relinquished for adoption.⁴³ But there was a change in attitude toward adoption relinquishment by social workers as they “professionalized” in the 1930s and 40s.⁴⁴ It is no coincidence that this time period is also when more people were interested in adopting, creating market incentives to produce children to be adopted.⁴⁵ World

⁴⁰ KRISTIN LUKER, *DUBIOUS CONCEPTIONS: THE POLITICS OF TEENAGE PREGNANCY* 97 (1996).

⁴¹ SOLINGER, *supra* note 39, at 21; Naomi Cahn, *Birthing Relationships*, 17 *WIS. WOMEN'S L.J.* 163, 174 (2002).

⁴² Cahn, *supra* note 41, at 174. For example, Maryland enacted a law in 1916 that established criminal penalties for the separation of mothers from their children under six months old. *Id.*; see also REGINA KUNZEL, *FALLEN WOMEN, PROBLEM GIRLS: UNMARRIED MOTHERS AND THE PROFESSIONALIZATION OF SOCIAL WORK 1890-1945*, at 128 (1993).

⁴³ Cahn, *supra* note 41, at 174-75.

⁴⁴ Cecilia E. Donovan, *Taking Matters into Their Own Hands: Social Workers and Adoption Practices in United States Maternity Homes 19-20* (Apr. 3, 2019) (undergraduate honors thesis, University of Colorado Boulder), https://scholar.colorado.edu/concern/undergraduate_honors_theses/wd375w830 [<https://perma.cc/ZC46-C4YG>].

⁴⁵ The end of the eugenics movement that discouraged adoption because of potential bad behavioral traits inherited by adoptees and the push for the importance of parenthood with the post-war baby boom created incentives for infertile couples to adopt, requiring a supply to meet the demand. Malinda L. Seymore, *Sixteen & Pregnant: Minors' Consent in Abortion & Adoption*, 25 *YALE J.L. & FEMINISM* 99, 114 (2013) [hereinafter *Sixteen & Pregnant*].

War II was also a demarcation line of “rapidly increasing incidence of nonmarital childbearing,” when the “illegitimacy rate . . . had tripled between 1940 and 1957, and the number of illegitimate births had increased by 125% since World War II began.”⁴⁶

Increasingly, social workers began to pressure unmarried mothers to surrender their children to adoption instead of parenting them.⁴⁷ One scholar describes this time in American adoption history as a time of “pressure, coercion, and inhumanity in procuring consents.”⁴⁸ A case from this era, where a mother successfully petitioned for the return of her child, provides insight into some of the tactics used to scoop babies from unwed mothers.⁴⁹ After the mother decided to keep her child, the maternity home embarked on a course of conduct to persuade her to relinquish the child for adoption.⁵⁰ She was told that she was being selfish, and had no right to keep the child.⁵¹ She was advised that the child would be a burden to her and that she would find it difficult to secure a husband, and that if she did find a husband, he would resent the child. It was suggested that her parents would owe the maternity home considerable money for her medical and housing expenses but would owe nothing if she relinquished the child. The social worker also suggested that the mother owed her child to the adoptive parents — after all, she could always have more children and the infertile adoptive parents couldn’t so they were likely to love the child more than the mother would. The worker asked her “what [she] would do when, some day in the future, her son returned home from school and asked, ‘Mommy, what’s a bastard?’”⁵² The mother testified that the interviews happened over a five day period immediately after the birth of her child, and that the period was a “nightmare” where she was only sleeping three

⁴⁶ SOLINGER, *supra* note 39, at 13.

⁴⁷ KUNZEL, *supra* note 42, at 129.

⁴⁸ David M. Smolin, *Child Laundering as Exploitation: Applying Anti-Trafficking Norms to Intercountry Adoption Under the Coming Hague Regime*, 32 VT. L. REV. 1, 7 (2007); *see also* SOLINGER, *supra* note 39, at 166 (“[W]hite unmarried mothers were defined by the state out of their motherhood.”).

⁴⁹ *Methodist Mission Home v. N.A.B.*, 451 S.W.2d 539, 541-44 (Tex. Civ. App. 1970).

⁵⁰ *Id.* at 540.

⁵¹ *Id.* at 544. Of course, prior to relinquishment of parental rights, she was the legal parent and had every legal right to change her mind about adoption and keep the child.

⁵² *Id.* at 542 n.7.

hours a night.⁵³ The court noted “the fact that an unwed mother who has just given birth is usually emotionally distraught and peculiarly vulnerable to efforts, well-meaning or unscrupulous, to persuade her to give up her child.”⁵⁴

In light of the unavailability of legal abortion prior to *Roe*, the stigma of unwed birth, the difficulty in finding gainful employment as a single woman with a child, and the pressures brought to bear by social workers at maternity homes, relinquishment for adoption was far higher prior to *Roe* than it is today. Still, the overall relinquishment rate prior to 1973 was just nine percent of all premarital births.⁵⁵ White women were far more likely to relinquish — relinquishing for adoption at the rate of almost twenty percent.⁵⁶ Black women relinquished at a rate of less than two percent.⁵⁷

B. Adoption After Roe

When Justices Barrett and Alito suggest that abortion access is unnecessary since adoption is a viable alternative, they rely on a tactic that the anti-abortion movement embraced following the legalization of abortion. Built upon notions of the moral superiority of adoption to abortion, supported by some moral philosophers,⁵⁸ and the false idea that adoption is less harmful to birth mothers than is abortion, an entire ethos arose that sought to convince — if not compel — women to choose adoption over abortion. Despite studies showing that adoption has little salience for women deciding whether to end a pregnancy, and

⁵³ *Id.* at 543-44.

⁵⁴ *Id.* at 544.

⁵⁵ Kathy S. Stolley, *Statistics on Adoption in the United States*, 3 *FUTURE CHILD*. 26, 32 (1993); see also Gretchen Sisson, *Who Are the Women Who Relinquish Infants for Adoption? Domestic Adoption and Contemporary Birth Motherhood in the United States*, 54 *PERSPS. ON SEXUAL & REPROD. HEALTH* 46, 47 (2022) [hereinafter *Who Are the Women Who Relinquish*].

⁵⁶ Sisson, *Who Are the Women Who Relinquish*, *supra* note 55; Stolley, *supra* note 55.

⁵⁷ Stolley, *supra* note 55.

⁵⁸ See, e.g., Daniel Friedrich, *A Duty to Adopt?*, 30 *J. APPLIED PHIL.* 25, 26 (2013) (asserting a duty to adopt because of the ability to prevent harm with little cost to ourselves); Stephen G. Post, *The Moral Meaning of Relinquishing an Infant: Reflections on Adoption*, 67 *THOUGHT* 207, 208 (1992) (arguing that adoption placement is virtuous). For a critique of these arguments, see Malinda L. Seymore, *Adoption as a Substitute for Abortion?*, 95 *U. COLO. L. REV.* (forthcoming 2023) (manuscript at 35-41).

that women already know about the availability of adoption, legislatures began to pass statutes insisting that women seeking abortion be informed about adoption options.⁵⁹ Thirty-three states require counseling prior to an abortion, with twenty-three of those states going beyond merely medical counseling.⁶⁰ The counseling often includes information designed to talk women out of having the abortion, including information to encourage her to carry the pregnancy to term and place the child for adoption.⁶¹

Despite attempts to encourage adoption over abortion, the adoption placement rates have declined since 1973. “Before 1973, almost 9% of all premarital births were placed for adoption. For premarital births occurring from 1973 through 1981, this percentage decreased to 4%; for births from 1982 through 1988, it decreased even further to 2%.”⁶² Today, it is estimated that relinquishment rates have declined even further, to .9% of premarital births⁶³ or .5% of all births.⁶⁴

As relinquishment rates plummeted, birth mothers seemed to have increasing power in adoptions,⁶⁵ which spurred open adoption.⁶⁶ “Indeed, with fewer and fewer infants available, the forces of supply and demand provided expectant parents considering adoption more of a

⁵⁹ See, e.g., Sisson et al., *Adoption Decision Making*, *supra* note 23, at 138-39 (women denied abortion were aware of the adoption option but did not consider it a viable option).

⁶⁰ Rachel Benson Gold & Elizabeth Nash, *State Abortion Counseling Policies and the Fundamental Principles of Informed Consent*, 10 GUTTMACHER POL’Y REV. 6, 7 (2007).

⁶¹ See discussion *infra* Part III.B.1.

⁶² Stolley, *supra* note 55.

⁶³ Chandra et al., *supra* note 20.

⁶⁴ Sisson, *Estimating the Annual Domestic Adoption Rate*, *supra* note 17, at 17.

⁶⁵ DEBORAH H. SIEGEL & SUSAN LIVINGSTON SMITH, EVAN B. DONALDSON ADOPTION INST., OPENNESS IN ADOPTION: FROM SECRECY AND STIGMA TO KNOWLEDGE AND CONNECTIONS 12 (2012).

⁶⁶ The term “open adoption” refers to a continuum of contact between prospective birth parents and prospective adoptive parents. It may mean only contact before placement or may mean continuing contact after placement. Continuing contact after placement can vary from mediated, anonymous exchange of information and photos throughout the child’s life to continuing in-person contact between the birth parent, adoptive parent, and child. Lisa A. Tucker, *From Contract Rights to Contact Rights: Rethinking the Paradigm for Post-Adoption Contact Agreements*, 100 B.U. L. REV. 2317, 2322 (2020).

say.”⁶⁷ Agencies were more likely to listen and respond to desires of birth mothers than during previous eras.⁶⁸ The agencies also had to compete with non-agency private placement adoptions, where the birth parents and adoptive parents found each other, and openness of identity was inevitable.⁶⁹ The market response of adoption agencies became part of social work practice, with the professionals crafting a continuum of openness from which birth mothers could choose.⁷⁰ Open adoption grew in practice, and by the mid-1980s, “agencies increasingly provided pictures of the placed child to birthparents, let birthparents select adoptive parents for the child, arranged meetings between birthparents and adoptive parents without sharing identifying information, and offered ongoing contact between parties.”⁷¹

Though birth mothers in open adoptions tended to be happier than those of the Baby Scoop Era,⁷² even open adoption did not encourage

⁶⁷ SIEGEL & SMITH, *supra* note 65; see also Susan M. Wolfgram, *Openness in Adoption: What We Know So Far — A Critical Review of the Literature*, 53 SOC. WORK 133, 134 (2008) (“Another factor affecting adoption was a decrease in the availability of healthy white infants given the more prevalent societal acceptance of single parent-hood as well as the availability of abortion.”).

⁶⁸ See Susan M. Henney, Ruth G. McRoy, Susan Ayers-Lopez & Harold D. Grotevant, *The Impact of Openness on Adoption Agency Practices: A Longitudinal Perspective*, 6 ADOPTION Q. 31, 33-42 (2003) (asserting the number one reasons agencies gave for increasing openness during the 10 years of the study was birth mother demand); Carol Sanger, *Bargaining for Motherhood: Postadoption Visitation Agreements*, 41 HOFSTRA L. REV. 309, 314-15 (2012) (explaining how adoption agencies began to pay serious attention to what it would take to get mothers to place their newborns for adoption).

⁶⁹ See HAROLD D. GROTEVANT & RUTH G. MCROY, OPENNESS IN ADOPTION: EXPLORING FAMILY CONNECTIONS 35 (1998); BARBARA MELOSH, STRANGERS AND KIN: THE AMERICAN WAY OF ADOPTION 278 (2002) (noting that no state required confidential adoption, and allowing birth mothers to directly place their children allowed open adoption to be “implemented with ease”); JUDITH S. MODELL, A SEALED AND SECRET KINSHIP: THE CULTURE OF POLICIES AND PRACTICES IN AMERICAN ADOPTION 61 (2002) (noting the shift from secrecy in adoption to more open adoption).

⁷⁰ E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 202 (1998); MELOSH, *supra* note 69, at 277; see SIEGEL & SMITH, *supra* note 65.

⁷¹ GROTEVANT & MCROY, *supra* note 69, at 34.

⁷² See Gretchen Sisson, “*Choosing Life*”: *Birth Mothers on Abortion and Reproductive Choice*, 25 WOMEN’S HEALTH ISSUES 349, 352 (2015) (explaining why women in this study showed fewer negative effects of adoption relinquishment than did mothers of the Baby Scoop Era) [hereinafter *Choosing Life*].

wide-spread interest in adoption placements. Perhaps most striking was the results of the Turnaway Study — abortion-seeking women who were denied abortions chose in overwhelming numbers (ninety-one percent) to parent the child rather than place for adoption.⁷³ Still, the nine percent placement rate is far higher than the .9% figure while abortion was legal.

Now that *Dobbs* allows states to ban and/or severely restrict abortion, what do we know of the future effects of that decision on adoption? It is too early for peer-reviewed empirical analyses of estimated excess births and/or adoption placements post-*Dobbs*, but there have been early estimates that are instructive.

C. *Abortion, Excess Births and Adoption Post-Dobbs*

After Mississippi successfully pressed the Supreme Court to allow it to ban nearly all abortions, only then did it hold legislative hearings to discover what effect that ruling might have.⁷⁴ At the hearing, the Mississippi State Health Officer estimated that there would be 5,000 additional yearly births in Mississippi now that abortion is outlawed.⁷⁵ The Health Officer concluded that most of the children born would be “unwanted or unplanned,” and that about sixty percent of those

⁷³ The Turnaway Study is a ten-year longitudinal study of 1,000 women who sought abortions, the women who successfully obtained abortions, and those denied abortions. DIANA GREENE FOSTER, *THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING — OR BEING DENIED — AN ABORTION 2018 (2020)* [hereinafter *TURNAWAY STUDY*]. The study has also spawned a great number of academic articles based on the research.

⁷⁴ Ashton Pittman, *Officials: Mississippi Unprepared for 5,000 More Babies Born Yearly After Dobbs Ruling*, *MISS. FREE PRESS* (Oct. 3, 2022), <https://www.mississippifreepress.org/28031/officials-mississippi-unprepared-for-5000-more-babies-born-yearly-after-dobbs-ruling> [<https://perma.cc/TP7P-4Q3C>] (discussing Senate Study Group on Women, Children and Families hearing on September 28, 2022, three months after *Dobbs* was decided).

⁷⁵ *Id.* No information is given as to the source of the conclusion of 5,000 additional births. According to the CDC, in 2019 Mississippi performed 3,194 abortions on residents and 335 abortions on nonresidents. Katherine Kortsmit, Michele G. Mandel, Jennifer A. Reeves, Elizabeth Clark; H. Pamela Pagano, Antoinette Nguyen, Emily E. Petersen & Maura K. Whiteman, *Abortion Surveillance — United States, 2019*, *70 MORBIDITY & MORTALITY WKLY. REP. — SURVEILLANCE SUMMARIES*, Nov. 26, 2021, at 1, 14.

children would “end up in the [foster care] system.”⁷⁶ Since Mississippi already has 4,000 children in the foster care system, the commissioner of the Department of Child Protective Services testified that they were unprepared to handle the yearly addition of 5,000 children.⁷⁷ At the hearing, it was also noted that Mississippi has the highest rates in the nation of births to unwed mothers, preterm births, and low birthweight newborns.⁷⁸

Do these Mississippi estimates correlate nation-wide? The health-care industry consulting firm Sg2 estimates that there will be an additional 150,500 to 159,700 births each year in a United States with limited abortion access post-*Dobbs*.⁷⁹ It built its estimate by considering CDC data⁸⁰ of the number of abortions performed in 2019, and assuming that the sixty percent of adoptions occurring in states with no or few abortion restrictions would continue unrestricted and the forty percent of abortions in states with restrictions “would not have been performed if the Supreme Court ruling had occurred then.”⁸¹ The figure Sg2 reached is 30,000 births higher than that reached by Diana Greene Foster, the head of the Turnaway Study⁸² of women seeking abortions, who estimates that “a quarter of those who would previously have been able to get an abortion will instead give birth.”⁸³ #WeCount, a national abortion reporting organization, reported in April 2023 that in the six months since *Dobbs*' June 2022 release, “there were 32,260 cumulative

⁷⁶ Pittman, *supra* note 74.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Mary Kekatos, *More than 150,000 Births Could Occur in the US Every Year Following the Reversal of Roe v. Wade, Report Predicts*, ABC NEWS (June 27, 2022, 12:47 PM) <https://abcnews.go.com/Health/150000-births-occur-us-year-reversal-roe-wade/story?id=85795552> [<https://perma.cc/CGJ6-A3AA>].

⁸⁰ *Id.*; Kortsmitt et al., *supra* note 75, at 1.

⁸¹ Kekatos, *supra* note 79.

⁸² FOSTER, TURNAWAY STUDY, *supra* note 73, at 99.

⁸³ Diana Greene Foster, *Six Predictions About the End of Roe, Based on Research*, POLITICO MAG. (June 8, 2022, 4:32 AM EDT), <https://www.politico.com/news/magazine/2022/06/08/the-end-of-roe-wont-cause-birth-rates-or-adoptions-to-spike-00037864> [<https://perma.cc/2XJU-Z5A5>]. She assumes that some women who seek abortions in states that would deny them will be able to travel to other states or secure abortion pills to use in their homes for a self-managed abortion. Her 25% figure results in approximately 120,000 excess births, compared to Sg2's figure of 150,000.

fewer abortions from July to December.”⁸⁴ If that pattern continues for the next six months that would suggest 64,520 extra births annually, a figure lower than the Foster and Sg2 predictions. That may be explained because the #WeCount study only counted abortions through formal healthcare systems, including virtual-only clinics, but not “any self-managed abortions, defined as any attempt to end a pregnancy outside the formal healthcare system, including using medications, herbs or something else, or obtaining pills from friends or online without clinical assistance.”⁸⁵

Sg2 also estimated the number of births among that 150,000 excess births that would need extraordinary health care after birth. They calculate approximately 18,000 premature births.⁸⁶ “Premature babies are at a greater risk for problems with feeding, breathing, vision and hearing, as well as behavioral issues.”⁸⁷ Approximately 1,500 to 1,600 additional babies will be born with congenital issues like Down syndrome or heart defects.⁸⁸

The health and race of babies born to pregnant persons who would have preferred abortion if it had been available is relevant to adoption placements, as adoptive parents overwhelmingly prefer to adopt healthy white newborns and infants.⁸⁹ According to CDC information, which is limited because twenty-two states did not report by race/ethnicity, in 2019, non-Hispanic white women had 115,486 abortions; Black, Hispanic and other women had 230,443 abortions, nearly double the abortions of white women.⁹⁰ If we assume Sg2’s excess birth figure of 150,000 follows that pattern, we can expect 50,000 additional white infants born each year, though basing this conclusion on the race of the mother is

⁸⁴ SOC’Y OF FAM. PLAN., *supra* note 15, at 2.

⁸⁵ *Id.* at 1; *see also* Margot Sanger-Katz & Claire Cain Miller, *Legal Abortions Fell by 6 Percent in the Six Months After Dobbs, New Data Shows*, N.Y. TIMES (Apr. 12, 2023), https://www.nytimes.com/2023/04/12/upshot/legal-abortion-fell-dobbs.html?name=styln-abortion-us®ion=TOP_BANNER&block=storyline_menu_recirc&action=click&pgtype=Article&variant=undefined [https://perma.cc/GJ8J-PRQP].

⁸⁶ Kekatos, *supra* note 79.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Chandra et al., *supra* note 20, at 8-9 tbl.4.

⁹⁰ Kortsmitt et al., *supra* note 75, at 20 tbl.6.

imperfect in that the children may be bi-racial based on the race of the father.

The next question is what percentage of women would relinquish their children for adoption when abortion is no longer available as an option post-*Dobbs*? The nine percent figure from the Turnaway Study⁹¹ would result in 10,800-13,500 children available for adoption, approximately 4,500 being the white infants coveted by adoptive parents. But if the historical .9% figure applies, then we would see only an additional 1,080-1,350 adoption relinquishments, including 450 white children.

Of course, more sophisticated analyses need to be done. Relinquishment rates differ on various axes, including age, race, and socioeconomic status, as do rates of abortion. It will take time to assess the full picture of the effect of *Dobbs* on adoption. I offer these back-of-the-envelope numbers as a starting place to consider what adoption will look like in a country with no or limited access to abortion.

Even the higher figures would make little difference in meeting the demand for adoption. If there are, indeed, millions of prospective adoptive parents waiting to adopt in any given year, the addition of 13,500 children to the 20,000 children estimated to be placed each year will make little difference. Rather than thirty-six couples per available child, there would be twenty-one couples per available child. The competition to adopt would remain high, incentivizing conduct that may coerce consent for adoption.

II. ABORTION & ADOPTION DECISION-MAKING

While abortion and adoption are linked in public consciousness, there is considerable question of whether it is linked in the ways in which women consider choices when faced with an unexpected pregnancy. Much of the focus of the anti-abortion movement has been on persuading women to choose adoption over abortion, as is reflected in Justices Barrett's and Alito's position that the availability of adoption makes abortion unnecessary. But studies show, as the next Section explains, that women faced with crisis pregnancies do not consider the issues in this way. How, if at all, is abortion salient to the adoption

⁹¹ Sisson et al., *Adoption Decision Making*, *supra* note 23, at 142.

decision — and *vice versa*? Who are the pregnant persons who place for adoption rather than seeking abortion or choosing to parent?

A. *The Salience of Abortion in the Adoption Decision*

Many expect that women who place children for adoption are opposed to abortion, and that is certainly true for some.⁹² In one study of birth mothers who placed children, however, nearly half of the participants were pro-choice.⁹³ Eight out of the forty participants actually sought abortions but could not afford one or were past the gestational age.⁹⁴ Only four of the participants reported considering adoption at the beginning of their pregnancies, while the vast majority expressed a desire to parent the child.⁹⁵ It was only later in the pregnancy that they made the decision that they lacked the support and resources to parent. “Adoption decisions were rooted in a sense that they would be inadequate mothers, rather than as a freely chosen way of avoiding parenthood.”⁹⁶

⁹² This flows from the belief that pro-life people will not have abortions, but that assumption is untrue. See, e.g., Sisson, *Choosing Life*, *supra* note 72, at 351 (noting that women in all demographic groups, including those who identify as pro-life, get abortions); Megan K. Simmons, Examining the Impact of Social Ecological Factors on Women’s Pregnancy and Parenting Decision-Making (Dec. 2017) (Ph.D. dissertation, Indiana University) (ProQuest) (finding that women’s opposition to abortion did not prevent them from considering abortion as an option for unplanned pregnancy). This is akin to the assumption that all adoptees must be pro-life, out of gratitude that their birth mother did not get an abortion. After *Dobbs*, a number of adoptees sought to disabuse the public of this notion. See, e.g., Merritt, *supra* note 3, at 204-05 (detailing the author’s internalization of the notion that all adoptees must be pro-life leading to a strong belief that people should have the right to an abortion “even if that meant I never existed.”); Adoptees for Choice, FACEBOOK, <https://www.facebook.com/AdopteesForChoice/> (last visited July 30, 2023) [<https://perma.cc/U895-5JJN>] (using the tag line, “We Are Not Your Political Pawns,” group of adoptees advocating for choice); Lina Vanegas, *Organizing and Activism of Adopted and Displaced People*, HARV. L. SCH. PETRIE FLOM CTR. BILL OF HEALTH BLOG (May 13, 2022), <https://blog.petrieflom.law.harvard.edu/2022/05/13/organizing-and-activism-of-adopted-and-displaced-people/> [<https://perma.cc/V2LJ-N9D5>] (describing the narrative that adoptees ought to be grateful for being given a better life as propaganda).

⁹³ Sisson, *Choosing Life*, *supra* note 72, at 351.

⁹⁴ *Id.* at 350.

⁹⁵ *Id.* at 351.

⁹⁶ *Id.* at 352.

A little over half of the birth mothers in the study were strongly pro-life. Consider Sandra, who said bluntly, “I am not a murderer. . . . I had no other option but adoption.”⁹⁷ Some birth mothers described feeling, at least at the outset, that their decisions to place for adoption were validated within the pro-life community.⁹⁸ One birth mother, Amanda, spent a year after the adoption committing to the pro-life movement. “However, she became more critical after growing weary of upholding a ‘pro-life fantasy’ and being portrayed as a ‘hero.’”⁹⁹ She ultimately became alienated from the movement:

My experience with adoption has totally changed the way I think about abortion . . . Everything about how I was brought up says that abortion is wrong, but I would never, ever wish this [adoption] experience on anyone, and I would never strategically use adoption as a way to mitigate or negotiate an abortion issue. I think that people who suggest that girls do adoptions instead of abortions just don’t know how difficult and challenging adoption can be.¹⁰⁰

In the Turnaway Study of women who sought abortion, researchers tried to determine the role of adoption in their decision-making. They found that the women were aware of the option of adoption, but adoption “was simply not a choice they were interested in pursuing when abortion was available to them.”¹⁰¹ One pregnant single woman, 26-year-old Latishia, explained:

I was like if I feel like if I’m going to go full term then I was [sic] just prefer to just keep it. I don’t want to have to know that I had a child out here in the world or whatever that I done gave my baby away. No. I would just either — I just felt either more

⁹⁷ *Id.* at 351.

⁹⁸ *Id.* at 352.

⁹⁹ *Id.* at 352.

¹⁰⁰ *Id.* at 352.

¹⁰¹ Sisson et al., *Adoption Decision Making*, *supra* note 23, at 139.

comfortable with terminating it or just keeping it. I was not even going to do adoption. It's not an option for me.¹⁰²

The study included 161 women who were denied abortions and carried the pregnancies to term; ultimately only fifteen (nine percent) of the women placed the children for adoption.¹⁰³ Thus, ninety-one percent of women who were considering and were denied abortions decided to parent.¹⁰⁴ Three reasons emerged from open-ended questions to explain the decision to parent rather than relinquish the children. First, the mothers found more support from their families or partners than they expected when first facing an unplanned pregnancy.¹⁰⁵ Second, the mothers expressed strong bonds with the child after birth.¹⁰⁶ And third, they felt that they would be shirking their parental responsibilities not to raise their child.¹⁰⁷

Despite studies showing that adoption has little salience for women deciding whether to end a pregnancy, and that women already know about the availability of adoption, legislatures frequently pass statutes

¹⁰² *Id.*; Other researchers also report similar sentiments from birth mothers regarding adoption:

Sure I thought about it, but I never could do it. I know a lot of people could do a better job than me of being a mother and they can't get pregnant, but that's not my fault. I'm not going to go through nine months and then give someone else the benefit.

KRISTIN LUKER, *DUBIOUS CONCEPTIONS: THE POLITICS OF TEENAGE PREGNANCY* 163 (1996) (reporting on attitude of 16-year-old mother).

¹⁰³ Sisson et al., *Adoption Decision Making*, *supra* note 23, at 139.

¹⁰⁴ *Id.* at 141.

¹⁰⁵ *Id.* at 140.

¹⁰⁶ *Id.* The Turnaway Study also shares the story of Amy, who chose abortion for her second unplanned pregnancy, though she initially chose adoption for her first unplanned pregnancy. But as she relates,

[W]e had picked out a family, and she actually went there for about two weeks until we changed our mind. . . I tried to separate the postpartum blues from my own emotions. And then I realized it's not postpartum. This is our child. We need to get her back. . . . So, on this new pregnancy We already knew that adoption wasn't going to work.

FOSTER, *TURNAWAY STUDY*, *supra* note 73, at 25-27.

¹⁰⁷ Sisson et al., *Adoption Decision Making*, *supra* note 23, at 140.

insisting that women seeking abortion be informed about adoption options. Thirty-three states require counseling prior to an abortion, with twenty-three of those states going beyond merely medical counseling.¹⁰⁸ As these statutes show, states are extremely solicitous to make sure that women receive counseling before abortion. The counseling often includes information designed to talk women out of having the abortion, including information to encourage her to carry the pregnancy to term and place the child for adoption.¹⁰⁹ In *Planned Parenthood v. Casey*, the Supreme Court opened the door to attempts by states to persuade women to choose childbirth over abortion.¹¹⁰

Prior to *Casey*, the Court had approved some informed consent regimes, but rejected those that sought to persuade women to forego an abortion in favor of childbirth.¹¹¹ In *Thornburgh v. American College of Obstetricians & Gynecologists*,¹¹² the Court addressed the constitutionality of requiring the provision of a list of agencies that would assist with parenting and adoption placement, coupled with a required notice about

¹⁰⁸ Gold & Nash, *supra* note 60, at 7-8. See e.g., ARIZ. REV. STAT. ANN. § 36-2153 (2023) (requiring counseling, including information about the father's obligation to pay child support, that coercing someone to have an abortion is illegal, and that adoption information is available of certain state websites); IND. CODE ANN. § 16-34-2-1.1 (2023) (requiring counseling, including that Indiana has a safe haven law — allowing the child to be anonymously abandoned without criminal consequences — and that adoption is available); KAN. STAT. ANN. § 65-6709(b)(2) (2023) (requiring information about medical assistance benefits that may be available for prenatal care, childbirth and neonatal care, alternatives to abortion — to include “a special section listing adoption services”); TEX. HEALTH & SAFETY CODE ANN. § 171.012 (2023) (requiring information about the father's child support obligations, including the statistical likelihood of receiving child support, and the availability of adoption).

¹⁰⁹ Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1757-58 (2008) (positing that abortion counseling requirements “provides information that communicates to a woman seeking an abortion her community's judgment that she reconsider the decision that brought her to the scene of the ‘informed consent’ dialogue, and perhaps give different weight to the balance of considerations that led her to seek an abortion”).

¹¹⁰ See *Planned Parenthood v. Casey*, 505 U.S. 833, 901 (1992) (imposing an undue burden standard for state abortion regulations).

¹¹¹ See *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 444-45 (1983) (holding the City's informed consent statute was designed to persuade women to withhold consent altogether and impede the physician's discretion).

¹¹² 476 U.S. 747 (1986).

the availability of adoption and aid for parenting.¹¹³ The Court concluded that these requirements intruded too heavily on the doctor-patient relationship.¹¹⁴

The Court reversed its position on persuasive counseling in *Casey*, in addressing the nearly identical Pennsylvania statute it had held unconstitutional in *Thornburgh*. Again, the physician was required to provide a list of adoption agencies to women seeking abortion.¹¹⁵ But the Court concluded that states could constitutionally provide information that preferred childbirth to abortion, so long as it was true and not misleading.¹¹⁶ It did not, in the Court's view, unduly burden a woman's right to an abortion for a state to "further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion."¹¹⁷

Since *Casey*, states have passed statutes requiring counseling on a variety of issues, and in virtually all of those states that includes information about adoption as an option.¹¹⁸ For example, Indiana statute requires that women be told "[t]hat adoption alternatives are available and that adoptive parents may legally pay the costs of prenatal care, childbirth, and neonatal care."¹¹⁹ In Arizona, women must be informed that "[p]ublic and private agencies and services are available to assist the woman during her pregnancy and after the birth of her child if she chooses not to have an abortion, whether she chooses to keep the child or place the child for adoption."¹²⁰ The Texas statute also requires notification about the availability of alternatives to abortion, including a list of adoption agencies.¹²¹ One Texas legislator apparently felt that was not sufficient; he proposed that women seeking abortion take a

¹¹³ *Id.* at 761.

¹¹⁴ *Id.* at 762-63.

¹¹⁵ *Casey*, 505 U.S. at 881-83.

¹¹⁶ *Id.* at 882.

¹¹⁷ *Id.* at 883.

¹¹⁸ Sonia M. Suter, *The Politics of Information: Informed Consent in Abortion and End-of-Life Decision Making*, 39 AM. J.L. & MED. 7, 25 (2013).

¹¹⁹ IND. CODE ANN. § 16-34-2-1.1(a)(2)(C) (2023).

¹²⁰ ARIZ. REV. STAT. ANN. § 36-2153(A)(2)(c) (2023).

¹²¹ TEX. HEALTH & SAFETY CODE ANN. § 171.015(1)(A)(i)-(iii) (2011).

three-hour course on adoption and be required to present a certificate of completion before an abortion could be performed.¹²² The bill was presented on the last day of the legislative session and did not proceed further.¹²³

But what about counseling women about adoption? What counseling is required of those women making the decision to place a child for adoption? Are states equally as solicitous when women are relinquishing their parental rights and placing a child for adoption as when they are considering abortion?

In stark contrast to legislatures' stated concern that women need counseling before making a decision about abortion, only six states mandate counseling before a birth parent may relinquish a child for adoption.¹²⁴ Most of the statutes require the counseling to be from an adoption service provider, despite the fact that such counseling may not be neutral counseling about alternatives to adoption.¹²⁵ In one study, independent counselors — not affiliated with adoption agencies — “were more likely to provide birth mothers with information about the various options available to them, as well as information about specific resources in the community related to parenting.”¹²⁶ After all, adoption

¹²² See S.B. 42, 83d Leg., 2d Spec. Sess. (Tex. 2013).

¹²³ Kolten Parker, *Lucio Files Bill to Require Pre-abortion Adoption Course*, MY SAN ANTONIO (July 30, 2013, 5:53 PM), https://www.mysanantonio.com/news/politics/texas_legislature/article/Lucio-files-bill-to-require-pre-abortion-adoption-4696182.php [<https://perma.cc/9M5L-5LHC>].

¹²⁴ COLO. REV. STAT. ANN. § 19-5-103(1)(a) (2023); IOWA CODE ANN. § 600A.4(2)(d) (2023); LA. CHILD. CODE ANN. art. 1120 (2010); ME. REV. STAT. ANN. tit. 18-C, § 9-202(2)(A) (2023); N.M. STAT. ANN. § 32A-5-22 (2023); OR. REV. STAT. ANN. § 109.346 (2023); see also U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD.'S BUREAU, CONSENT TO ADOPTION 3 n.19 (2021), <https://www.childwelfare.gov/pubPDFs/consent.pdf> [<https://perma.cc/28LP-8FPG>]. This government report also identifies Kansas as a state that requires counseling, but I was not able to find that requirement in Kansas statutes. There are seven states that require psychological counseling, and 13 that require legal counseling. Of those 13, four also require psychological counseling. *Id.*

¹²⁵ See generally ELISSA MADDEN, SCOTT RYAN, DONNA AGUINIGA & MARCUS CRAWFORD, THE DONALDSON ADOPTION INST. & UNIV. OF TEXAS AT ARLINGTON, UNDERSTANDING OPTIONS COUNSELING EXPERIENCES IN ADOPTION: A QUANTITATIVE ANALYSIS OF BIRTH PARENTS AND PROFESSIONALS 7 (2016) [hereinafter *OPTIONS COUNSELING I*] (explaining the lack of research conducted regarding whether adoption agencies and other adoption practitioners provide expectant parents with unbiased counseling).

¹²⁶ *Id.* at 9.

agencies only get paid when an adoption is finalized, which requires first that the birth parent relinquish.¹²⁷

Colorado requires a relinquishing birth parent to receive counseling from the county department of human or social services or from a licensed child placement agency and a recommendation from the counselor regarding relinquishment.¹²⁸ Iowa requires that a release of custody for adoption be accompanied by a written acknowledgement that the parent was offered three hours of counseling after the birth of the child and three hours of counseling after relinquishment, and whether the offer was accepted or rejected.¹²⁹ Again, the counseling can be from the adoption service provider.¹³⁰ Louisiana allows birth fathers to waive counseling, but does not allow birth mothers to do so, and requires two counseling sessions.¹³¹ The counselor must report whether the parent “appeared to understand the nature and consequences of his intended act.”¹³² The counselor in Louisiana may be a licensed social worker, psychologist, psychiatrist, counselor — or “a counselor employed by a licensed child-placing agency.”¹³³ Oregon also allows counseling by a person employed by the child-placing agency, but it cannot be the social worker assigned to the adoptive parents.¹³⁴ Only in New Mexico does the statute explicitly provide that the counseling should cover alternatives to the adoption,¹³⁵ in contrast to all the abortion counseling statutes that require discussion of alternatives to abortion.

Counseling of prospective birth parents by adoption agencies is potentially problematic. There is a long history of adoption agency social workers employing “skills and techniques” to obtain

¹²⁷ See generally Malinda L. Seymore, *Adopting Civil Damages: Wrongful Family Separation in Adoption*, 76 WASH. & LEE L. REV. 895 (2019) [hereinafter *Adopting Civil Damages*] (describing the business model of adoption agencies through the lens of how that model is affected by information disclosures and tort claims).

¹²⁸ COLO. REV. STAT. ANN. § 19-5-103(1)(a) (2023).

¹²⁹ IOWA CODE ANN. § 600A.4(2)(d)(1) (2023).

¹³⁰ *Id.*

¹³¹ LA. CHILD. CODE ANN. art. 1120(A), (D) (2010).

¹³² *Id.* art. 1120(B) (2010).

¹³³ *Id.* art. 1120(A) (2010).

¹³⁴ OR. REV. STAT. ANN. § 109.346(4)(a) (2023).

¹³⁵ N.M. STAT. ANN. § 32A-5-22(C)(2) (2023).

relinquishments, convincing single women who they considered unfit to parent by virtue of being single, to place the child for adoption.¹³⁶ During the Baby Scoop Era, social workers began to receive training to steer prospective birth mothers toward adoption, in line with their newly-indoctrinated belief that “[r]ealistically [the unwed mother] is in no position to make any kind of decision.”¹³⁷ While directive counseling like this is formally out of favor, even nondirective adoption counseling seems to press for adoption as the best or only option.¹³⁸

At least when looking to legislative requirements, there seems less solicitude about counseling prospective birth mothers about the choice of adoption than mothers considering abortion. Standards of consent — set by law and/or morality — all rest on notions of autonomy of the actors involved, but tend to differ based on assessments of outsiders of the rightness or wrongness of the conduct involved.¹³⁹ A legal realist¹⁴⁰ might mention here, in light of the Supreme Court’s view of adoption as the solution for abortion, that three of the six justices in the majority are adoptive parents.¹⁴¹

¹³⁶ See Seymore, *Sixteen & Pregnant*, *supra* note 45, at 113-14; see also Smolin, *supra* note 48, at 7 (describing this time in American adoption history as a time of “pressure, coercion, and inhumanity in procuring consents”).

¹³⁷ SOLINGER, *supra* note 39, at 157-58.

¹³⁸ See *infra* discussion in text accompanying notes 223-40.

¹³⁹ See Alexander A. Guerrero, *The Epistemology of Consent*, in APPLIED EPISTEMOLOGY 348, 354 (Jennifer Lackey ed., 2021).

¹⁴⁰ See generally Dan Priel, *Law Is What the Judge Had for Breakfast: A Brief History of an Unpalatable Idea*, 68 BUFF. L. REV. 899 (2020) (discussing legal realism as a philosophy, using a familiar adage as an illustration).

¹⁴¹ See Carol S. Hook, *10 Things You Didn't Know About Clarence Thomas*, U.S. NEWS & WORLD REP. (Oct. 1, 2007, 12:33 PM), <https://www.usnews.com/news/national/articles/2007/10/01/10-things-you-didnt-know-about-clarence-thomas> (noting that Justice Thomas and his wife “adopted his 6-year-old grandnephew out of a difficult home situation in 1997”); Todd S. Purdum, Jodi Wilgoren & Pam Belluck, *Court Nominee's Life Is Rooted in Faith and Respect for Law*, N. Y. TIMES (July 21, 2005), <https://www.nytimes.com/2005/07/21/politics/court-nominees-life-is-rooted-in-faith-and-respect-for-law.html> [<https://perma.cc/87C7-MVBR>] (in profile of Chief Justice John Roberts, mentioning that he and his wife have adopted two children); Scott Stump, *Amy Coney Barrett opens up about her 7 children at Supreme Court confirmation hearing*, TODAY (Oct. 12, 2020, 11:36 AM PDT), <https://www.today.com/parents/amy-coney-barrett-talks-about-her-kids-confirmation-hearing-t194002> [<https://perma.cc/E9RH-ZMS4>] (noting that two of Justice Coney Barrett’s children are adopted).

With Supreme Court justices, legislators, and the general public subscribing to an idealized notion of the rightness of adoption, and especially when compared to the perceived moral ambiguity of abortion, consent to adoption seems to be an easy case. But Noam Chomsky and Edward Herman wrote 30 years ago about how politics and media can shape values in a way that “manufactures” consent.¹⁴² The anti-abortion movement has used both politics and media to seize the moral high ground in the abortion debate. By taking adoption as an unadulterated moral good we give permission to allow consent to go unexamined.

B. *Who Makes the Decision to Place and Why?*

Women who make the decision to relinquish a child for adoption are “an especial minority in choosing neither abortion nor parenting.”¹⁴³ The majority are white,¹⁴⁴ and contrary to popular belief, most are not teenagers, but in their 20s.¹⁴⁵ Many are already parenting other children.¹⁴⁶ In one study, thirteen percent of birth mothers were married at the time of adoption placement.¹⁴⁷ In many studies, women who relinquish are somewhat different demographically from unmarried women who choose to parent; placing birth mothers are more likely to have parents who are college-educated, to have grown up in a two-parent home, and to have higher income parents.¹⁴⁸ They are more likely

¹⁴² See EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA passim* (1998) (noting the powerful propaganda function of media’s focus on the interests of the powerful over the interests of the powerless).

¹⁴³ Sisson, *Choosing Life*, *supra* note 72, at 349.

¹⁴⁴ *Id.* at 350; Sisson, *Who Are the Women Who Relinquish*, *supra* note 55, at 49.

¹⁴⁵ See THE EVAN B. DONALDSON ADOPTION INST., *SAFEGUARDING THE RIGHTS AND WELL-BEING OF BIRTHPARENTS IN THE ADOPTION PROCESS* 23 (2007) (citing that approximately one-fourth of women choosing adoption today are below the age of 20).

¹⁴⁶ Sisson et al., *Adoption Decision Making*, *supra* note 23, at 138 tbl.1 (47% of women who placed a child up for adoption after being denied an abortion were already raising children, while 51% of women who decided to parent after being denied an abortion were already parenting); Sisson, *Who Are the Women Who Relinquish*, *supra* note 55, at 49 tbl.2 (63.4% of this cohort of birth mothers already had children).

¹⁴⁷ Sisson, *Who Are the Women Who Relinquish*, *supra* note 55, at 49 tbl.2 (12.8% of this cohort of birth mothers were already married).

¹⁴⁸ Sisson, *Choosing Life*, *supra* note 72, at 349.

to have completed high school,¹⁴⁹ and have “a greater future orientation.”¹⁵⁰ According to the Turnaway Study, women denied abortions who parented and those who placed for adoption were similar in age, race, ethnicity, and poverty status, but parenting mothers were more likely to be employed and less likely to have completed high school than mothers who placed for adoption.¹⁵¹

The reasons mothers gave for adoption placement were often about financial instability and lack of family support, absence of an involved birth father, and their young age.¹⁵² When asked what they would need to parent as they had initially planned, they focused on these factors, as exemplified by Jennifer: “My mother was saying I needed to choose adoption. She didn’t feel like I was responsible enough, in her view, to be a single mom. [She thought] I’d be selling the baby short if I didn’t provide him with a father.”¹⁵³ As Gretchen Sisson summarizes: “Not only are few women choosing between abortion and adoption at any point in their pregnancy, but most birth mothers only choose adoption when their first plan — either parenting or abortion — is no longer legally or logistically possible.”¹⁵⁴

In another recent study, birth mothers also expressed fears of being judged for being pregnant while not married, and stigma associated with single parenting.¹⁵⁵ As one birth mother put it, “if you’re a single mother, you’re somehow an abusive mother because you’re depriving your child.”¹⁵⁶ That stigma, associated with their religion, along with other

¹⁴⁹ See *id.*; THE EVAN B. DONALDSON ADOPTION INST., *supra* note 145, at 23.

¹⁵⁰ Sisson, *Choosing Life*, *supra* note 72, at 349.

¹⁵¹ Sisson et al., *Adoption Decision Making*, *supra* note 23, at 142.

¹⁵² Sisson, *Choosing Life*, *supra* note 72, at 351; see Sisson, *Who Are the Women Who Relinquish*, *supra* note 55, at 49 tbl.2 (64% of birth mothers in this study reported income less than \$5,000 per year).

¹⁵³ Sisson, *Choosing Life*, *supra* note 72, at 351.

¹⁵⁴ Sisson et al., *Adoption Decision Making*, *supra* note 23, at 142 (citation omitted).

¹⁵⁵ ELISSA MADDEN, SCOTT RYAN, DONNA AGUINIGA, OLGA VERBOVAYA, MARCUS CRAWFORD & CHANDLER GOBIN, THE DONALDSON ADOPTION INST. & UNIV. OF TEX. AT ARLINGTON, UNDERSTANDING OPTIONS COUNSELING EXPERIENCES IN ADOPTION: A QUALITATIVE ANALYSIS OF BIRTH PARENTS AND PROFESSIONALS 12 (2017) [hereinafter *OPTIONS COUNSELING II*].

¹⁵⁶ *Id.* at 13.

outside pressures, often motivated them to relinquish for adoption.¹⁵⁷ Pressure from their adoption worker or prospective adoptive parents “negatively impacted the mothers’ capacity to change their mind about adoption for their child because of the impact it would have on the prospective adoptive parents.”¹⁵⁸

With abortion no longer available in half the states, and extremely difficult to access elsewhere, *Dobbs* has manufactured an environment where adoption will be a choice of last resort: “[A]doption is chosen more frequently when there are fewer real or perceived options available.”¹⁵⁹ But despite *Dobbs*, it is unlikely that the high demand for adoptable infants will be satisfied. Prospective adoptive parents and adoption agencies will still be motivated to procure consent from those facing an unplanned pregnancy. The law gives them considerable leeway in doing so.

C. *Aftereffects of the Adoption Decision for Birth Mothers*

Much of the rhetoric about adoption is that it is an unmitigated good for all involved. But there are psychosocial studies showing that birth mothers do experience issues related to adoption placement. A recent study led by one of the researchers of the Turnaway Study, Gretchen Sisson, focusing on women who had relinquished a child for adoption between 1962 and 2009, found that over half “described their adoption experiences as predominately negative.”¹⁶⁰ Mothers in closed adoptions were more likely to describe the decision to place as coerced: “[T]hese participants felt they had no options available to them other than adoption.”¹⁶¹ Of those who felt the adoption experience was a negative one, many said they once felt more positively about it — except for a

¹⁵⁷ *See id.*

¹⁵⁸ *Id.*

¹⁵⁹ Sisson et al., *Adoption Decision Making*, *supra* note 23, at 142.

¹⁶⁰ Sisson, *Choosing Life*, *supra* note 72, at 352.

¹⁶¹ *Id.* Closed adoptions are those where there is no continuing contact between the birth mother and adoptive family/adopted child after the adoption. Secrecy in adoption is enforced in a closed adoption, and the birth mother will not know the identity of the adoptive parents, the location of her child, or whether her child is doing well — not even whether her child is living or dead.

period of mourning initially — but began to feel more negatively about it over time.¹⁶²

While the majority of birth parents report general satisfaction from their adoption decision, a significant portion experience long-term effects of adoption relinquishment on emotions and well-being.¹⁶³ Some researchers report feelings of satisfaction by birth mothers four years after birth, and positive outcomes on some socio-demographic and social psychological outcomes,¹⁶⁴ most birth mothers also experience continuing grief and loss.¹⁶⁵ In one study, the majority of birth mothers reported “no decrease in feelings of sadness, anger, and guilt since their relinquishment up to 30 years [before].”¹⁶⁶ Long-term effects include ongoing depression, shame, and negative self-image.¹⁶⁷ Birth mothers also report feeling unlovable.¹⁶⁸ These feelings can cause birth mothers future difficulties in attaching to romantic partners and subsequent children.¹⁶⁹ Issues with future parenting include “intense attachment to and overprotection of children born to and raised by birthmothers after the placement of a child for adoption.”¹⁷⁰

¹⁶² *Id.*

¹⁶³ Amanda L. Baden & Mary O’Leary Wiley, *Birth Parents in Adoption: Research, Practice, and Counseling Psychology*, 33 *COUNSELING PSYCH.* 13, 29 (2005). The author cautions that research on the long-term effects of adoption relinquishment tend to be based on self-selecting samples or samples from birth mothers seeking treatment. *Id.* at 30. While this sampling bias may make it difficult to assess how many birth parents suffer long-term effects and how many do not, the studies do offer important information about negative effects that birth mothers may experience long-term.

¹⁶⁴ See Pearla Brickner Namerow, Debra Kalmuss & Linda F. Cushman, *The Consequences of Placing Versus Parenting Among Young Unmarried Women*, 25 *MARRIAGE & FAM. REV.* 175, 185 (1997).

¹⁶⁵ Baden & Wiley, *supra* note 163, at 29.

¹⁶⁶ *Id.* at 31. See generally Sisson, *Choosing Life*, *supra* note 72, at 352 (explaining negative experiences faced by adoption participants the longer it has been since the adoption took place).

¹⁶⁷ See ROBIN WINKLER & MARGARET VAN KEPPEL, *INST. OF FAM. STUD., RELINQUISHING MOTHERS IN ADOPTION: THEIR LONG-TERM ADJUSTMENT* 41 (1984).

¹⁶⁸ Baden & Wiley, *supra* note 163, at 29.

¹⁶⁹ *Id.* at 29-30.

¹⁷⁰ Cinda L. Christian, Ruth G. McRoy, Harold D. Grotevant, Chalandra M. Bryant, *Grief Resolution of Birthmothers in Confidential, Time-Limited Mediated, Ongoing Mediated, and Fully Disclosed Adoptions*, 1 *ADOPTION Q.* 35, 39 (1997).

Birth mothers who kept the adoption relinquishment a secret feared that others would reject them if the secret were discovered.¹⁷¹ Birth mothers experienced what one researcher calls the “psychological presence” of the relinquished child, discrediting the frequently-asserted notion that birth mothers would forget about the relinquishment experience and continue on their pre-pregnancy life trajectory.¹⁷² Perhaps this is why modern trends toward more openness in adoption appears to help birth parents in adjusting to adoption in a number of ways.¹⁷³ Birth mothers benefit from continued post-adoption contact, and experience less grief when they know that their children are happy in their adoptive homes.¹⁷⁴ But, in one study, the group that scored worse in grief resolution was birth mothers who initially had continuing contact, but for whom the contact ceased.¹⁷⁵ Cessation of contact is a prevalent problem with promises of open adoption/continuing contact because in many states that promise is not binding and enforceable; promising openness that cannot be enforced is one of the potentially coercive practices that can induce invalid consent.¹⁷⁶

III. CONSENT IN ADOPTION

In *The Moral Magic of Consent*, Heidi Hurd famously said, “[C]onsent turns a trespass into a dinner party; a battery into a handshake; a theft

¹⁷¹ Baden & Wiley, *supra* note 163, at 30; Michael De Simone, *Birth Mother Loss: Contributing Factors to Unresolved Grief*, 24 CLINICAL SOC. WORK J. 65, 71 (1996). Secrecy about the adoption, and the lack of opportunity to express feelings about the adoption, correlate strongly with unresolved grief, guilt, and shame about the adoption placement.

¹⁷² Deborah Lewis Fravel, Ruth G. McRoy & Harold D. Grotevant, *Birthmother Perceptions of the Psychologically Present Adopted Child: Adoption Openness and Boundary Ambiguity*, 49 FAM. RELS. 425, 428 (2000).

¹⁷³ Xiaojia Ge, Misaki N. Natsuaki, David M. Martin, Leslie D. Leve, Jenae M. Neiderhiser, David S. Shaw, Georgette Villareal, Laura Scaramella, John B. Reid & David Reiss, *Bridging the Divide: Openness in Adoption and Postadoption Psychosocial Adjustment Among Birth and Adoptive Parents*, 22 J. FAM. PSYCH. 529 (2008); see Sisson, *Choosing Life*, *supra* note 72, at 352.

¹⁷⁴ Ruth G. McRoy, Harold D. Grotevant, Susan Ayers-Lopez, & Susan M. Henney, *Open Adoptions: Longitudinal Outcomes for the Adoption Triad*, in HANDBOOK OF ADOPTION: IMPLICATIONS FOR RESEARCHERS, PRACTITIONERS, AND FAMILIES 175, 181-82 (Rafael A. Javier, Amanda L. Baden, Frank A. Biafora & Alina Camacho-Gingerich eds., 2007).

¹⁷⁵ GROTEVANT & MCROY, *supra* note 69, at 169.

¹⁷⁶ See discussion *infra* nn.287-99 and accompanying text.

into a gift; an invasion of privacy into an intimate moment; a commercial appropriation of name and likeness into a biography.”¹⁷⁷ To this litany I might add that consent turns an abduction into an adoption and an unlawful battery into a legal abortion. Professor Hurd describes these circumstances as “mak[ing] an action right when it would otherwise be wrong.”¹⁷⁸ But in order for consent to have this magical, transformative property, she says, a person must exercise autonomy; they must be free of certain constraints on that autonomy.¹⁷⁹ In other words, a person “fails to give consent to a defendant’s actions if she lacks (1) the capacity or (2) the opportunity for meaningful choice.”¹⁸⁰ Susan Stefan sees the line between capacity and meaningful choice as one between internal and external influence.¹⁸¹ The legal doctrine of competency addresses “completely internal deficiencies” that “operates under law to relieve an individual of the burdens of a decision she is understood not to have made as an exercise of her own will.”¹⁸² Coercion and duress are “totally external compulsion generated by an identifiable individual or group,” in which “an individual is robbed of power and autonomy in decisionmaking.”¹⁸³ Both adoption and abortion hinge on notions of consent, and are concerned with both the internal and external factors; but in this article, I will address external interference with consent in adoption. How does the law frame consent in adoption? What constraints on autonomy, if any, are considered?

¹⁷⁷ Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 123 (1996).

¹⁷⁸ *Id.* Professor Hurd posits a second way in which consent alters the morality of conduct, using a serial-abortion-as-birth-control hypothetical. In her view, it does not morally transform a wrong act into a right act, it simply grants another a “stained permission” to do wrong. She concedes, however, that in a pro-choice view, the woman’s consent to the abortions makes her abortions morally permissible. *Id.* at 124.

¹⁷⁹ *Id.* at 139-40.

¹⁸⁰ *Id.* at 140.

¹⁸¹ Susan Stefan, *Silencing the Different Voice: Competence, Feminist Theory and Law*, 47 U. MIA. L. REV. 763, 767 (1993).

¹⁸² *Id.*

¹⁸³ *Id.*

A. *General Law of Consent to Adoption*

Unless a parent's rights have been involuntarily terminated by the state, a parent must consent to the relinquishment of parental rights and to placement of the child for adoption.¹⁸⁴ "Courts everywhere are powerless to alter the natural parent-child relationship and create an artificial one in its stead without agreement" of the parents.¹⁸⁵ As a matter of "natural rights, common law, and cultural traditions" parents have "superior rights to the possession and control of their offspring."¹⁸⁶ Those parental rights have been recognized as constitutionally protected.¹⁸⁷

Because of the importance of these parental rights, a parent will not be stripped of them lightly.¹⁸⁸ Involuntary termination of parental rights requires proof of unfitness by at least clear and convincing evidence.¹⁸⁹ And for relinquishment of parental rights and consent to adoption, knowledge and voluntary consent is required.¹⁹⁰ The distinction between involuntary termination and voluntary relinquishment are legal categories that may make little difference to the emotions of birth parents. Wiley and Baden note that the distinction between these two legal categories are points on a continuum rather than firmly cabined categories.

Whereas some birth parents who sign voluntary relinquishment papers actually feel coerced by loved ones, spouses, parents, or even their culture (i.e., cultural norms against childbearing out of wedlock) to relinquish their children, other birth parents who

¹⁸⁴ 1 JOAN HEIFETZ HOLLINGER, *ADOPTION LAW AND PRACTICE* § 2.01 (2023).

¹⁸⁵ *Barwin v. Reidy*, 307 P.2d 175, 180 (N.M. 1957).

¹⁸⁶ 1 HOLLINGER, *supra* note 184.

¹⁸⁷ *See, e.g., Prince v. Massachusetts*, 321 U.S. 158 (1943) (recognizing the constitutional right of parents to rear their children as they deem appropriate); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (recognizing the constitutional right of parents to choose how their children should be educated); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (recognizing the constitutional right of parents to rear and educate their children).

¹⁸⁸ *See* Joleen Okun, *Termination of Parental Rights*, 6 *GEO. J. GENDER & L.* 761, 761 (2005) (noting that "[p]arental rights are constitutionally protected and may not be terminated without due process of law").

¹⁸⁹ *Santosky v. Kramer*, 455 U.S. 745, 769-70 (1982).

¹⁹⁰ 1 HOLLINGER, *supra* note 184.

formally have their rights terminated by the court system can be in agreement with that plan.¹⁹¹

Involuntary termination of parental rights requires proof of wrongdoing, and supplies more procedural protections for the parents, including a requirement of clear and convincing evidence¹⁹² and, in some cases, appointment of legal counsel.¹⁹³ Birth mothers who relinquish voluntarily often have no attorney and do not have to appear in court where a judge might examine the case to ensure her rights have been protected.¹⁹⁴

Adoption is a creature of statute, so in addition to constitutional requirements, legislation sets out the requirements for valid consent in each state.¹⁹⁵ In one state, for example, consent may need to be signed in the presence of a judge;¹⁹⁶ and in another state, the consent need not be signed before a judge.¹⁹⁷ And in the case of Indian children who are the subject of the Indian Child Welfare Act, the consent must be before a judge even if state law does not require consent before a judge.¹⁹⁸

¹⁹¹ Baden & Wiley, *supra* note 163, at 21.

¹⁹² See *Santosky*, 455 U.S. at 769-70.

¹⁹³ See *Lassiter v. Dep't. of Soc. Servs.*, 452 U.S. 18, 30-31 (1981). The Court held in *Lassiter* that while due process did not require appointed counsel in every case, the weighty interest in parenthood would require counsel in some cases. A number of states, however, by statute require appointment of counsel for indigent parents in cases involving involuntary termination of parental rights. See, e.g., TEX. FAM. CODE ANN. § 107.013(a)(1) (2023). And as the Court noted in *Lassiter*, "Thus, courts have generally held that the State must appoint counsel for indigent parents at termination proceedings. *State ex rel. Heller v. Miller*, 61 Ohio St.2d 6, 399 N.E.2d 66 (1980); *Department of Public Welfare v. J.K.B.*, 379 Mass. 1, 393 N.E.2d 406 (1979); *In re Chad S.*, 580 P.2d 983 (Okla.1978); *In re Myricks*, 85 Wash.2d 252, 533 P.2d 841 (1975); *Crist v. Division of Youth and Family Services*, 128 N.J. Super. 402, 320 A.2d 203 (1974); *Danforth v. Maine Dept. of Health and Welfare*, 303 A.2d 794 (Me.1973); *In re Friesz*, 190 Neb. 347, 208 N.W.2d 259 (1973)." *Lassiter*, 452 U.S. at 30.

¹⁹⁴ See Malinda L. Seymore, *Ethical Blind Spots in Adoption Lawyering*, 54 U. RICH. L. REV. 461, 502 (2020) [hereinafter *Ethical Blind Spots*]; Seymore, *Sixteen & Pregnant*, *supra* note 45, at 155.

¹⁹⁵ 1 HOLLINGER, *supra* note 184.

¹⁹⁶ Seymore, *Sixteen & Pregnant*, *supra* note 45, at 152-53.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 153.

Often, consent is not defined by statute, leaving courts to determine what valid consent in adoption means. In most cases, the court does not try to define valid consent, but instead describes what they believe the absence of valid consent would look like. In a Louisiana case, *In re J.M.P.*, for example, the court considered consent in adoption to be akin to consent in contract law, and looked to the same issues that would vitiate consent in contract: error, fraud, or duress.¹⁹⁹ The court relied on the provisions of the Civil Code defining error, fraud, or duress that would control a stock redemption agreement, or transfer of property, or sale of property. The court made no adjustment to the standards to take into account that the agreement involved a child and a parent's constitutional rights as a parent, rather than a widget.

Cases involving adoption consent are fact-based determinations,²⁰⁰ with courts generally unwilling to find that consent was invalid; often the posture of these cases involves prospective adoptive parents who have had custody of the child for some time and courts will not want to disturb that arrangement.²⁰¹ Even when courts find serious defects in the adoption, including invalid consent, courts will often hold that it would not be in the best interest of the child to invalidate the adoption. As one court put it, it was inadvisable to transfer custody of a "child who has spent almost his entire life with an adoptive mother, father and siblings" to have him "taken to another place and brought up by people

¹⁹⁹ See *In re J.M.P.*, 528 So. 2d 1002, 1007-08 (La. 1988).

²⁰⁰ As one court put it:

Eons would be required to recount the opinions flailing the curial saw that each case must be determined in accordance with its particular facts. Especially is this true of adoption cases where the principal participants in one are no more alike to those in another than their fingerprints. A dissertation on the obvious factual differences existing among the heretofore noted opinions, readily discernible to any reader, would provide nothing but an unwelcome elongation of this opinion.

In re D., 408 S.W.2d 361, 368 (Mo. Ct. App. 1966).

²⁰¹ See Seymore, *Adopting Civil Damages*, *supra* note 127, at 895; see also *Benson v. Jordan*, 584 N.Y.S.2d 376, 376-77 (App. Div. 1992), *leave denied*, 602 N.E.2d 1127 (N.Y. 1992) (despite invalid consent, child not to be returned to natural mother in light of presence of two-year-old child in adoptive parents' custody since he was less than four months old).

who are complete strangers to him.”²⁰² Adoption agencies and their lawyers are aware of this clear trend, and will strategically delay the litigation to make stronger the argument that it would be harmful to the child to disrupt the placement.²⁰³

In assessing whether consent is impaired by duress, coercion, or undue influence, courts will consider a number of factors, including the maturity or immaturity of the person consenting,²⁰⁴ whether the parent has had the opportunity to ponder the decision,²⁰⁵ and whether they have received impartial advice.²⁰⁶ Also considered are threats,²⁰⁷ false promises,²⁰⁸ and undue influence.²⁰⁹ One court noted the following

²⁰² Lemley v. Barr, 343 S.E.2d 101, 109 (W. Va. 1986). The long delay with the child in the prospective adoptive parents' custody was caused by the adoptive parents refusing to allow disclosure of their identities and their location and the location of the child, so Tammy Lemley had to litigate in Ohio first to find out who they were, and then go to West Virginia to seek return of her child.

²⁰³ Seymore, *Adopting Civil Damages*, *supra* note 127, at 902; Seymore, *Ethical Blind Spots*, *supra* note 194, at 513 & n.344.

²⁰⁴ See, e.g., Anonymous v. Anonymous, 530 P.2d 896, 898 (Ariz. Ct. App. 1975) (no coercion when mother was “25 years of age, and a woman of considerable sophistication”); *In re D.*, 408 S.W.2d 361 (finding no valid consent because mother was only 19, together with other factors); *In re Adoption of Susko*, 69 A.2d 132 (Pa. 1949) (no valid consent when mother was 18 and subjected to “reprehensible coercion” by her 7 brothers).

²⁰⁵ See, e.g., Huebert v. Marshall, 270 N.E.2d 464 (Ill. App. Ct. 1971) (mother consented a mere two days after adoption was first mentioned to her).

²⁰⁶ See, e.g., *id.* (advice about adoption came from a friend who was emotionally involved with the biological father).

²⁰⁷ See, e.g., *J.S. v. S.A.*, 912 So. 2d 650 (Fla. Dist. Ct. App. 2005) (mother alleged that school counselor said her child would be taken away if she did not relinquish him; consent considered voluntary); *Wuertz v. Craig*, 458 So. 2d 1311 (La. 1984) (unwarranted threat from grandmother that she would report mother for criminal child abuse rendered consent invalid).

²⁰⁸ See, e.g., *In re S.O.*, 795 P.2d 254 (Colo. 1990) (unenforceable promise of visitation rights post-adoption was not sufficient to invalidate consent); *Vela v. Marywood*, 17 S.W.3d 750 (Tex. App. 2000) (consent invalid where agency's promise of open adoption was unenforceable and thus illusory).

²⁰⁹ See, e.g., *In re Adoption of Baby Boy Irons*, 684 P.2d 332 (Kan. 1984) (where physician recommended adoption and would not let mother see the baby after birth until she had met with adoption attorney, undue influence invalidated consent); *Gray v. Maxwell*, 293 N.W.2d 90 (Neb. 1980) (unlawful payments to birth mother is undue influence that invalidates consent); *Sorentino v. Fam. & Child.'s Soc'y*, 367 A.2d 1168

factors characterize undue influence and over-persuasion: “(1) discussion and consummation of the transaction in an unusual place; (2) insistent demand that the business be finished at once; (3) extreme emphasis on untoward consequences of delay; and (4) absence of third party advisors to the servient party.”²¹⁰ So where adoption was first suggested by the unwed mother’s doctor who shared her Adventist faith and who called an Adventist adoption agency in another state for her, and where she moved to that other state at the behest of the agency and was surrounded by Adventist church members who worked to get her to consent to adoption, the court found undue influence.²¹¹

B. *Special Issues in Consent*

Despite the language of careful consent suggested in the legal rules, consent in adoption tends to shift according to social expectations. Judges who see adoption as an unmitigated good are reluctant to disrupt an adoption placement and therefore accept consent in circumstances that seem quite clearly involuntary. Consent needs to be seen as a standard with teeth to prevent problematic tactics used today to induce consent.

1. Crisis Pregnancy Centers & High-Pressure Tactics

Crisis pregnancy centers masquerade as medical clinics, but they are designed to dissuade pregnant persons from having abortions.²¹² They

(N.J. 1976) (consent induced by undue influence where agency representative threatened harassment and litigation and failed to inform mother of options for care of the child other than an immediate choice either of irrevocable surrender for adoption or return of the child); *Methodist Mission Home v. N.A.B.*, 451 S.W.2d 539 (Tex. Civ. App. 1970) (over-persuasion by maternity home). *But see* *B.A.L. v. Edna Gladney Home*, 677 S.W.2d 826 (Tex. App. 1984) (no over-persuasion by maternity home). Some specific problems relating to potentially invalid consent, including false promises and duress of circumstances is discussed, *infra*, at text accompanying nn. 212-354.

²¹⁰ *In re Cheryl E.*, 207 Cal. Rptr. 728, 737 (Ct. App. 1984).

²¹¹ *In re Perry*, 641 P.2d 178, 179-80 (Wash. Ct. App. 1982).

²¹² *See* Aziza Ahmed, *Medical Evidence and Expertise in Abortion Jurisprudence*, 41 AM. J.L. & MED. 85, 115 (2015) (noting that crisis pregnancy centers mislead women into believing they provide abortions to get them in the door so they can persuade them not to get an abortion); Brittany A. Campbell, Note, *The Crisis Inside Crisis Pregnancy Centers:*

may offer free pregnancy tests and ultrasounds, but they often have no doctors or any other professionals who can provide medical services.²¹³ They are usually religiously-affiliated,²¹⁴ and will promote parenting only within marriage and adoption if unmarried.²¹⁵ In anti-abortion states, they are often funded by public money. In Texas, “The legislature approved \$100 million for crisis pregnancy centers in 2021, to be doled out over two years, while simultaneously banning abortions after six weeks of pregnancy.”²¹⁶ Some of that money may have been used to misdirect women seeking abortions to the center: they “took to Google, . . . paying thousands of dollars to bid on key search terms. Now, whenever someone in Corpus Christi searches for phrases like ‘need an abortion’ or ‘abortion cost Texas,’ the Pregnancy Center of the Coastal Bend is regularly the first item on the list.”²¹⁷

With the end of Roe, one might think that crisis pregnancy centers will vanish to the same extent that abortion clinics will vanish, as they

How to Stop These Facilities from Depriving Women of Their Reproductive Freedom, 37 B.C. J.L. & SOC. JUST. 73, 77 (2017).

²¹³ See Beth Holtzman, *Have Crisis Pregnancy Centers Finally Met Their Match: California's Reproductive FACT Act*, 12 NW. J.L. & SOC. POL'Y 78, 79-80 (2017).

²¹⁴ See Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2368 (2018) (quoting from the report of the California Legislature in passing regulations concerning crisis pregnancy centers, identifying them as “pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center”).

²¹⁵ Kathryn Joyce, *Shotgun Adoption*, NATION (Aug. 26, 2009), <https://www.thenation.com/article/archive/shotgun-adoption/> [<https://perma.cc/C4B8-4TFV>] (noting that religiously-based centers “oppose unmarried parenthood as against ‘God’s plan for the family’”); see Caroline Kitchener & Beth Reinhard, *A Texas Blueprint for Converting the “Abortion-Minded”: Lattes and a View*, WASH. POST (July 31, 2022, 8:00 AM EDT), <https://www.washingtonpost.com/politics/2022/07/31/pregnancy-center-of-the-coastal-bend-expansion/> [<https://perma.cc/J2GJ-HDKX>] (the Pregnancy Center of the Coastal Bend brags that their new crisis pregnancy center will have a “man cave” for the partners of those seeking services, and the men will be talking to a certified marriage counselor); Anna North, *The Anti-Abortion “Social Safety Net,”* VOX (June 28, 2022, 7:30 AM EDT), <https://www.vox.com/23184939/abortion-ban-roe-wade-crisis-pregnancy-centers> [<https://perma.cc/YNL3-6LZV>] (quoting Professor Katrina Kimport saying that crisis pregnancy centers have “an expectation of monogamy, of marriage, of a two-parent home,” and of a male breadwinner and “female caretaker and primary caregiver”).

²¹⁶ Kitchener & Reinhard, *supra* note 215.

²¹⁷ *Id.*

need not dissuade women from seeking abortions. But instead, it appears that they are prepared to rebrand themselves. Consider the Pregnancy Center of the Coastal Bend in Texas, where all abortions are banned; “[r]ight next to the local Texas A&M campus, looking out over the Oso Bay, Pinson’s \$10 million crisis pregnancy center will be built to attract female undergraduates, with a coffee shop and a thrift store visible from the road, and a patio where students can sip their caffè lattes.”²¹⁸ The mission of the Center is already entwined with adoption — their website promotes adoption and promises to recommend adoption agencies.²¹⁹

While the role of crisis pregnancy centers in abortions is well known, their role in promoting adoption is less high-profile. Kathryn Joyce reported in 2009 that crisis pregnancy centers “seek not only to induce women to ‘choose life,’ but to choose adoption.”²²⁰ One crisis pregnancy center took that mission so far that they were charged with five counts of unlicensed adoption and foster care practices in South Dakota, after offering women money to continue their pregnancies to term and relinquish the babies for adoption.²²¹ In 2000, the Family Research Council produced a report, *The Missing Piece: Adoption Advocacy and Pregnancy Resource Centers*, decrying the terrible record that crisis pregnancy centers had in persuading women to place children for adoption: “their leaders should address this weakness,” the report said, “so that more adoptions can occur.”²²² The report encourages the training of crisis pregnancy counselors to change women’s minds about adoption.

The National Council for Adoption (“NCFA”) has taken up that education mission.²²³ They spearheaded legislation to create and fund

²¹⁸ *Id.*

²¹⁹ *Pregnancy Options Texas*, PREGNANCY CTR. OF THE COASTAL BEND, <https://ccpregnancy.org/pregnancy-center-south-texas/pregnancy-services/pregnancy-options/adoption-texas/> (last visited July 22, 2023) [<https://perma.cc/9EDZ-ZUZ4>].

²²⁰ Joyce, *supra* note 215.

²²¹ *Id.*; JESSICA VALENTI, *THE PURITY MYTH: HOW AMERICA’S OBSESSION WITH VIRGINITY IS HURTING YOUNG WOMEN* 114 (2009).

²²² CURTIS J. YOUNG, *FAM. RSCH. COUNCIL, THE MISSING PIECE: ADOPTION ADVOCACY AND PREGNANCY RESOURCE CENTERS 2* (2000).

²²³ The National Council for Adoption describes itself as an advocacy organization that has “worked tirelessly to increase public understanding of adoption and promote a

the Infant Adoption Awareness Program, which offers free training to those who might come into contact with pregnant teens at health clinics, to encourage adoption.²²⁴ The NCFA also offers the training to school nurses and counselors, abstinence program personnel, and crisis pregnancy center counselors to encourage girls to consider adoption placement.²²⁵ Although the law requires counseling to be nondirective, there is considerable evidence in the training materials that the counselor is expected to direct the girl towards adoption. One method suggested in the training materials is that a girl resistant to adoption is self-deceived and selfish, is behaving “inhumanely.”²²⁶ The counselor is advised to “be relentless” in promoting adoption.²²⁷

Rather than simply providing truthful and accurate information about adoption, as the materials claim, the counseling relentlessly promotes adoption as the best option, not just one of many options. The counseling presents outdated information about adoption, including studies that show negative effects of single parenting and positive

positive image of adoption as a loving way to build nurturing, permanent families.” *About National Council for Adoption*, NAT'L COUNCIL FOR ADOPTION, <https://adoptioncouncil.org/who-we-are/about-us/> (last visited July 22, 2023) [<https://perma.cc/54TS-2JG6>]. They also represent adoption agencies who become members of the NCFA:

We represent the concerns and interests of our member agencies before policymakers and foreign and domestic governments to ensure adoption-friendly practices. Our member agencies speak with one powerful voice on matters of common interest, and, whenever possible, we assist them individually with policy issues in their states and specific-case problems they encounter with government agencies.

NCFA Membership Information, NAT'L COUNCIL FOR ADOPTION, <https://adoptioncouncil.org/adoption-professionals/membership-requirements/> (last visited July 22, 2023) [<https://perma.cc/35SU-P2HY>].

²²⁴ See Children's Health Act of 2000, Pub. L. No. 106-310, § 1201, 114 Stat. 1101, 1132-35.

²²⁵ *Pregnancy Counseling Training*, NAT'L COUNCIL FOR ADOPTION, <https://adoption.mclms.net/en/package/2924/course/1697/view> (last visited June 18, 2022) [<https://perma.cc/7DDT-PZLA>]. See also Ashley Albert & Amy Mulzer, *Adoption Cannot be Reformed*, 12 COLUMBIA J. RACE & L. 558, 595 n. 176 (2022).

²²⁶ *Training Handout*, Nat'l Council for Adoption, *Birth Parent Counseling, Adoption Practices in the Humane World* (2022) (on file with author) (handout provided for course instructing on counseling birth parents).

²²⁷ *Id.*

effects of adoption placement on the birth mother's well-being.²²⁸ The information ignores the more nuanced understanding of problems related to teen childbearing prevalent today, which relate these problems to the underlying poverty that is a risk factor for teen pregnancy. In other words, "studies have called into question the methodological error of assuming that teens who became mothers would have had the same life trajectories as teens who did not, had they delayed pregnancy."²²⁹ Instead, when researchers compared similarly situated girls who parented to girls who experienced miscarriages, they found that many of the negative consequences of teen childbearing were less than expected and relatively short-lived.²³⁰

The NCFA materials about the effect of adoption on adoptees is similarly one-sided.²³¹ This cherry-picked data ignores countless studies showing less rosy outcomes. For example, while adoption often has a positive effect on adoptees,²³² psychological studies show issues that many adoptees face throughout their lifetimes.²³³ Many adoptees struggle with adoption identity issues, which may explain high levels of behavioral issues reported in adopted children and adolescents,²³⁴ as

²²⁸ Training Materials, Nat'l Council for Adoption, Introduction to "Adoption Practices in the Humane World," (2005) (on file with author) (reciting studies indicating that single parenthood causes poverty and lack of education for mothers and behavioral issues for children).

²²⁹ Arielle F. Shanok & Lisa Miller, *Stepping Up to Motherhood Among Inner-City Teens*, 31 PSYCH. WOMEN Q. 252, 252 (2007).

²³⁰ Seymore, *Sixteen & Pregnant*, *supra* note 45, at 109.

²³¹ Training Materials, Nat'l Council for Adoption, Good for Birth Mothers and Children (on file with author) (reciting studies indicating that adopted children have higher levels of well-being and lower levels of behavior problems than biological children).

²³² THE EVAN B. DONALDSON ADOPTION INST., BEYOND CULTURE CAMP: PROMOTING HEALTHY IDENTITY FORMATION IN ADOPTION 14 (2009); David M. Brodzinsky, *Long-Term Outcomes in Adoption*, 3 FUTURE CHILD. 153, 153 (1993).

²³³ Harold D. Grotevant, Albert Y.H. Lo, Lisa Fiorenzo & Nora D. Dunbar, *Adoptive Identity and Adjustment From Adolescence to Emerging Adulthood: A Person-Centered Approach*, 53 DEVELOPMENTAL PSYCH. (2017).

²³⁴ See, e.g., *id.* (explaining the special challenges faced by adoptees in developing a coherent identity that links past, present and future); DAVID M. BRODZINSKY, MARSHALL D. SCHECHTER & ROBIN MARANTZ HENIG, BEING ADOPTED: THE LIFELONG SEARCH FOR SELF (1992) (describing adoptees' identity struggles at various phases of development in childhood and adulthood); David M. Brodzinsky, Leslie M. Singer & Anne Braff,

well as the fact that they are significantly overrepresented in mental health care facilities.²³⁵ Studies have also shown an increased risk of suicide and suicide attempts by adoptees.²³⁶ Adoptees may experience adoption not as the exclusively happy event adoptive parents and society ascribe to it, but as a more nuanced experience.²³⁷ Adoptees may experience adoption as a profound loss — loss of family, loss of culture, loss of language, loss of all sense of familiarity — despite the

Children's Understanding of Adoption, 55 CHILD DEV. 869 (1984) (identifying identity struggles as a reason adoptees are over-represented in psychological treatment settings); Femmie Juffer, *Children's Awareness of Adoption and Their Problem Behavior in Families with 7-Year-Old Internationally Adopted Children*, 9 ADOPTION Q. 1 (2006) (noting the link between identity and behavioral struggles in adoptees); Daniel W. Smith & David Brodzinsky, *Stress and Coping in Adopted Children: A Developmental Study*, 23 J. CLINICAL CHILD PSYCH. 91 (1994) (acknowledging the overrepresentation of adoptees in psychological treatment settings).

²³⁵ Smith & Brodzinsky, *supra* note 234, at 91; *see also* Michael Wierzbicki, *Psychological Adjustment of Adoptees: A Meta-Analysis*, 22 J. CLINICAL CHILD PSYCH. 447, 450-51 (1993) (adoptees significantly overrepresented in clinical populations). It is possible that the overrepresentation of adoptees in clinical populations is not because of increased incidences of psychological problems, but because of increased rates of referrals by adoptive parents and professionals who are aware of issues relating to adoption and, therefore, might be more inclined to refer. *See* Brodzinsky, *supra* note 232, at 154; Femmie Juffer & Marinus H. van Ijzendoorn, *Behavior Problems and Mental Health Referrals of International Adoptees: A Meta-Analysis*, 293 J. AM. MED. ASS'N 2501, 2507 (2005) (noting that adoptees, both domestic and international, exhibited more behavior problems than nonadoptive controls, and were overrepresented in mental health referrals).

²³⁶ Annika von Borczyskowski, Anders Hjern, Frank Lindblad & Bo Vinnerljung, *Suicidal Behaviour in National and International Adult Adoptees: A Swedish Cohort Study*, 41 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 95, 99 (2006); Margaret A. Keyes, Stephen M. Malone, Anu Sharma, William G. Iacono & Matt McGue, *Risk of Suicide Attempt in Adopted and Nonadopted Offspring*, 132 PEDIATRICS 639, 644 (2013) (odds of a reported suicide attempt were approximately four times greater in adoptees compared with nonadoptees); Gail Slap, Elizabeth Goodman & Bin Huang, *Adoption as a Risk Factor for Attempted Suicide During Adolescence*, 108 PEDIATRICS 1, 1 (2001) (reporting an increased risk of suicide among American adoptees living with an adoptive parent when compared to those living with a biological parent). *But see* William Feigelman, *Are Adoptees at Increased Risk for Attempting Suicide?*, 35 SUICIDE & LIFE-THREATENING BEHAV. 206, 213 (2005) (reporting no greater risk of attempting suicide and depression for adoptees).

²³⁷ Brodzinsky, *supra* note 232, at 153; Penny Callan Partridge, *The Particular Challenges of Being Adopted*, 61 SMITH COLL. STUD. SOC. WORK 197, 199 (1991).

“replacement” of the lost birth family by an adoptive family.²³⁸ Adoptees may fear abandonment and rejection, and experience issues with trust and attachment that affects future relationships.²³⁹ Because of cultural biases that favor biological families, adoptees may face stigma and microaggressions associated with being adopted.²⁴⁰ Yet none of this information is reflected in the training materials offered by the NCFA.

One of the biggest drivers of adoption pressure tactics is, as Justice Alito put it, the dearth of domestic supply of infants. Although adoption presents as a child welfare institution, it is unavoidable to admit that it is also a business.²⁴¹ Adoption agencies get paid when children are successfully placed with the adoptive family, creating the incentive to procure consent from the birth mother. With that incentive comes the potential for duress and coercion, including using cherry-picked positive information about adoption and ignoring any troublesome information about adoption. It is hard to argue informed consent in such an atmosphere.

²³⁸ Partridge, *supra* note 237, at 199.

²³⁹ Michael F. McGinn, *Developmental Challenges for Adoptees Across the Life Cycle*, in *HANDBOOK OF ADOPTION: IMPLICATIONS FOR RESEARCHERS, PRACTITIONERS, AND FAMILIES*, *supra* note 174, at 61, 65; Wendy Tieman, Jan van der Ende, Frank C Verhulst, *Social Functioning of Young Adult Intercountry Adoptees Compared to Nonadoptees*, 41 *SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY* 68, 70 (2006) (adult adoptees in the study were almost two times less likely to be married than nonadopted counterparts, were less likely to be living with a romantic partner, and were less likely to have had a relationship that lasted longer than one year). *But see* Johanna Despax, Evelyne Bouteyre & Jean-Baptiste Pavani, *Adoptees’ Romantic Relationships: Comparison with Nonadoptees, Psychological Predictors and Long-Term Implications of the Adoption Pathway*, 24 *ADOPTION Q.* 251, 265 (2021) (finding no differences between adoptees and nonadoptees not accounted for by pre-adoption experiences).

²⁴⁰ James G. Dwyer, *First Parents: Reconceptualizing Newborn Adoption*, 37 *CAP. U. L. REV.* 293, 295-96 (2008) (noting that adoptive parents and adoptees are stigmatized); *see also* Amanda L. Baden, “Do You Know Your Real Parents?” and Other Adoption Microaggressions, 19 *ADOPTION Q.* 1, 13 (2016) (examining adoption stigma and microaggressions and identifying 13 themes common to adoption stigma).

²⁴¹ Seymore, *Adopting Civil Damages*, *supra* note 127, at 903 (“There has long been an economic as well as child welfare model of adoption.”).

2. Targeting Birth Mothers: Low-Tech and High-Tech

Looking for potential birth mothers in places where teen girls might be found was part of the motivation for NCFA to offer training on adoption to school nurses, workers at crisis pregnancy centers, and the like. As noted before, one crisis pregnancy center feels that enticing women and girls in with a thrift shop and a coffee shop — as well as beautiful views of the oceans — will do the trick.²⁴² But high-tech tactics have now entered the picture. Prospective adoptive parents were once told to search for birth parents by putting flyers up at church or in college unions or in the grocery store or laundromat²⁴³ and print up business cards to hand out to barbers and store clerks;²⁴⁴ to print up bumper stickers with a “Crisis Pregnancy?” message and a 1-800 number that would ring in the adoptive parents’ home;²⁴⁵ to let their preachers, doctors, or lawyers know they wanted to adopt, since those folks might interact with pregnant girls;²⁴⁶ and print up ads in the newspaper.²⁴⁷

Adoptive parent and well-known real estate mogul and *Shark Tank* judge Barbara Corcoran said of advertising to adopt:

‘Attracting moms who wanted to give you their baby was exactly the same as writing a good real estate ad,’ says Corcoran. ‘You

²⁴² Kitchener & Reinhard, *supra* note 215.

²⁴³ One site suggests bulletin boards at “laundromats and trailer parks,” on the theory that these are places where people in financial difficulties might be found. *Advertising Tips for Finding Prospective Birth Mothers*, CREATING A FAM., <https://creatingafamily.org/adoption-category/advertising-tips-finding-prospective-birth-mothers/> (last visited July 15, 2023) [<https://perma.cc/U4J7-3KMX>].

²⁴⁴ LAURA BEAUVAIS-GODWIN & RAYMOND GODWIN, *THE COMPLETE ADOPTION BOOK: EVERYTHING YOU NEED TO KNOW TO ADOPT A CHILD* 140 (2005); CHERYL JONES, *THE ADOPTION SOURCEBOOK: A COMPLETE GUIDE TO THE COMPLEX LEGAL, FINANCIAL, AND EMOTIONAL MAZE OF ADOPTION* 141 (1998).

²⁴⁵ BEAUVAIS-GODWIN & GODWIN, *supra* note 244, at 140; JONES, *supra* note 244, at 140.

²⁴⁶ JONES, *supra* note 244.

²⁴⁷ *Id.* at 142 (stating that “[a]ds are usually short and simple such as: ‘Childless couple seeks to adopt a baby. We can provide love, security, and a wonderful extended family. Call 555-1212’”). Note, however, that in some states, advertising to adopt a child or to place a child for adoption is illegal. U.S. DEP’T OF HEALTH & HUM. SERVS., CHILD’S BUREAU, *USE OF ADVERTISING AND FACILITATORS IN ADOPTIVE PLACEMENTS 2* (2020) (noting that 33 states have laws that “in some way limit or regulate the use of advertising in adoptive placement”).

needed a great top line, and my top line I used in every Pennysaver in the Catholic states was ‘I want your child to ski in the winter and spend summers at the beach.’ Sort of like the baby version of ‘views and lots of light,’ she says, laughing. ‘It’s all sales. I think I had 27 moms who wanted me to take their babies — and it’s not easy getting a baby in America.’²⁴⁸

Of course, the danger of adoption advertising is not simply the potentially coercive effect; it is also the commodification that advertising represents.²⁴⁹ Corcoran’s ad perfectly illustrates that problem, with her analogy to real estate ads, her conclusion that it is all sales, and that she is very, very, very good at sales.

Advice about how to reach potential birth parents has reached to higher-tech options with the advent of the internet.²⁵⁰ Messages on Facebook from prospective adoptive parents abound, and adoptive parents will go onto Facebook groups for women experiencing crisis pregnancy in order to announce they will take the baby if the mother doesn’t want to parent. In one infamous case, a prospective adoptive parent left a message on a pregnant woman’s baby registry expressing the desire to adopt the baby if the mother did not want to keep it: “If anything falls through with your husband, or you wish against this baby, I would be happy to take it off your hands, no questions asked.”²⁵¹

²⁴⁸ Kris Frieswick, *Why Barbara Corcoran Thinks Growing Up Poor Is a Key Ingredient for Success*, INC. MAG. (Nov. 2016), <https://www.inc.com/magazine/201611/kris-frieswick/barara-corcoran-beyond-shark-tank.html> [<https://perma.cc/ZQ74-NDW2>]. Note also the mention of placing ads in Catholic states, on the apparent assumption that pregnant girls who would not abort were more likely to be found there.

²⁴⁹ JULIE SAMUELS, ADOPTION IN THE DIGITAL AGE: OPPORTUNITIES AND CHALLENGES FOR THE 21ST CENTURY 29 (2018); Elizabeth Hunter Milovidov & Vilna Bashi Treitler, *The Commodification and Online Marketing of Children in Transnational Adoption*, in RACE IN TRANSNATIONAL AND TRANSRACIAL ADOPTION 84, (Vilna Bashi Treitler ed., 2014); Matthew Higgins & Warren Smith, *Engaging the Commodified Face: The Use of Marketing in the Child Adoption Process*, 11 BUS. ETHICS: A EUR. REV. 179, 186-87 (2002).

²⁵⁰ ADAM PERTMAN, ADOPTION NATION: HOW THE ADOPTION REVOLUTION IS TRANSFORMING AMERICA 249-51 (2000) (noting the way the world wide web has changed adoption recruitment); *Advertising Tips for Finding Prospective Birth Mothers*, *supra* note 243; see also SAMUELS, *supra* note 249, at 29; Milovidov & Treitler, *supra* note 249, at 84.

²⁵¹ Karpoozy (@Karpoozy), TIKTOK (Mar. 15, 2022), <https://tinyurl.com/5xnbkacp> [<https://perma.cc/RUN6-J9KD>].

Adoption agencies and other service providers will publish “Dear Birthparent” letters from prospective adoptive parents online for birth parents to review.²⁵² In fact, there are services that will create compelling “Dear Birthparent” letters and adoption portfolios to help adoptive parents market themselves to birth parents.²⁵³ Photo listings of adoptable children tug at prospective parents’ heartstrings.²⁵⁴

Perhaps one of the most sophisticated attempts to reach potential birth mothers recently came from Bethany Christian Services, an adoption agency. They hired a digital adoption agency to use a technology called geo-fencing²⁵⁵ — a location-based advertising technology — to identify women (or rather women’s smartphones) entering reproductive health clinics. Targeted ads would then be sent to

²⁵² Kristen M. Norwood & Leslie Baxter, “Dear Birth Mother”: *Addressivity and Meaning-Making in Online Adoption-Seeking Letters*, 11 J. FAM. COMM’N 198, 201 (2011). For examples, see *Choose a Family*, ADOPTION.ORG, GLADNEY CTR. FOR ADOPTION, <https://adoption.org/choose-a-family> (last visited July 20, 2023) [<https://perma.cc/F5Y7-KTGK>]; *Parent Profiles, Adoption Advertising & Marketing for Adoptive Parents*, ADOPTIMIST, <https://www.adoptimist.com/hopeful-parents> (last visited July 20, 2023) [<https://perma.cc/E3J2-35G5>] (not affiliated with an adoption agency, but for parents interested in private direct placement adoption to post a profile in the hopes a prospective birth mother will select it); *View Waiting Families*, AM. ADOPTIONS, https://www.americanadoptions.com/family_profile/browse (last visited July 20, 2023) [<https://perma.cc/NSB7-GLV2>].

²⁵³ See, e.g., ADOPTION PROFILES BY DESIGN, <https://www.adoptionprofilesbydesign.com/> (last visited July 20, 2023) [<https://perma.cc/XA23-TLY2>] (according to the order form, writing the profile will cost \$400, light editing of a profile you write will cost \$50; layout and printing cost more); *Adoption Profile Design Service*, MY ADOPTION ADVISOR, <https://myadoptionadvisor.com/adoption-profile-design/> (last visited July 20, 2023) [<https://perma.cc/4BK2-JDAR>] (offers advising on profile design, content and layout); OUR CHOSEN CHILD, <https://www.ourchosenchild.com/> (last visited July 20, 2023) [<https://perma.cc/4F66-4XU2>] (offers adoption portfolios and website design for prospective adoptive parents).

²⁵⁴ At AdoptUSKids, you can search photo listings by age of child, race, sex, and state. You can also consider siblings at the same time. *Search AdoptUSKids Photolisting*, ADOPTUSKIDS, <https://www.adoptuskids.org/meet-the-children/search-for-children/search> (last visited July 20, 2023) [<https://perma.cc/6UHD-VH8X>].

²⁵⁵ Michael Downey, *Legal Ethics and Geofencing*, 45 LITIG. J. 64, 64 (2019) (describing geo-fencing as a “marketing technique that sets virtual geographic boundaries or ‘fences’ for advertising When a smartphone or similar device enters, leaves, or is located in the fenced area — the geographic area marked by the virtual boundary — the device receives a communication”).

their smartphones suggesting they consider adoption and contact Bethany Christian Services.²⁵⁶ An adoption agency worker, after being contacted by the ad agency to explain their services, reacted as follows:

I felt disgust, and I felt protective of these women who are going to seek sensitive medical services at a time when they're vulnerable

They're being spied on by this capitalist vulture who is literally trying to sell their fetuses To do this to women without consent is predatory and it's an invasion of her privacy, and unethical.²⁵⁷

Imagine the effect of receiving an adoption agency ad out of the blue while sitting in an abortion clinic. Especially for someone unaware of geo-fencing, might it seem like a message from God or fate or some other force telling you to forego the abortion and choose adoption instead? As the adoption worker mentioned above said of the ad agency executive's scheme, "He's doing it and it's working and it's probably really impacting human trajectories It changes human lives to be funneled into a system like this."²⁵⁸

In a post-*Roe* world it may seem harder to geo-fence to find women in crisis pregnancies seeking abortions, since shuttered abortion clinics will not be a convenient location in which to fish for birth mothers. But in the way low-tech outreach has targeted potential birth parents, geo-

²⁵⁶ Christina Cauterucci, *Anti-Abortion Groups Are Now Sending Targeted Smartphone Ads to Women in Abortion Clinics*, SLATE (May 26, 2016, 4:31 PM), <https://slate.com/human-interest/2016/05/anti-abortion-groups-are-sending-targeted-smartphone-ads-to-women-in-abortion-clinics.html> [<https://perma.cc/37VV-KHCX>]; Sharona Coutts, *Anti-Choice Groups Use Smartphone Surveillance to Target 'Abortion-Minded Women' During Clinic Visits*, REWIRE NEWS GRP. (May 25, 2016), <https://rewirenewsgroup.com/article/2016/05/25/anti-choice-groups-deploy-smartphone-surveillance-target-abortion-minded-women-clinic-visits/> [<https://perma.cc/J8LM-YLNB>]; Joel Martinez, *Agreement Bars Ad Firm from Targeting Women Entering Clinics*, 22NEWS W.W.L.P. (Apr. 4, 2017, 7:00 PM EDT), <https://www.wwlp.com/news/agreement-bars-ad-firm-from-targeting-women-entering-clinics/> [<https://perma.cc/SZT5-Y4JA>]. For more about geo-fencing and privacy issues, see Kearston L. Wesner, *Is the Grass Greener on the Other Side of the Geofence: The First Amendment and Privacy Implications of Unauthorized Smartphone Messages*, 10 CASE W. RESRV. J.L. TECH. & INTERNET 1, 2-3 (2019).

²⁵⁷ Coutts, *supra* note 256.

²⁵⁸ *Id.*

fencing can do the same, by focusing on college girls entering the student health center, women visiting a prenatal clinic in a poor area, and the like. The geo-fencing plan mentioned above targeted methadone clinics as well as abortion clinics²⁵⁹ (think about what that says about who they thought potential birth mothers were).

3. Money

Much has been written about money in adoption. Richard Posner has argued that what's needed is an elimination of "legal restrictions that prevent the market from operating freely in the sale of babies as of other goods," on the premise that allowing birth parents to sell their children would increase the legal supply of children and eliminate the black market (where children are illegally sold).²⁶⁰ Michele Goodwin asserts that adoption as currently practiced in the U.S. is a market, noting that "economic interests influence adoption more than we might like to acknowledge."²⁶¹ But she does not accept that a market model is good, analogizing to slave markets, and noting that the market is racialized so that highly-desirable white babies cost more than Black babies.²⁶² Margaret Jane Radin notes the problem of commodification when babies become objects to be sold, and argues that "freedom/autonomy for women" arguments are inapposite:

Under a market regime, prostitutes may be choosing to sell their sexuality, but babies are not choosing for themselves that under current nonideal circumstances they are better off as commodities. If we permit babies to be sold, we commodify not only the mother's (and father's) baby-making capacities — which might be analogous to commodifying sexuality — but we also conceive of the baby itself in market rhetoric.²⁶³

²⁵⁹ *Id.*

²⁶⁰ Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 339 (1978).

²⁶¹ Goodwin, *supra* note 30, at 4.

²⁶² *See id.* at 8.

²⁶³ Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1925 (1987). Radin makes an important point, that adopted children are not making the choice to be adopted, yet they are bound for life by the actions of their parents. Adoption reform

While baby-selling is roundly condemned, adoption is a “nearly \$2 billion-a-year US business that is growing fast.”²⁶⁴ About the only actor who is not allowed to make money is the birth parent. Birth parents can receive money for living, medical, and birth expenses, but even that is regulated and limited.²⁶⁵ The Uniform Adoption Act, for example, authorizes payment for “living expenses of a mother for a reasonable time before the birth of her child and for no more than six weeks after the birth.”²⁶⁶

Birth mothers in one survey reported that prospective adoptive parents gave them gifts during the pregnancy, such as “art supplies, flowers, books, and dinners out.”²⁶⁷ A Consumer Guide to adoption recognizes, “There are individuals who will bend and break the rules to achieve a result that was not intended by the law. There are adoption professionals from sea to shining sea who will and do look at the ability to provide financial assistance to the birth mother as a way to ‘buy’ the baby.”²⁶⁸ As one adoptive father said, about making payments to the birth mother on advice of his agency, “We were led to understand, in so many words, that the more we gave her, the more obligated she’d feel to give up her child, which she ultimately did.”²⁶⁹

Prospective birth mothers will often feel beholden to the agency or the maternity home or the prospective adoptive parents for any expenditures they make for her, which raises serious questions about the voluntariness of consent.²⁷⁰ As one birth mother put it, “I felt like I

advocates often argue that they should have access to original birth certificates as they become adults, since they feel they are not bound by agreements they had no part in. Some argue that they should be able to nullify the adoption once they reach adulthood.

²⁶⁴ Sue Zeidler, *Net Transforms U.S. Adoption Process*, SYDNEY MORNING HERALD (July 23, 2004, 10:00 PM), <https://www.smh.com.au/technology/net-transforms-us-adoptionprocess-20040723-gdjefi.html> [<https://perma.cc/SW7E-E8GG>].

²⁶⁵ See, e.g., UNIF. ADOPTION ACT § 7-103 (UNIF. L. COMM’N 1994) (section on lawful payments related to adoption); 1 HOLLINGER, *supra* note 184, § 3.05 (section on fees and permissible payments).

²⁶⁶ UNIF. ADOPTION ACT § 7-103(5).

²⁶⁷ MADDEN ET AL., *OPTIONS COUNSELING I*, *supra* note 125, at 25.

²⁶⁸ ROBERT A. KASKY & JEFFREY KASKY, *THE ABA CONSUMER GUIDE TO ADOPTING A CHILD: EVERYTHING YOU NEED TO KNOW FOR A SUCCESSFUL ADOPTION* 47 (2016).

²⁶⁹ PERTMAN, *supra* note 250, at 250.

²⁷⁰ Andrea B. Carroll, *Reregulating the Baby Market: A Call for a Ban on Payment of Birth-Mother Living Expenses*, 59 U. KAN. L. REV. 285, 312-13 (2011).

couldn't back out because the prospective adoptive parents told me about all the things they bought for my baby."²⁷¹ The birth mother may worry about the inability of her family or herself to pay them back if she were to change her mind about placing the child. Some will create an impression that they will charge her if she changes her mind,²⁷² though doing so would look suspiciously like baby selling — the payments are then contingent on her relinquishment.²⁷³ Still, it can be a successful maneuver.²⁷⁴

4. Pre-Birth Matching

Pre-birth matching of pregnant women and prospective adoptive parents frequently occurs with private adoptions, where pregnant

²⁷¹ SAVING OUR SISTERS, <https://savingoursistersadoption.org/> (last visited July 20, 2023) [<https://perma.cc/UFB3-RSKR>] (featuring the story of McKayla, dated from 2015).

²⁷² See, e.g., *Methodist Mission Home v. N.A.B.*, 451 S.W.2d 539, 543–44 (Tex. Civ. App. 1970); Tik Root, *The Baby Brokers: Inside America's Murky Private-Adoption Industry*, TIME (June 3, 2021, 6:00 AM EDT), <https://time.com/6051811/private-adoption-america/> [<https://perma.cc/XJ9D-HQQT>] (“[T]hey made me feel like, if I backed out, then the adoptive parents were going to come after me for all the money that they had spent.”).

²⁷³ A number of states make it illegal to require a birth parent to pay the adoptive parents back for monies expended in anticipation of adoption placement. See, e.g., CAL. PENAL CODE § 273(b) (2023) (describing payments of living expenses for birth mother as an “act of charity,” making the monies non-reimbursable); MINN. STAT. ANN. § 259.55(2) (2023) (“A contract purporting to require a birth parent to reimburse a prospective adoptive parent for [living expenses] under any circumstances . . . in which a birth parent refuses to consent to adoption or withdraws consent to adoption, is void as against public policy.”); MONT. CODE ANN. § 42-7-105(4) (2023) (“It is illegal to require repayment or reimbursement of anything provided to a birth parent. . . . All payments by the adoptive parent made . . . [to] a birth parent . . . are considered a gift to the birth parent.”); N.H. REV. STAT. ANN. § 170-B:13(II) (2023) (“A contract purporting to require a birth parent to reimburse an intended adoptive parent for such payments under any circumstances, including circumstances in which a birth parent refuses to surrender his or her parental rights or withdraws said surrender, is void as against public policy.”); see also 1 HOLLINGER, *supra* note 184, § 5.09(1) (noting that in California “prospective adoptive parents cannot demand repayment if the placement falls through or the birth mother reclaims” the child).

²⁷⁴ Elissa E. Madden, Donna M. Aguiniga & Scott Ryan, *Birth Mothers' Options Counseling and Relinquishment Experiences*, in THE ROUTLEDGE HANDBOOK OF ADOPTION 219, 232 (Gretchen Miller Wrobel, Emily Helder & Elisha Marr eds., 2020). In this study, 20.5% of birth mothers reported a fear that they would owe money to the adoptive parents or agency if they did not relinquish the child.

women and prospective adoptive parents find and contact each other personally or through a facilitator, and agency adoptions, where pregnant women select the prospective adoptive parents they wish to parent their child. This feature of modern-day adoption is often thought of as positive for the potential birth mother because she has more control of who will adopt her child and can develop a relationship with the prospective parents that might give her comfort in relinquishing her child to them.²⁷⁵ There is, however, a downside to pre-birth matching. The relationship between a birth mother in crisis and the adoptive parents can be subtly — and sometimes overtly — coercive.

Consider a birth mother who has heard nothing but condemnation of her pregnancy from family,²⁷⁶ who feels terribly alone in the midst of that apparent rejection,²⁷⁷ who finds adoptive parents who seem to embrace and accept her. They give her flowers and dinners out, encourage her interests by buying art supplies or books.²⁷⁸ Her needs and wants may become secondary to their needs and wants. A booklet from Concerned United Birthparents warns,

If your friends and family are not being supportive, the hopeful adoptive parents might be the only ones who are kind to you during your crisis. You may find yourself wanting to please

²⁷⁵ See Linda F. Cushman, Debra Kalmuss & Pearla Brickner Namerow, *Openness in Adoption*, 25 MARRIAGE & FAM. REV. 7, 14 (1997) (birth mothers who played a role in selecting the adoptive parents for their child reported “lower levels of grief, regret, worry, and sadness, and higher levels of relief and peace, than do their counterparts who did not have this opportunity”). Although a birth mother may “select” an adoptive parent for her child, that decision is rarely binding on the agency. In most cases, the relinquishment signed by the birth mother relinquishes custody to the agency, and they can place the child with any family they choose without invalidating that relinquishment. See, e.g., *C.G. v. Guardian Ad Litem Program*, 920 So. 2d 854 (Fla. Dist. Ct. App. 2006) (consent to adoption not invalid when agency changed placement preference of mother); see also Seymore, *Sixteen and Pregnant*, *supra* note 45, at 150 (noting that when relinquishment is to an agency, that agency can consent to an adoption by someone other than the persons chosen by the biological parent).

²⁷⁶ MADDEN ET AL., *OPTIONS COUNSELING II*, *supra* note 155, at 13.

²⁷⁷ Madden et al., *Birth Mothers’ Options*, *supra* note 274, at 228-29 (reporting that over half of birth mothers expressed lack of support from their families and friends).

²⁷⁸ MADDEN ET AL., *OPTIONS COUNSELING I*, *supra* note 125, at 25.

them. . . . No matter how much you like the preadoptive parents, you must not put their feelings first.²⁷⁹

Indeed, in the report on how to encourage adoption by crisis pregnancy counselors, it is suggested that prospective birth mothers should be led to see themselves as “nurturing not only their children [by relinquishing them], but also, the adoptive parents.”²⁸⁰

As one birth mother said, about changing her mind on placing her child, “I fell in love with my son’s potential adoptive parents. They were amazing people. . . . I was so afraid to hurt the potential adoptive parents. I knew it was going to devastate them.”²⁸¹ According to one study of birth mothers, “For some of the women, the guilt that mothers felt about the possibility of disappointing or hurting their child’s prospective adoptive family had a significant impact on their decision. One mother indicated that the pressure was the determining factor in her decision to follow through with the relinquishment.”²⁸²

Even the terminology that is used in adoption sends a subtle message that the child “belongs” to the prospective adoptive parents from the moment of matching. That the mother of the pre-born child is called the “birth mother” is a way to put her in her place as a “relinquisher” long before she relinquishes. Prospective adoptive parents are called adoptive parents long before the relinquishment and long before the adoption is finalized. The terminology suggests the adoption is a done deal — irrevocable — when no real legal steps have yet been taken to start, much less finish, the adoption. Convincing a mother that she is a birth mother is designed to ensure that the adoption happens. “Heather made the mistake of thinking of herself as a birthmother while she was still pregnant. ‘I took on the identity of a birthmother prematurely.

²⁷⁹ HEATHER LOWE, CONCERNED UNITED BIRTHPARENTS, WHAT YOU SHOULD KNOW IF YOU’RE CONSIDERING ADOPTION FOR YOUR BABY 3 (n.d.) (on file with author) (emphasis omitted).

²⁸⁰ YOUNG, *supra* note 222, at 13.

²⁸¹ SAVING OUR SISTERS, *supra* note 271 (featuring the story of Raynee, dated from 2017).

²⁸² MADDEN ET AL., OPTIONS COUNSELING II, *supra* note 155, at 13. Almost nine percent (8.7%) of birth mothers in this study “explicitly stated hurting or disappointing the adoptive family as a form of pressure.” MADDEN ET AL., OPTIONS COUNSELING I, *supra* note 125, at 41.

Simply considering adoption doesn't make you an instant birthmother. Pregnancy is parenting, and during that time, you are a mother, plain and simple."²⁸³

Pre-birth matching also often leads to another potentially coercive event — the prospective adoptive parents in the delivery room.²⁸⁴ “By receiving an infant directly from the birth mother soon after the birth and, as happens in some cases, by being present at the birth, childless adults may vicariously experience childbirth. They feel the child is ‘theirs.’”²⁸⁵ This, too, seems to be a tactic that convinces the prospective birth mother that she is not the parent, the prospective adoptive parents are the parents of the child. To confirm the symbolism, often the adoptive father will cut the umbilical cord.²⁸⁶

5. False Promises to Induce Consent

A classic case of fraud in the inducement of consent in the adoption context is *Vela v. Marywood*.²⁸⁷ Corina, age 19 and unmarried, approached an adoption agency when she discovered she was pregnant. Corina was a college student and was described by the appellate court as “an exemplary young woman” from “a strong, stable, and supportive

²⁸³ LOWE, *supra* note 279, at 6.

²⁸⁴ In an early study of open adoption, researchers found that a “full 30% of the adoptive parents were present at the birth of the adopted child (half of those in the delivery room and half nearby in the hospital).” Marianne Berry, *The Practice of Open Adoption: Findings from a Study of 1396 Adoptive Families*, 13 CHILD. & YOUTH SERVS. REV. 379, 386 (1991). Nancy Verrier, adoptee researcher, notes that the infant needs time with the birth mother to recover immediately after the birth, and that the birth mother needs that time as well. Her conclusion about adoptive parents in the delivery room: “At the time [before birth] it seems supportive, but afterwards, looking back on it, it seems very coercive.” *Interview with Marcy Axness and Nancy Verrier*, CREATING A FAM. BLOG (July 29, 2014), <https://creatingafamily.org/adoption-category/adoptive-parents-delivery-room/> [https://perma.cc/CX9L-9Y6V].

²⁸⁵ 1 HOLLINGER, *supra* note 184, § 1.05(3)(b).

²⁸⁶ In a contested adoption case involving the Indian Child Welfare Act, the Supreme Court included reference to this practice: “Adoptive Couple was present at Baby Girl’s birth in Oklahoma on September 15, 2009, and Adoptive Father even cut the umbilical cord.” *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 644 (2013). Perhaps unsurprisingly, in light of the inclusion of that fact in the Court’s recitation of facts, the Court ruled in favor of the Adoptive Couple, and against the birth father.

²⁸⁷ *Vela v. Marywood*, 17 S.W.3d 750 (Tex. App. 2000).

family.”²⁸⁸ When receiving counseling from Marywood, a child-placing agency, Corina was adamant that she wanted open adoption²⁸⁹ and Marywood said it was able to provide that for her. Marywood offered, as a standard practice, a “sharing plan,” where adoptive parents agree to allow the birth mother to visit the child after the termination of her parental rights. The arrangement was, however, an “empty promise,” as Marywood admitted, since it was wholly unenforceable.²⁹⁰ Marywood failed to mention the unenforceable nature of the agreement.²⁹¹ That “empty promise” was compounded by statements made by her counselor shortly after the baby’s birth at the hospital that Corina “would always be able to visit her baby’ and that her baby would always know that Corina was his mother.”²⁹² Corina cried throughout that visit.²⁹³

When Corina tried to withdraw her consent to adoption and regain possession of her child, the agency refused.²⁹⁴ The trial court upheld the adoption, and Corina appealed. The appellate court found fraud because of the agency’s failure to disclose the unenforceability of the open adoption agreement. Marywood “owed Corina a duty of complete disclosure when discussing adoption procedures, including any proposed post-adoption plan.”²⁹⁵ The agency had an obligation to fully

²⁸⁸ *Id.* at 752-53.

²⁸⁹ “Open adoption,” also known as post-adoption contact, can include any number of different kinds of contact, from anonymously shared letters and photographs throughout the child’s lifetime to occasional-to-frequent in-person visits. Seymore, *Sixteen & Pregnant*, *supra* note 45, at 151-52.

²⁹⁰ *Vela*, 17 S.W.3d at 754.

²⁹¹ *Id.*; see also Seymore, *Sixteen & Pregnant*, *supra* note 45, at 151-52 (noting that “it is still common practice in states without enforceable open-adoption agreements, however, for agencies and adoptive parents to enter into such unenforceable ‘agreements,’” and reviewing agency websites in states where open adoption agreements are not enforceable and finding many promises of continuing contact. One agency, for example, promised much like Marywood: “arrangements can be made with the assistance of Spirit of Faith Adoptions to stay in touch with your child’s adoptive parents throughout his/her lifetime.” The websites were all silent on the fact that no such agreements were legally enforceable in their jurisdictions).

²⁹² *Vela*, 17 S.W.3d at 755.

²⁹³ *Id.*

²⁹⁴ See *id.* at 756.

²⁹⁵ *Id.* at 761.

disclose “the whole truth” about the open-adoption agreement, including the fact that it was not binding. Further, the court concluded, the agency held a position of superiority and influence over the birth mother who placed special confidence in them “by virtue of the counseling relationship.” The court noted the vulnerability of “a young unmarried mother considering placement of her child for adoption,” entitled her to a “‘higher obligation’ when she confides in a maternity counselor.”²⁹⁶

Corina’s case is unusual in one respect (the fraud was unfortunately typical) — the court concluded that the fraud vitiated her consent, and that she was, therefore, entitled to the return of her child.²⁹⁷ In another jurisdiction, return of the child might well have been blocked by a “best interest of the child” analysis²⁹⁸ that privileges the fact that the child had been with the prospective adoptive parents for two years during the course of the litigation.²⁹⁹ Corina’s case is important in several respects, including the recognition that an adoption agency may owe a fiduciary duty to birth parents who seek their services. Recognizing the disparate power between a vulnerable birth mother and the agency with special expertise is a crucial step in identifying how consent in adoption may not represent the autonomous choice of the birth mother.

6. The Duress of Circumstances

When women decide to place a child for adoption, the reason is usually financial hardship and lack of family support. In one study of birth mothers, based on adoption agency data, sixty-four percent of the birth mothers reported income of less than \$5,000 per year; fifty-five percent were unemployed; and eighty-eight percent qualified for public health insurance.³⁰⁰ According to one agency, twenty-eight percent of the birth mothers they worked with lived in “chronic poverty,” and

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 765.

²⁹⁸ 2 JOAN H. HOLLINGER, ADOPTION LAW AND PRACTICE § 8.02(1)(a)(i) (2023).

²⁹⁹ *Vela*, 17 S.W.3d at 765. The court notes that though “the child is now two years of age and has spent almost his entire life with the prospective adoptive parents . . . any fault lies with the pace of the legal system and not with the mother,” and ordered return of the child.

³⁰⁰ Sisson, *Who Are the Women Who Relinquish*, *supra* note 55, at 50.

twenty percent were homeless at the time they relinquished for adoption.³⁰¹ “It is supposed to violate America’s espoused values to punish people for being poor. Some states include an economic exemption in their child neglect statutes, charging parents for failing to provide for a child’s material needs only if they are ‘financially able.’”³⁰² Yet birth mothers who relinquish their parental rights because of abject poverty are said to do so voluntarily. If they are poor, lacking in parental support, and kicked out of the house then it is simply the duress of circumstances. Williston on Contracts confirms that, ordinarily, it is not duress “when a party is constrained to enter into a transaction by force of circumstances for which the other party is not responsible.”³⁰³ But, Williston cautions, “if such circumstances were known and advantage taken of them by the other party a degree of pressure which would not ordinarily amount to duress, might have such coercive effect as to invalidate a transaction.”³⁰⁴

A few courts have found that duress of circumstances will vitiate consent in adoption. In one case, a court noted, “Consent to adoption, like any other instrument, must be understandably given and free from legal fraud or duress. In adoption cases there is recognized a somewhat indefinite and shadowy border area which for want of better words can be called duress ‘by force of circumstances.’”³⁰⁵ But other courts have found that duress of circumstances would not vitiate consent. As one court stated,

We are not dealing with . . . compulsion here, but simply duress of circumstances, circumstances in no way the creation of the [adoptive parents].

If consents to adoption were ineffective every time this sort of duress entered the picture, it is difficult to see how any adoption

³⁰¹ *Id.*

³⁰² DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES — AND HOW ABOLITION CAN BUILD A SAFER WORLD* 69 (2022).

³⁰³ 3 SAMUEL WILLISTON, *LAW OF CONTRACTS* §1608 (1st ed. 1920).

³⁰⁴ *Id.*

³⁰⁵ *In re G.*, 389 S.W.2d 63, 69 (Mo. Ct. App. 1965). The court goes on to describe the mother as a victim of circumstances over which she had little control. *See also In re D.*, 408 S.W.2d 361, 369 (Mo. Ct. App. 1966) (finding that the mother was “subjected to duress ‘by force of circumstances’”).

where consent is required could be allowed to stand, for what natural parent would ever consent to the adoption of his or her child in the absence of duress of circumstance?³⁰⁶

Consider Dawn's case, *In re J.M.P.*, which is illustrative of many cases where a birth mother initially consents because of duress of circumstances and then seeks the return of the child because her consent was not voluntary.³⁰⁷ When Dawn found herself unmarried and pregnant at eighteen, while still living at home and supported by her parents, she hid the pregnancy. She waited too late and was unable to get the abortion she wanted;³⁰⁸ the clinic referred her to a lawyer who offered to help her place the child for private adoption.³⁰⁹ Her mother told her she could not live at home if she kept the baby, and Dawn could not support herself on her salary from her grocery store job.³¹⁰ After the baby was born, and while Dawn was still in the hospital, the lawyer had her sign a release allowing him to take the baby from the hospital and give him to prospective adoptive parents.³¹¹ He said that Dawn appeared sad, but birth mothers often did. One week later, the lawyer had her sign the official relinquishment documents.³¹² At that time, her mother told the lawyer that Dawn wanted to keep the baby but she (the mother) wasn't interested in raising another child, having raised five already, and

³⁰⁶ *Barwin v. Reidy*, 307 P.2d 175, 198 (N.M. 1957); see also *In re Surrender of Minor Child.*, 181 N.E.2d 836, 839 (Mass. 1962); *McCurdy v. Albertina Kerr Homes, Inc.*, 498 P.2d 392, 394-95 (Or. Ct. App. 1972).

³⁰⁷ *In re J.M.P.*, 528 So. 2d 1002, 1004-16 (La. 1988).

³⁰⁸ In this respect, Dawn's story is consistent with results of The Turnaway Study. See FOSTER, TURNAWAY STUDY, *supra* note 73, at 99.

³⁰⁹ *In re J.M.P.*, 528 So. 2d at 1004. They explained that the lawyer was opposed to abortion, so he would not charge her anything to arrange an adoption. Of course, since he was always representing the adoptive parents, he would not have charged her in any event. Further, consider whether his opposition to abortion and subsequent interest in having Dawn place her child for adoption might have presented a conflict of interest such that he should not have represented Dawn. See generally Seymore, *Ethical Blind Spots*, *supra* note 194, at 461 (regarding the potential conflict of interest that might have occurred by this anti-abortion attorney representing Dawn).

³¹⁰ *In re J.M.P.*, 528 So. 2d at 1004-05.

³¹¹ *Id.*

³¹² *Id.*

the only way Dawn would be able to raise the child was on welfare.³¹³ The lawyer did not interpret the remark about Dawn wanting to keep the baby as an indication that she had changed her mind about the adoption placement.³¹⁴

Three weeks later, within the time limit allowed for revocation of consent under Louisiana law, Dawn notified the lawyer that she was revoking her consent.³¹⁵ At trial, Dawn's parents testified as follows:

Mr. & Mrs. B. admitted that they had caused Dawn to sign the act of surrender by telling her that she could not bring the child home. They testified that they had experienced a change of heart because of the suffering Dawn had endured, that they regretted their actions which had been intended only for her own welfare, and that they now stood ready to support Dawn financially and in every other way should she recover custody of the child.³¹⁶

They also said that when the lawyer called them upon getting the revocation of consent, he said that the prospective adoptive parents would probably sue them for repayment of Dawn's medical expenses.³¹⁷

The court held that though Dawn's revocation of consent was timely, that revocation did not mean that she was automatically entitled to the return of the child. Rather, the decision of whether to return the child or proceed with the adoption would depend on the best interests of the child.³¹⁸ The only way to guarantee a return of the child was if the consent was void when given, not merely revoked according to law.³¹⁹ Hence, the court had to determine whether Dawn's consent was void, as the result of error, fraud, or duress, as a contract's consent may be void for those reasons.

³¹³ *Id.* at 1005.

³¹⁴ *Id.*

³¹⁵ *Id.* at 1005.

³¹⁶ *Id.*

³¹⁷ *Id.* at 1006; *see supra* notes 270-74 and accompanying text for discussion on how the supposed need to repay the adoptive parents or the agency for expenses is used as a way to coerce consent.

³¹⁸ *See In re J.M.P.*, 528 So. 2d at 1016.

³¹⁹ *See id.* at 1007-08.

The facts of Dawn's case are characteristic of many adoption placements. There is no mention in the opinion of the biological father in any way. This might as well have been an immaculate conception for all the attention paid to the father, including his financial responsibility to support the child. Dawn considered adoption placement only after she was unable to secure a legal abortion; it is extremely common for an unwanted pregnancy to lead to delays in reckoning by young mothers fearful of the reaction of others to the pregnancy. Part of her likely concern was realized — her parents were willing to kick her out of the house because of the pregnancy. She expressed that her preference was to raise the child herself, but she was poor and lacking in support to do so. Her adoption decision was driven by her lack of resources, with her parents admitting that they “caused Dawn to sign the act of surrender by telling her that she could not bring the child home.”³²⁰

But the very commonality of these characteristics seems to be why courts resist finding these circumstances constitute duress. After all, if attorneys and adoption agencies could not rely on the poverty of birth parents, where would adoptable children come from? “[F]or what natural parent would ever consent to the adoption of his or her child in the absence of duress of circumstance?”³²¹ Though Louisiana law clearly states that duress from a third party — one not part of the agreement — can be duress that vitiates consent,³²² the court in *In re J.M.P.* is careful to tell us that the prospective adoptive parents did nothing wrong and the lawyer did nothing wrong. Even Dawn's parents did nothing wrong — since Dawn was an adult, they had no legal obligation to support her or her child.

Dawn may have been coerced, but she was coerced by the circumstances she found herself in — the circumstances that most birth mothers find themselves in. Indeed, one birth mother, in discussing the lack of support she experienced, echoed the *in re J.M.P.* court:

It was a confusing time. I did all the wrong things, but it was no one's fault. I needed someone to help me realize I could do it and have the courage and have the help. Without that I guess I

³²⁰ *Id.* at 1005.

³²¹ *Barwin v. Reidy*, 307 P.2d 175, 185 (N.M. 1957).

³²² *In re J.M.P.*, 528 So. 2d at 1008.

turned against myself. No one did anything wrong. But I just didn't have someone who said it's okay to keep him and I'll help you.³²³

Speaking of autonomy and choice seems almost an insult in light of the serious financial constraints that lead birth mothers to relinquish children. As one study observed,

It was common for birth mothers to express concern about their lack of financial stability during their pregnancy. Financial concerns were a major reason why many mothers first considered, and then ultimately elected, adoption. One mother shared, "My real number one concern was I can barely make bills now. The electric was on. Rent was paid, but there wasn't a lot left over afterwards . . . My concern by far was definitely money."³²⁴

As Professor Hurd notes, before there can be consent, there must be an "opportunity for meaningful choice."³²⁵ Of course, a great number of parents face financial difficulties in parenting and still continue to parent. But in those cases, parents often have other support systems, including knowledge about how to access government assistance.

Yet the options counseling offered by adoption agencies rarely convey information about resources available for parenting. In one recent survey, "[i]nformation about resources available to assist birth mothers should they desire to parent their child was not provided to nearly 8 out of 10 mothers."³²⁶ Nor did the agencies provide information about parental rights or the implications of parenting or relinquishing parental rights.³²⁷ Eighty-five percent of birth mothers "indicated that they would have liked to have known more about parenting resources available to assist them should they opt to parent their child."³²⁸ Indeed,

³²³ MADDEN ET AL., *OPTIONS COUNSELING I*, *supra* note 125, at 36.

³²⁴ MADDEN ET AL., *OPTIONS COUNSELING II*, *supra* note 155, at 14.

³²⁵ Hurd, *supra* note 177, at 140.

³²⁶ MADDEN ET AL., *OPTIONS COUNSELING I*, *supra* note 125, at 31.

³²⁷ *Id.*

³²⁸ *Id.* at 40.

sixty percent of birth mothers said that the option of parenting was never discussed with them.³²⁹ As one birth mother reported:

My decision to place my child was one where I did the best I could with the resources I was given. I am a firm believer that should I have been given other options and hope regarding parenting him (the ability to graduate from high school and complete college AND not feeling like my father was going to disown me), I would have been brave enough to parent him. The situation felt hopeless and like adoption was my only option.³³⁰

Choice implies a selection between two (or more) options; when the “choice” presented is one option, it is a Hobson’s choice.

When birth mothers are virtually stalked on the internet, face coercive options counseling, are influenced by money from the adoptive parents or by their own lack of resources, when no information about resources is provided to them, it does not appear that they are exercising a meaningful choice. Consent in these circumstances is hardly knowing or voluntary.

The standards for consent to adoption need to consider that there is an imbalance of power in the placement relationship. Adoption agencies and prospective adoptive parents are far more powerful than birth mothers, and economic, social, political, racial, and gendered factors also come into play. A lack of financial support is the number one reason given by birth mothers for relinquishing a child for adoption,³³¹ and they are provided with inadequate information about the availability of parenting resources by the very same agencies that claim to help them choose between parenting and placing.³³² Single motherhood is stigmatized in the United States,³³³ and that stigma can be used to

³²⁹ *Id.* at 31.

³³⁰ *Id.* at 43.

³³¹ See Sisson, *Choosing Life*, *supra* note 72, at 351.

³³² MADDEN ET AL., OPTIONS COUNSELING I, *supra* note 125, at 40 (85.4% of birth mothers wanted more information about resources for parenting).

³³³ Ellen Hauser, *Single Motherhood: Mythical Madness and Invisible “Insanity,”* in MOTHERHOOD AND SINGLE-LONE PARENTING: A 21ST CENTURY PERSPECTIVE 115 (Maki Matapanyane ed., 2016) (ebook) (arguing that single mothers are stigmatized because they transgress the “dominant heterosexist fairy tale of marriage and motherhood”); Maitri Jain & Venus Mahmoodi, *Being One in a World of Twos: Experiences and*

convince birth mothers that a two-family couple would be better parents than she could possibly be.³³⁴ The tendency of women to please others over themselves, to make sure that the adoptive parents get what they desperately desire, despite the cost to themselves, is used to great effect in pre-birth matching to ensure women consent to relinquishment they do not actually desire.

And as the powerful are acutely aware of the imbalance of power, and seek to use that as an advantage, we see how geo-fencing and other techniques are used to target potential birth mothers in their vulnerability. Those seeking to ensure that the birth mother places her child, rather than parenting her child, have an adversarial relationship with the birth mother. If she chooses to withhold her consent, neither the agency nor the adoptive parents get what they want; they may hide their conflict of interest behind the supposed best interest of the birth mother or the best interest of the future child, but it is truly their interest that predominates. They have the power in the relationship, as is evident from courts' application of the standards in consent in adoption cases. By starting with the presumption that adoption is an obvious rational choice, especially for a single mother, and by viewing it as morally superior to abortion, judges can find that consent is voluntary without much analysis.

IV. REFORMS TO MAKE CONSENT IN ADOPTION MEANINGFUL

Needed reforms to ensure the voluntariness of the adoption decision, particularly in an environment where the choice of abortion is severely circumscribed, include: 1) greater regulation of adoption agencies and private direct placement adoption, to include restrictions on advertising; 2) requirement of independent options counseling before

Consequences of Single Parenting, 18 GRADUATE STUDENT J. PSYCH. (SPECIAL ISSUE) 1, 5 (2022) (finding stigma against single parenting world-wide); Heidi Moseson, Moria Mahanaimy, Christine Dehlendorf & Caitlin Gerdts, "...Society Is, at the End of the Day, Still Going to Stigmatize You No Matter Which Way": A Qualitative Study of the Impact of Stigma on Social Support During Unintended Pregnancy in Early Adulthood, 14 PLOS ONE, May 23, 2019, at 1, 2 (noting a strong stigma toward unintended and/or single pregnancy).

³³⁴ See MADDEN ET AL., OPTIONS COUNSELING II, *supra* note 155, at 13 (birth mothers explaining that their single status made them unfit and abusive if they chose to parent, because their child would be deprived of a father).

consent is considered voluntary; 3) recognition of duress of circumstances as vitiating consent; 4) representation of prospective birth parents by independent legal counsel; 5) greater protection of the constitutional right to parent; and 6) judicial education about the dynamics of adoption.

The usual response to recommendations of reforms to adoption is that they are likely to drive up the already high costs of adoption. And certainly skyrocketing adoption fees are a problem, to the extent that only the wealthy can afford to adopt and those of modest means are closed out of the market. My overall recommendation for reform would be to retool the adoption market so there are no private adoptions. High fees are not inevitable in adoption; adoption agencies did not initially charge fees to adoptive parents for fear that adoption would be conflated with baby-selling. And in other countries, adoption is exclusively government-run and does not entail high fees.³³⁵ Adoption from foster care, run by the states, is inexpensive today. If state governments handled all adoptions, private and public, costs would be far lower.

Adoption is a largely-unregulated market.³³⁶ As Michele Goodwin notes, deregulation is a hallmark of the adoption marketplace, with some agencies licensed and some not, with adoption facilitators who are not monitored by any agency and who take no exam or classes to be qualified.³³⁷ “State laws govern part of the adoption process but are generally inadequate.”³³⁸ Tighter regulation of direct placement adoption and money in adoption is necessary.³³⁹ To the extent that we view adoption as a societal good, the government should take on additional responsibility to provide housing and medical care to birth mothers who need it, rather than allow adoptive parent payments of

³³⁵ Seymore, *Ethical Blind Spots*, *supra* note 194, at 491.

³³⁶ GOODWIN, *supra* note 30, at 5; PERTMAN, *supra* note 250, at 238 (remarking that “[a]doption cannot conceivably require less-attentive monitoring and regulation than cable television”).

³³⁷ GOODWIN, *supra* note 30, at 5.

³³⁸ *Id.*

³³⁹ See Carroll, *supra* note 270, at 305-27. In only a handful of states are direct placement adoptions banned. 1 HOLLINGER, *supra* note 184, § 1.05(3)(b).

living expenses that may be coercive.³⁴⁰ Further, regulation of advertising methods like geo-fencing and other internet activity is necessary.³⁴¹ Existing limitations on adoption advertising were not created with the internet in mind.³⁴² Greater regulation should address the problems of pre-birth matching; birth mothers could still have the benefits of selecting adoptive parents, but do so after birth.³⁴³

Legislators' stated concern that women are being coerced into abortions and that counseling them about adoption is the cure has not proven to decrease abortion and increase adoption. Data shows that women making abortion decisions already know about adoption as an option; and when making a decision about abortion, women first consider whether to continue or end the pregnancy before choosing between the options of parenting and placing for adoption. The legislators' chosen remedy is not at all responsive to the way women make decisions about abortion. Still, counseling about options that allows considerations about all options in a fair and unbiased and truthful manner is a potential solution for coercion, including coercion in adoption decision-making. While thirty-three states mandate counseling before an abortion decision, only six mandate counseling prior to adoption.

A counseling requirement should be paired with courts' recognition of duress of circumstances that vitiates consent to adoption; appropriate options counseling would be strong evidence that a birth parent who chooses adoption after being fully informed of the options and given available resources for parenting was, in fact, voluntarily consenting. A requirement of counseling from an independent counselor — one not affiliated with an adoption agency — would help

³⁴⁰ See Carroll, *supra* note 270, at 312-13, 325-26 (placing the burden of paying living and medical expenses on adoptive parents raises questions about voluntariness of consent and skews the availability of appropriate adoptive parents on the basis of wealth).

³⁴¹ Jini L. Roby & Holly White, *Adoption Activities on the Internet: A Call for Regulation*, 55 SOC. WORK 203, 210 (2010).

³⁴² *Id.* at 210. For existing regulation of advertising, see U.S. DEP'T OF HEALTH & HUM. SERVS. & CHILD.'S BUREAU, *supra* note 247, at 2-3.

³⁴³ It is not an uncommon practice for newborns to spend some time in temporary agency foster care after birth, to allow time for a birth father's rights to be protected or to allow a birth mother the opportunity to make a decision about adoption.

ensure that an adoption decision is the right one for a particular birth mother. That counseling cannot be left to adoption agencies, who have a vested interest in securing adoption consent and who have proven inadequate to the job. They do not offer information about parenting as an alternative and offer no support or resources for parenting. Options counseling from a licensed professional counselor or social worker who is independent of adoption agencies could fill that gap. Ideally, counseling would be referred to an adoption-competent therapist:

In work with birth parents, adoption competent clinical practice requires an understanding of clinical issues associated with voluntary adoption planning and with involuntary termination of parental rights, including cultural implications of relinquishment, the impact of loss on birth family members, the impact of search and reunion on birth family members, and appropriate therapeutic approaches that support birth parents in understanding the emotional aspects of separation from the child, addressing grief issues, and potentially redefining their role(s) in the child's life.³⁴⁴

As part of the counseling process, the independent counselor should certify to the court that the counseling was performed and whether the woman's consent to adoption placement was knowing, intelligent and voluntary.

In a previous article about minors making the decision to place a child for adoption, I suggested that before a minor's consent to adoption can be considered valid additional protections should be required.³⁴⁵ Now, I amend that proposal to apply to all prospective birth parents. In that article I proposed that birth parents be represented by independent legal counsel — a lawyer who does not represent the prospective adoptive parent or the child placing agency involved in the adoption.³⁴⁶

³⁴⁴ Anne J. Atkinson, *Adoption Competent Clinical Practice*, in THE ROUTLEDGE HANDBOOK OF ADOPTION, *supra* note 274, at 435, 441; *see also* Elissa E. Madden, Monica Faulkner & Donna M. Aguiniga, *Adoption Competency in a Post-Roe v. Wade Reality*, 58 J. SOC. WORK EDUC. 427, 427-28 (2022).

³⁴⁵ Seymore, *Sixteen & Pregnant*, *supra* note 45, at 154-55.

³⁴⁶ *Id.* Dual representation of adoptive parents and a birth parent inherently involves a conflict of interests, ABA Comm. on Ethics & Pro. Resp., Informal Op. 1523 (1987),

I do not believe that adoption agencies can be relied upon to protect the rights of birth parents and to ensure valid consent, given their conflict of interest.

In addition, I believe that it should be the attorney's obligation to directly advise the parent that she has the right not to relinquish parental rights or consent to the adoption and should investigate the circumstances of consent to ensure that it is, in fact, voluntary and not the product of coercion, duress or undue influence. Because birth parents are often unable to afford counsel, the court should appoint independent counsel as in cases where involuntary termination of parental rights is at risk. After all, if the birth parent's consent is the product of duress, coercion, or undue influence, it is an involuntary termination of parental rights.

An independent counselor to cover all options and to provide information about resources for parenting, together with independent legal counsel to provide advice so that the mother understands the consequences of termination of parental rights, will help ensure that an adoption decision is the product of unconstrained choice. These steps move us closer to protecting the constitutional right to parent.

In involuntary termination of parental rights, states are required to grant due process to the parents, appoint counsel for them in many cases, and refrain from termination of parental rights absent clear and convincing evidence of wrongful conduct.³⁴⁷ Given that the *effect* of voluntary and involuntary termination of parental rights are the same, it can be argued that the constitutional protections should be the same,³⁴⁸ including a requirement of clear and convincing evidence justifying termination:

The right of a mother to her offspring is so fundamental that it cannot be abridged except by the most exacting compliance with due process. A natural parent's right to raise her child is based upon the most fundamental principles of protected privacy and

though some states permit dual representation. For more, see Seymore, *Ethical Blind Spots*, *supra* note 194, at 461.

³⁴⁷ Santosky v. Kramer, 455 U.S. 745, 769 (1982) (requirement of clear and convincing evidence).

³⁴⁸ 2 HOLLINGER, *supra* note 298, § 8.02(1)(b).

due process, and absent a clear and convincing showing that a *permanent* surrender was intended, interference with that right cannot be permitted.³⁴⁹

To take seriously constitutionally protected parental rights in voluntary adoption placement, courts must take seriously the problems of coercion, duress, fraud, and undue influence in adoption consent.

Courts fail to take seriously the rights of birth parents in adoption because of the narrative of adoption as a win-win-win for birth parents, adoptees, and adoptive parents. Attorneys — and judges who are attorneys — view adoption law as “happy law,” an antidote to some of the stressful and negative cases on a family law docket.³⁵⁰ That view often allows the positives of adoption to distract judges and attorneys from the realities of adoption as loss:

It is also too easy for attorneys to become caught up in the view that family formation work always exemplifies goodness and morality, possibly causing them to disregard the interests of the other parent as the lawyer marches toward the goal of creating a new and legally recognized parent/child relationship.³⁵¹

Judicial education and training has shown positive effects in combatting gender bias in the courtroom³⁵² and gaining better judicial understanding of domestic violence.³⁵³ As one judge remarked in response to a presentation on gender bias, “Many of the myths that are taken as facts by judges were shattered by your presentation and the

³⁴⁹ *In re Adoption of Daniel C.*, 473 N.E.2d 31, 37-38 (N.Y. 1984) (Jasen, J., dissenting) (citations omitted) (citing *Santosky*, 455 U.S. at 753).

³⁵⁰ Seymore, *Ethical Blind Spots*, *supra* note 194, at 463.

³⁵¹ Dana E. Prescott & Gary A. Debele, *Shifting Ethical and Social Conundrums and “Stunningly Anachronistic” Laws: What Lawyers in Adoption and Assisted Reproduction May Want to Consider*, 30 J. AM. ACAD. MATRIM. LAWS. 127, 153 (2017).

³⁵² Lynn Hecht Schafran, *Educating the Judiciary About Gender Bias: The National Judicial Education Program to Promote Equality for Women and Men in the Courts and the New Jersey Supreme Court Task Force on Women in the Courts*, 9 WOMEN’S RTS. L. REP. 109, 116 (1986).

³⁵³ Peter G. Jaffe, Claire V. Crooks, Maureen Reid, Jennifer White, Danielle Pugh-Markie & Linda Baker, *Enhancing Judicial Skills in Domestic Violence Cases: The Development, Implementation, and Preliminary Evaluation of a Model US Programme*, 40 J. SOC. WELFARE & FAM. L. 496, 508-09 (2018).

correct situation revealed. It was the impact of knowledge on ignorance.”³⁵⁴ Adoption is another area where myth-busting can be helpful. A renowned judicial trainer, Lynn Hecht Schafran, has noted that “judges are receptive to the combination of legal and social scientific data.”³⁵⁵ That seems precisely the information about adoption that courts need to consider. Knowing how birth mothers are targeted, how adoption agencies, facilitators, and society at large “counsel” women to relinquish for adoption, understanding the effects of relinquishment on women’s emotional and mental well-being and the effects of adoption on adoptees, and understanding current limitations on the law’s ability to ensure women’s autonomy is respected would enhance courts’ ability to assess adoption consent.

CONCLUSION

Creating children on spec — getting pregnant and giving birth *in order* to relinquish the child for adoption — is an unsettling prospect. When there were rumors that adoption middlemen in Guatemala were paying women to get pregnant in order to place the child for adoption, it contributed to the U.S. blocking international adoption from Guatemala.³⁵⁶ Compelling women to give birth, when abortion is a safe medical procedure, is also unsettling; but to do so *in order* to place the child for adoption is disturbing on another level. With the Supreme Court overruling *Roe v. Wade*,³⁵⁷ and using the availability of adoption as one justification,³⁵⁸ we have moved closer to a regime where children are created in order to be placed with strangers. Instead of adoption as a child welfare measure, where children without family are provided one,

³⁵⁴ Schafran, *supra* note 352, at 110.

³⁵⁵ *Id.* at 116.

³⁵⁶ Lulu Garcia-Navarro, *Adoptions of Guatemalan Babies Prompt Closer Look*, NPR (Sept. 19, 2007, 4:00 PM EST), <https://www.npr.org/templates/story/story.php?storyId=14537561> [<https://perma.cc/Q2XT-AWE3>] (“UNICEF says that some of these [adoption] middlemen who are supplying babies for American parents are paying women to get pregnant” in order to relinquish).

³⁵⁷ *Roe v. Wade*, 410 U. S. 113 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

³⁵⁸ *Dobbs*, 142 S. Ct. at 2259 n.46.

it becomes an operation to produce needy children to satisfy the wants of prospective adoptive parents.

While there has been much scholarship devoted to the social costs of abortion bans on pregnant persons, on economies, even on crime rates, little has been written about the effect of abortion bans on adoption. Justice Alito's pro-adoption turn in *Dobbs* relies on certain assumptions about children and family that would significantly change the nature of family and parenthood in our society if we took them seriously. First, it assumes that families are fungible. It matters not what family a child is raised in — they are all interchangeable. Consider all the care we take at hospital nurseries to match parents and newborns — unnecessary in this worldview. We should parcel them out on a first-come, first-served basis! Of course, we really do not accept that view — until we are talking about adoption. Second, despite our disapproval of baby-buying and baby-selling, we are comfortable as a society with children as commodities for some families to acquire from parents for whom we have little respect, like single parents. Judges do not find it necessary to question the consent of a birth parent when it seems like an eminently reasonable decision for the more well-to-do two-parent family to raise a child. We will accept the consent to relinquish for adoption without considering too closely the circumstances of that consent. Finally, these previous assumptions allow us to mythologize adoption, ignoring the fact that one family must be torn apart before the adoptive family can be created. We then, to justify that destruction, use definitions of consent that rely heavily on the mythology we created.

For the moral magic of consent to be effective, consent must be the product of autonomy, the act of a person who has choices. In expanding on the moral magic of consent, Heidi Hurd said:

To respect persons as autonomous is thus to recognize them as the givers and takers of permissions and obligations. It is to conceive of them as very powerful moral magicians. By recognizing their capacity for self legislation — for the creation and dissolution of rules that uniquely concern them — one gives meaning to the historic philosophical claim that persons are free inasmuch as they will their own moral laws. One very powerful means by which persons will their own moral laws—by which

they alter the moral landscape for themselves and for others—
is by granting or withholding consent to other's actions.³⁵⁹

In a post-*Roe* world, choices will be more constrained than before the Court's ruling in *Dobbs*. But the choices women face are often constrained — by powerlessness, economic instability that is often the product of gender discrimination, societal judgements that also rest on stereotypical views of women, and women's tendency to consent for the good of others rather than themselves. The #MeToo movement has highlighted a number of these problems in the arena of sexual relationships. The lessons from that movement apply with equal force to other areas of women's lives, including in decisions about pregnancy, abortion, parenting, and adoption. True choice requires that women be given true options when weighing these decisions, so that women, too, can be respected as autonomous persons.

³⁵⁹ Heidi M. Hurd, *The Normative Force of Consent*, in *THE ROUTLEDGE HANDBOOK ON THE ETHICS OF CONSENT* 44, 44 (Andreas Müller & Peter Schaber eds., 2016).