UNTOLD TRUTHS: WHAT ADOPTIVE PARENTS SHOULD KNOW ABOUT THEIR ADOPTEE'S IN UTERO DRUG AND ALCOHOL EXPOSURE

MEHRNOOSH TORBATNEJAD*

INTRODUCTION

In a *Law & Order: Special Victims Unit* episode titled "Choice," detectives Olivia Benson and Elliot Stabler visit the home of the Longleats, a couple who had adopted a young girl named Lily.[1] When the detectives met Lily, her slow speech and facial deformity indicated that she had a medical abnormality.[2] Lily's adoptive father explained that he first noticed Lily's coordination difficulties when she was three.[3] Hoping to find an explanation for Lily's delayed development, the Longleats attempted to find her biological parents' medical history, but "the adoption agency's records were a mess" and they were unsuccessful in obtaining medical information on their own.[4] It is revealed later in the episode that Lily suffers from fetal alcohol syndrome ("FAS"),[5] "the leading known preventable cause of mental retardation in children."[6]

Although this episode recounts a fictional story, unfortunately, this scenario is a reality for many adoptive parents, who often encounter problems with accessing the adoptees' complete and accurate medical information.[7] The unavailability of information becomes a predicament when parents unknowingly adopt children who have medical illnesses stemming from prenatal drug or alcohol

* Senior Articles Editor, CARDOZO J. L. & GENDER; J.D. Candidate, Benjamin N. Cardozo School of Law, Class of 2013; Dual B.A., *magna cum laude*, Journalism and Sociology, New York University, 2008. The author would like to thank her parents for their support, the Honorable Sara Schechter for her enthusiasm in supervising this Note, Ms. Erin Bistricer for her patience and guidance, and the CARDOZO J. L. & GENDER 2011-2013 for their feedback and friendship. This Note is dedicated to all adoptive parents who welcome children in need of families into their hearts and homes.

[1] *Law & Order: Special Victims Unit*: *Choice* (NBC television broadcast Nov. 4, 2003).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.* In fact, Kathrine Roberts, the actress who played Lily Longleat, suffers from FAS. Holly Auer, *NY Teen Lands Role on Spinoff of 'Law and Order'*, THE BUFFALO NEWS, Oct. 7, 2003, *available at* http://come-over.to/FAS/LawAndOrder.htm.

[6] Lawrence J. Nelson, *Of Persons and Prenatal Humans: Why the Constitution is Not Silent on Abortion*, 13 LEWIS & CLARK L. REV. 155, 185 (2009).

[7] Marianne Brower Blair, *The Uniform Adoption Act's Health Disclosure Provisions: A Model that Should Not Be Overlooked*, 30 FAM. L.Q. 427 (1996).

use.[8] Similar to the way in which Lily's on-screen adoptive parents struggled with accessing her biological mother's medical history,[9] adoptive parents off-screen face the same troubles because only a few states require adoption agencies to disclose a biological mother's prenatal drug or alcohol use to the prospective adoptive parents.[10]

Since states are not required to compel biological parents to disclose information about their medical histories,[11] it is implied that the disclosure of a biological mother's prenatal drug or alcohol use would be left to her own discretion.[12] Therefore, even if a state did require adoption agencies to disclose this type of information,[13] the prospective adoptive parents may have no other means of learning of these details if the biological mother chooses not to disclose this information.[14] When unaware of the details of an adoptee's prenatal history, adoptive parents may be unexpectedly burdened with the consequences that accompany the child's medical problems.[15] Most problematic of these consequences can include exposing adoptees to improper treatment, which can exacerbate their physical and mental wellbeing.[16] Adoptive parents may also be forced to quit their jobs in order to constantly supervise the adoptee who may inflict harm on other family members or may engage in self-mutilation.[17] The emotional stress of such unforeseen predicaments can even result in the dissolution of the parents' marriage.[18] Therefore, adoptive parents can face numerous challenges when unaware that they adopted a child affected by the repercussions of prenatal substance abuse.[19]

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[8] Marianne Brower Blair, *Lifting the Genealogical Veil: A Blueprint for Legislative Reform of the Disclosure of Health-Related Information in Adoption*, 70 N.C. L. REV. 681, 732 (1992) (explaining that addressing an adoptee's need for medical or psychological treatment depends on the availability and accuracy of their prenatal and neonatal records).

[9] *Law & Order: Special Victims Unit*, *supra* note 1.

[10] *See* 750 ILL. COMP. STAT. ANN. 50/18.4a (West 2011); ME. REV. STAT. ANN. TIT. 22, § 8205 (2011); MISS. CODE ANN. § 93-17-205 (West 2011), *amended by* 2012 Miss. Laws 556; N.J. STAT. ANN. § 9:3-41.1 (West 2011); N.Y. SOC. SERV. LAW § 373-a (McKinney 2010); N.C. GEN. STAT. ANN. § 48-3-205 (West 2010); OR. REV. STAT. ANN. § 109.342 (West 2011); WYO. STAT. ANN. § 1-22-116 (West 2011).

[11] *See, e.g.*, Gibbs v. Ernst, 647 A.2d 882, 894 (Pa. 1994) (explaining that the instant statute, 23 Pa.C.S. §2533(b)(12), did not impose a duty to investigate upon the adoption intermediaries, but only required a good faith effort to obtain the child's medical history).

[12] Marci J. Blank, *Adoption Nightmares Prompt Judicial Recognition of the Tort of Wrongful Adoption: Will New York Follow Suit?*, 15 CARDOZO L. REV. 1687, 1716 (1994) (noting that adoption agencies may rely solely on the medical information volunteered by birth parents without further investigating the biological parents' background and medical history).

[13] *See, e.g.*, *supra* note 10.

[14] *See* Blank, *supra* note 12.

[15] *See infra* Part II.C.

[16] *Id.*

[17] *Id.*

[18] Blair, *supra* note 7, at 431.

[19] Blank, *supra* note 12.

Despite warnings about the harmful effects of prenatal drug and alcohol use,[20] five-to-six percent of pregnant American women use illegal drugs, and between eleven and twenty-five percent prenatally use alcohol.[21] The growing percentage of infants born with FAS—a six-fold increase in the last few decades—may be attributed to the increasing number of women of childbearing age who use alcohol.[22] Considering these alarming statistics, it is increasingly imperative that prospective adoptive parents should have access to an adoptee's prenatal history so that they can make an informed decision about the adoption. To compile this critical information, states should mandate drug and alcohol testing of pregnant women who wish to place their children for adoption while preserving both their privacy and protection.

This Note examines the struggles adoptive parents confront when delivered inaccurate or incomplete medical information about an adoptee's in utero drug or alcohol exposure, and the measures that can be implemented to prevent unexpected complications. Part I of this Note will identify the differences among various forms of adoption agencies to provide a better understanding of the divergent processes available in the states. This section will also provide an overview of states' medical disclosure statutes, specifying their strengths and shortcomings. Part II discusses both the devastating effects that prenatal substance abuse can have on a fetus, and the rise of wrongful adoption claims filed by adoptive parents to address their grievances against adoption agencies for nondisclosure of the adoptee's medical information. Finally, Part III will propose that since agencies cannot compel biological mothers to disclose information about their prenatal drug and alcohol use,[23] states should require pregnant women seeking to place their children for adoption to submit to drug and alcohol tests only in order to collect medical information to disclose to prospective adoptive parents, and not for criminal prosecution purposes. This section will explore the privacy concerns of pregnant women as well as the many benefits and needs for mandated testing. This Note also proposes that states should amend the relevant provisions of their adoption statutes to require disclosure of a biological mother's in utero substance use to prospective adoptive parents. The solutions proposed in this Note aim to ensure that prospective adoptive parents have the opportunity to obtain all relevant

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[20] *U.S. Surgeon General Releases Advisory on Alcohol Use in Pregnancy*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Feb. 21, 2005), *available at* http://www.surgeongeneral.gov/news/2005/02/sg02222005.html.

[21] Linda C. Fentiman, *In the Name of Fetal Protection: Why American Prosecutors Pursue Pregnant Drug Users (and Other Countries Don't)*, 18 Colum. J. Gender & L. 647, 653 (2009).

[22] Sue Thomas, Lisa Rickert, & Carol Cannon, *The Meaning, Status, and Future of Reproductive Autonomy: The Case of Alcohol Use During Pregnancy*, 15 UCLA WOMEN'S L.J. 1, 16 (2006) (noting that because more than half of all pregnancies are unplanned, and since birth defects traced to prenatal alcohol use can take place in the first three to eight weeks of a pregnancy, damage to the fetus can be done before a woman becomes aware that she is pregnant).

[23] *See, e.g.*, Gibbs v. Ernst, 647 A.2d 882, 894 (Pa. 1994).

information about an adoptee's medical background to make an informed adoption decision.

I. ADOPTION AGENCIES AND STATES' MEDICAL DISCLOSURE STATUTES

A. The Differences Among Various Adoptions

When prospective adoptive parents begin the adoption process, they often have the option of adopting through a private adoption process, a state adoption agency, or a state-licensed adoption agency.[24] In a private adoption, the prospective adoptive parents and the birth parents locate each other themselves and are free to demand information from one another,[25] and can use an intermediary or an attorney to facilitate the process.[26] With private adoptions, the prospective adoptive parents often pay for the mother's maternity-related expenses.[27] It should be noted that a court must still approve private adoptions.[28] This option is not available everywhere, as it is prohibited or restricted in many states.[29]

When prospective adoptive parents contact a state adoption agency to adopt, adoption placement can take place through the local public agency, which, in turn, contacts foster care, child welfare, or social services.[30] If prospective adoptive parents choose to adopt through a licensed adoption agency, they are not contacting the local public agency, but rather, are contacting an adoption agency that has been licensed by the state.[31] In both state and state-licensed adoption agencies, prospective adoptive parents are interviewed by the agency and participate in a home study prior to placement.[32] A post-placement supervision period takes place

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[24] *What Are the Different Types of Adoption?*, ADOPTION.COM, http://adopting.adoption.com/child/what-are-the-different-types-of-adoption.html (last visited Oct. 20, 2012).

[25] *Independent Adoption*, THE ADOPTION GUIDE, http://www.theadoptionguide.com/options/articles/independent-adoption (last visited Oct. 20, 2012) (pointing out that the birth mother takes a more active role in selecting the adoptive parents by engaging in numerous face-to-face meetings).

[26] *Id.*

[27] Paula K. Bebensee, *In the Best Interests of Children and Adoptive Parents: The Need for Disclosure*, 78 IOWA L. REV. 397, 402 (1993).

[28] *The Different Types of Adoption*, FINDLAW, http://family.findlaw.com/adoption/the-different-types-of-adoption.html (last visited Oct. 20, 2012).

[29] *Use of Advertising and Facilitators in Adoptive Placements: Summary of State Laws*, U.S. DEP'T OF HEALTH & HUMAN SERVS. ADMIN. FOR CHILDREN & FAMILIES (2009), *available at* http://www.childwelfare.gov/systemwide/laws_policies/statutes/advertising.cfm#6. Delaware, Georgia, Illinois, Kansas, Massachusetts, Montana, New Mexico, North Dakota, New York, Oregon, and Wisconsin are among the states that restrict or limit the use of adoption intermediaries. *Id.*

[30] *Id.*

[31] *Id.*

[32] Charles Chejfec, Comment, *Disclosure of an Adoptee's HIV Status: A Return to Orphanages and Leper Colonies?*, 13 J. MARSHALL J. COMPUTER & INFO. L. 343, 349 (1995). Every state requires prospective adoptive parents to participate in a home study, which is a report conducted by the adoption agency that determines whether a match exists between the adoptee's needs and the prospective adoptive parents' ability to meet those needs. A determination is made based on the prospective adoptive parents' home environment, as well as their health, income, education, and employment background among many other factors. *The Adoption Home Study Process*, U.S. DEP'T OF HEALTH & HUMAN SERVS. ADMIN. FOR CHILDREN & FAMILIES (2010), *available at*

and a final report is submitted to the court prior to finalization of the adoption for review.[33] Both state and state-licensed agencies operate under the same procedures and regulations.[34] However, given the numerous steps that prospective adoptive parents must take when looking to adopt a child through these adoption agencies, they may have to wait longer periods of time for an available child.[35] This Note focuses on the problems that adoptive parents experience as a result of medical nondisclosure when they choose to contact these state or state-licensed adoption agencies when looking to adopt a child.[36]

B. States' Medical Disclosure Statutes

Historically, the lack of medical disclosure has always been a problem because adoption records were not accessible to adoptive parents, leaving them unaware of the medical histories of the adoptees.[37] Since health professionals were concerned with interruptions in the bonding between the adoptee and the adoptive parents, records were sealed to avoid contact between biological parents and the adoptees.[38]

However, beginning in the 1960s,[39] states moved to amend adoption statutes to permit disclosure of non-identifying information.[40] With the rise of babies born with FAS and drug addictions, disclosure of medical background information became a crucial concern.[41] Currently, all states require disclosure of some health history to adoptive parents.[42] The requirements of medical disclosure in these provisions vary from state to state, differing in the level and amount of information to be disclosed to prospective adoptive parents.[43] However, despite the lack of uniformity, the statutes can be roughly grouped into three categories: those that require disclosure of the adoptee's general medical history; those that require a more comprehensive list of medical detail; and those that require disclosure of a biological mother's prenatal drug or alcohol use in addition to a general medical

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http://www.childwelfare.gov/pubs/f_homstu.cfm.

[33] *The Different Types of Adoption*, *supra* note 28 (indicating that agencies screen adoptive parents extensively before the adoption proceeds).

[34] Blair, *supra* note 8, at 743.

[35] Bebensee, *supra* note 27, at 401-02.

[36] *What Are the Different Types of Adoption?*, *supra* note 24. Although there is also a risk of fraud and misrepresentation with private adoptions, that discussion is beyond the scope of this Note.

[37] Ellen Waldman, *What Do We Tell the Children?*, 35 CAP. U. L. REV. 517, 520 (2006).

[38] *Id.*

[39] *Id.* at 523.

[40] Bebensee, *supra* note 27, at 403-04.

[41] Blank, *supra* note 12, at 1716-17 (commenting that since the biological parents' identifying information would be kept confidential, disclosing medical information came to be accepted by the adoption community).

[42] Steve Mulligan, *Inconsistency in Illinois Adoption Law: Adoption Agencies' Uncertain Duty to Disclose, Investigate, and Inquire*, 39 LOY. U. CHI. L.J. 799, 808 (2008).

[43] Bebensee, *supra* note 27, at 404-05.

report.[44] Yet none of the states' provisions indicate which exact details of an adoptee's and biological parents' medical background should be disclosed,[45] and more importantly, most states do not require disclosure of a mother's prenatal drug and alcohol use.[46]

In Alabama, for example, the statute dictates that upon finalization of the adoption, the state is to provide the adoptive parents non-identifying information on the biological parents' and adoptee's medical histories.[47] If the court finds that there is a compelling need for other information not listed, then the court will direct the agency to establish contact with the biological parents to obtain that information.[48] However, the statute does not enumerate what particular information should be included about the biological parents' medical history.[49] Similarly, most other state statutes do not require a high level of medical history detail.[50] If a biological parent knows that the adoption records are incomplete or inaccurate, she can amend the record with updated information.[51] Despite these disclosure provisions and their requirements to release medical information when available, there is little or no detail as to what encompasses a child's or biological parent's health history.[52] These statutes, therefore, may fail to provide prospective adoptive parents with the necessary medical information.

Other states' disclosure provisions do enumerate more comprehensive requirements. For example, in California, a child cannot be placed for adoption unless the adoptee's medical background and—if available—the biological parents' medical histories have been submitted to the prospective adoptive parents.[53] The medical report must also include information about the child's developmental history, psychological evaluations, scholastic information, and family life.[54] As for biological parents, they can submit a blood sample to the state agency for which DNA testing can be conducted at a later date upon the request of either the adoptee

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[44] *See infra* notes 47-68. A general medical report usually requires the health and medical histories of both the adoptee and the adoptee's biological parents without a further description of what details should be included in these histories. *Id.*

[45] Blair, *supra* note 8, at 686.

[46] *See supra* Part I.B.

[47] *See* ALA. CODE § 26-10A-31 (2011).

[48] *Id.*

[49] *Id.*

[50] *See* CONN. GEN. STAT. ANN. § 45a-746 (West 2011); FLA. STAT. ANN. § 63.162 (West 2011); GA. CODE ANN. § 19-8-23 (West 2011); IOWA CODE ANN. § 600.8 (West 2011); MO. ANN. STAT. § 453.121 (West 2011); N.D. CENT. CODE ANN. §14-15-16 (West 2011). For example, in states such as Connecticut, Florida, Georgia, Iowa, Missouri, and North Dakota, the statute requires the state to release only a general report of the biological parents' medical history to the adoptive parents only if it is available from the adoption records, and usually upon the written request of the prospective adoptive parents. The medical report does not need to include details of a biological mother's prenatal history, let alone in utero alcohol or drug use. *Supra* note 50.

[51] *See* CONN. GEN. STAT. ANN. § 45a-746.

[52] *Supra* note 50.

[53] CAL. FAMILY CODE § 8909 (West 2011).

[54] *Id.*

or adoptive parents.[55] The California statute also notes that it would be in a child's best interest for the birth parents to keep the state informed of health problems that can affect the child.[56]

Other states have comparable levels of detail in their medical disclosure requirements, and some even require disclosure of the adoptee's genetic diseases.[57] In Kentucky, the statute specifies that information—if known—about HIV or Hepatitis A, B, and C test results, must be made available to the prospective adoptive parents.[58] Yet, despite the higher level of detail required by the statutes in these states, there still remains a lack of focus on the necessity of disclosing either an adoptee's in utero drug or alcohol exposure, or the biological mother's prenatal substance abuse history.

Finally, only a few states require that information available about a biological mother's prenatal drug or medication use be provided to the prospective adoptive parents.[59] For example, the Illinois statute specifies that this information will be provided along with "[a]ny other information that may be a factor influencing the child's present or future health . . . to the extent currently in possession of the agency."[60] Other states with similar requirements include New York,[61] New Jersey,[62] and North Carolina, whose statute dictates that "health-related information shall also include an account of the prenatal and postnatal care received by the minor."[63] These statutes express the kind of language that would direct an adoption agency to disclose the type of medical information to prospective adoptive parents that would assist them in making an informed adoption decision.

Other states—such as Oregon—delineate more specific language and require, when possible, for the court to provide the prospective adoptive parents with information about the child's "birth defects" as well as the "gynecologic and obstetric history of the biological mother."[64] Moreover, Maine's statute dictates

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[55] *Id.*

[56] *Id.* § 8702.

[57] *See* ARIZ. REV. STAT. ANN. § 8-129 (2011); ARK. CODE ANN. § 9-9-505 (West 2011); HAW. REV. STAT. § 578-14.5 (West 2011); IDAHO CODE ANN. § 16-1506 (West 2011); KAN. STAT. ANN. § 59-2130 (West 2010); LA. CHILD. CODE ANN. art. 1125 (2011); UTAH CODE ANN. § 78B-6-143 (West 2011); W. VA. CODE ANN. § 48-23-601 (West 2011). In states such as Arizona, Arkansas, Hawaii, Idaho, Kansas, Louisiana, Utah, and West Virginia, the statutes specify that medical forms must include information about the adoptees' or biological parents' genetic diseases, if known. *Supra* note 57.

[58] KY. REV. STAT. ANN. § 199.520 (West 2011).

[59] *See supra* note 10.

[60] 750 ILL. COMP. STAT. ANN. 50 / 18.4a (West 2011).

[61] *See* N.Y. SOC. SERV. LAW § 373-a (McKinney 2010).

[62] *See* N.J. STAT. ANN. § 9:3-41.1 (West 2011).

[63] N.C. GEN. STAT. ANN. § 48-3-205 (West 2010).

[64] OR. REV. STAT. ANN. § 109.342 (West 2012). In Wyoming, the medical history to be provided to the adoptive parent shall include "any drugs or medication taken during pregnancy by the child's natural mother and any other information which may be a factor influencing the child's present or future health." WYO. STAT. ANN. § 1-22-116 (West 2012). In Mississippi, the statute requires "[a] report describing the adoptee's prenatal care and medical condition at birth, if available" along with any inheritable diseases or illnesses. MISS. CODE ANN. § 93-17-205 (West 2011), *amended by* 2012 Miss. Laws 556.

that the adoption agency "shall attempt to obtain . . . an account of the child's prenatal care, medical condition at birth, results of newborn screening, [and] any drug or medication taken by the child's birth mother during pregnancy."[65] Most importantly, if the listed information is unavailable, then the adoptive parents must be informed in writing.[66] Maine's statute is unique, as it also requires disclosure of the birth parent's history of drug and alcohol use, information on his or her health at the time of the adoptee's birth, as well as the birth mother's health during her pregnancy.[67] No other state mentions disclosure of a biological parent's alcohol use.[68]

The problem that persists in the language of the statutes in all categories—including the second and third categories which require a higher level of medical detail—is that medical information is to be disclosed to the prospective adoptive parents only "where known or available."[69] Therefore, despite an adoption agency's reasonable efforts to obtain medical information,[70] if they cannot acquire details about a birth mother's prenatal substance use, then that information will be unavailable to the prospective adoptive parents.[71] Unfortunately, without explicit requirements to alert prospective adoptive parents to the notion that a biological mother's prenatal history is unavailable, parents will continue to make uninformed adoption decisions with no opportunity as to what they should expect of the medical reports.[72]

By mandating testing of pregnant women who place their children for adoption, agencies would, in fact, be able to obtain the necessary medical details for disclosure. In addition, amending statutes to require adoption agencies to disclose these details to prospective adoptive parents would provide them with a more concrete idea of what they should expect of an adoptee's medical records. Further, statutes should explicitly require disclosure of prenatal alcohol abuse to prospective adoptive parents. As discussed earlier, with the exception of Maine's statute, the few states that do require disclosure of a birth mother's prenatal substance use do not specifically mention disclosure of alcohol use.[73] As studies have shown, both prenatal drug and alcohol ingestion can lead to birth defects,[74]

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65 ME. REV. STAT. ANN. tit. 22, § 8205 (West 2011).

66 *Id.*

67 *Id.*

68 *Supra* notes 47-64.

69 *See, e.g.*, WASH. REV. CODE ANN. § 26.33.350 (West 2012).

70 Blair, *supra* note 8, at 687.

71 Shannon M. Connelly, Note, *The Need for Disclosure Laws: A Survey of the Wrongful-Adoption Cause of Action and Statutory Remedies for Adoption Fraud*, 10 REV. LITIG. 793, 795 (1991) (explaining that adoptive parents obtain all their information about the adoptee from the agency). Because of this complete dependence on the adoption agency, adoptive parents who are not provided certain types of information by the agency will also probably not obtain this information elsewhere.

72 *Supra* note 50.

73 *Supra* note 10.

74 Blair, *supra* note 8, at 733.

and due to the consequences that this can have for the fetus, supplying this information to prospective adoptive parents is of utmost importance.[75]

II. THE EFFECTS OF IN UTERO SUBSTANCE ABUSE AND WRONGFUL ADOPTION CLAIMS

A. The Effects of In Utero Alcohol Use

Each year, between 350,000 and 739,200 infants are born who have been exposed to drugs or alcohol in utero, and the number continues to rise.[76] Although studies vary as to the exact effects that prenatal alcohol use can have on a fetus,[77] it is clear that pregnant women who drink alcohol put their children at some risk for birth defects and disorders.[78] Most alarmingly, prenatal alcohol use can lead to FAS, a disease identified in 1973 that is caused by in utero alcohol exposure,[79] and occurs once in every 1,000 live births.[80] FAS is associated with physical deformities, mental deficiencies,[81] and various degrees of central nervous system dysfunctions.[82] Physical problems might include a lower birth weight and length, and a smaller head circumference.[83] The possible mental defects can include cognitive problems; specifically, a child with FAS may have "difficulty demonstrating common sense, understanding concepts, solving problems, or organizing information."[84] Affected children often have lower IQs, lack mathematical skills, have abnormal socio-emotional development, and may exhibit behavioral problems that do not improve upon adulthood.[85] Research shows that children with FAS are also more likely to abuse drugs and experience trouble with the law.[86] Furthermore, central nervous system deficiencies associated with FAS

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[75] *Id.*

[76] David C. Brody & Heidee McMillin, *Combating Fetal Substance Abuse and Governmental Foolhardiness Through Collaborative Linkages, Therapeutic Jurisprudence and Common Sense: Helping Women Help Themselves*, 12 HASTINGS WOMEN'S L.J. 243, 245 (2001).

[77] April L. Cherry, *The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health*, 16 COLUM. J. GENDER & L. 147, 157 (2007).

[78] John Stogner, *The War on Whiskey in the Womb: Assessing the Merit of Challenges to Statutes Restricting the Alcohol Intake of Pregnant Women*, 7 RUTGERS J. L. & PUB. POL'Y 259, 261 (2010).

[79] *Id.*

[80] Deborah A. Schmedemann, *Voice: Speaking for a Deaf Boy in Foster Care (A True Story with Questions)*, 7 J. Ass'n Legal Writing Dirs. 203, 221 (2010).

[81] Stogner, *supra* note 78.

[82] Brody & McMillin, *supra* note 76, at 245.

[83] Stogner, *supra* note 78, at 261-62.

[84] *Id.* at 261.

[85] Ellen M. Weber, *Child Welfare Interventions for Drug-Dependent Pregnant Women: Limitations of a Non-Public Health Response*, 75 UMKC L. REV. 789, 809 (2007) (explaining that behavioral problems include a lack of interpersonal skills and the inability to conform to social norms).

[86] Brody & McMillin, *supra* note 76, at 246.

can include coordination problems, language delays,[87] and abnormalities in muscle tone.[88]

Studies find that a child can be born with FAS when there has been significant in utero alcohol exposure, but even moderate amounts of alcohol may lead to learning and attention problems.[89] Thus, there is a continuing debate about whether even minimal alcohol consumption during a pregnancy can be a safe option.[90] Though not all affected fetuses develop FAS, in utero alcohol exposure can lead to other problems, such as Alcohol-Related Neurodevelopmental Disabilities ("ARND").[91] While children with ARND can have central nervous system defects that are similar to those detected in FAS, they do not exhibit facial deformities.[92] These children can also have complications with "arithmetic, socio-emotional, and attention capabilities, particularly in their ability to retrieve information from memory."[93] While the severity of these complications and defects may vary based on the quantity of alcohol ingested,[94] what is clear is that the detrimental effects are not curable or reversible.[95]

B. The Effects of In Utero Drug Use

Similar to in utero alcohol exposure, the severity and permanence of the effects of in utero drug exposure also varies, although most scientists do agree that drug use can harm a fetus.[96] While it is difficult to separate the effects of prenatal drug exposure from the impact of other hazardous behaviors,[97] prenatal exposure to drugs has been linked to a variety of birth defects.[98] Medical problems can range from mental to developmental and behavioral complications, which can have life-long or short-term consequences.[99] The type of substance used, timing of exposure, and other environmental factors account for the variation in defects as well.[100] In general, in utero drug exposure can cause stunted growth, underdeveloped organs, shorter body lengths, and a smaller head circumference at

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[87] Sharon G. Elstein, *Children Exposed to Parental Substance Abuse: The Impact*, 34-FEB COLO. LAW. 29, 30 (2005).

[88] Brody & McMillin, *supra* note 76, at 246.

[89] Fentiman, *supra* note 21, at 654.

[90] *Id.*

[91] Elstein, *supra* note 87.

[92] *Id.* at 30-31.

[93] Weber, *supra* note 85.

[94] Stogner, *supra* note 78, at 265 (emphasizing that the exact amount that can cause some of these abnormalities remains in question).

[95] *Id.* at 282 (explaining that even though not all pregnant women who consume alcohol give birth to infants with such problems, the defects that do occur are linked to prenatal alcohol consumption).

[96] Fentiman, *supra* note 21.

[97] LaShanda D. Taylor, *Creating a Causal Connection: From Prenatal Drug Use to Imminent Harm*, 25 N.Y.U. Rev. L. & Soc. Change 383, 396 (1999) (highlighting that these hazardous factors can include exposure to violence, unsanitary living conditions, as well as poor nutrition and overall health).

[98] Brody & McMillin, *supra* note 76, at 245.

[99] Elstein, *supra* note 87.

[100] *Id.*

birth.[101] In addition, babies born to mothers who have used drugs prenatally are at a higher risk for sudden infant death syndrome.[102]

Birth defects may also vary based on the type of drug that was used by the mother prenatally.[103] For example, in utero cocaine exposure can lead to a premature birth, visual impairment, mental retardation,[104] and attention deficit disorder.[105] Cocaine use can also cause miscarriages, prenatal strokes, and kidney and lung problems.[106] Heroin use can result in similar defects, and it "has been linked to congenital abnormalities, jaundice, respiratory distress syndrome, low birth weight . . . and a high likelihood of complications resulting from withdrawal."[107] Most commonly, heroin use can lead to neonatal abstinence syndrome, which is identified by withdrawal symptoms that include tremors, hyperactive reflexes, rapid respiration, seizures, and dehydration.[108] Marijuana exposure can comparably lead to behavioral and memory problems.[109]

Given the extensive gamut of complications that can develop as a result of alcohol or drug use during a pregnancy, prospective adoptive parents would need complete and accurate information of all possible risks pertaining to the adoptee in order to prepare for the adoptee's medical needs.[110] The results of mandated testing of pregnant women who place their children for adoption—while preserving their privacy—would also alert prospective adoptive parents to the emotional and financial repercussions of the adoption placement.[111] Currently, however, because of either the agency's negligent or deliberate nondisclosure of medical information, or because of its lack of information about a biological mother's prenatal history,[112] adoptive parents continue to encounter the medical, emotional, and financial burdens that are associated with the adoptee.[113] One way that adoptive

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101 Brody & McMillin, *supra* note 76, at 245.

102 Elstein, *supra* note 87, at 31. Sudden infant death syndrome ("SIDS") is the sudden and unexplained death of an infant who is between two and four months of age. *Sudden Infant Death Syndrome*, U.S. NAT'L LIBRARY OF MED., *available at* http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0002533/ (last reviewed Aug. 2, 2011).

103 Cherry, *supra* note 77.

104 Schmedemann, *supra* note 80.

105 Major Kirsten M. Dowdy, *Article 119A: Does it Protect Pregnant Women or Target Them?*, 2008-SEP ARMY LAW 1, 17 (2008) (quoting Nora D. Janssen, *Fetal Rights and the Prosecution of Women for Using Drugs During Pregnancy*, 48 DRAKE L. REV. 741, 763-64 (2000)).

106 Elstein, *supra* note 87, at 31.

107 Dowdy, *supra* note 105.

108 Elstein, *supra* note 87, at 32. Neonatal abstinence syndrome is a withdrawal syndrome of infants, due to the prenatal or maternal use of drugs. *Neonatal Abstinence Syndrome*, MEDSCAPE, http://emedicine.medscape.com/article/978763-overview (last updated Apr. 24, 2012).

109 Dowdy, *supra* note 105.

110 Blank, *supra* note 12, at 1715.

111 *Id.* at 1716.

112 Connelly, *supra* note 71.

113 *Id.* at 796.

parents have sought to alleviate these burdens is by pursuing wrongful adoption claims.[114]

C. Wrongful Adoption Claims

Wrongful adoption is the term applied to the group of tort claims brought by adoptive parents against adoption agencies for their negligent or intentional misrepresentations of the adoptee's health.[115] Under a negligence-based wrongful adoption claim, adoptive parents can hold agencies liable for failing to exercise reasonable care in accurately collecting and disclosing the adoptee's medical information.[116] If an adoption agency deliberately conceals medical information about the adoptee from the adoptive parents in order to expedite placement, then parents can also file wrongful adoption suits based on the agency's intentional misrepresentation.[117] A successful wrongful adoption claim allows adoptive parents to recover compensatory damages sustained from the high costs of raising a special needs child,[118] as well as punitive damages for the adoptive parents' emotional suffering stemming from the unforeseen problems.[119]

In 1986, Ohio became the first state to recognize a wrongful adoption claim in *Burr v. Board of County Commissioners*,[120] in which the court found the adoption agency liable for intentionally failing to disclose to the adoptive parents that the adoptee's biological mother was mentally impaired.[121] This influential decision began the movement towards judicial recognition and the gradual expansion of a wrongful adoption tort.[122] Since the *Burr* case, adoptive parents across the country have flooded state courts with claims against adoption agencies for negligent and intentional medical misrepresentations.[123]

The increasing number of these claims filed not only demonstrates the pressing need for proper medical disclosure, but also reveals the nationwide lack of uniformity in state courts' holdings.[124] Since the medical disclosure provisions of adoption statutes vary from state to state, courts across state lines also lack consistency in their analyses of wrongful adoption cases.[125] If a statute imposes a limited duty to disclose upon the adoption agency, or if it is silent as to whether a duty exists at all, unpredictable outcomes may ensue when it is left to the court's

[114] *Id.* at 797.

[115] Mulligan, *supra* note 42, at 809.

[116] Jennifer Emmaneel, Note, *Beyond Wrongful Adoption: Expanding Adoption Agency Liability to Include a Duty to Investigate and a Duty to Warn*, 29 GOLDEN GATE U. L. REV. 181, 186 (1999).

[117] Mulligan, *supra* note 42, at 809.

[118] *Id.* at 809-10.

[119] Emmaneel, *supra* note 116, at 185-86.

[120] Burr v. Bd. of Cnty. Comm'rs of Stark Cnty., 491 N.E.2d 1101 (Ohio 1986).

[121] Mulligan, *supra* note 42, at 810.

[122] *Id.* at 811.

[123] *Id.* at 811-12.

[124] *See supra* Part II.C.

[125] *Id.*

discretion to determine the extent of that duty.[126] In other words, inconsistencies become apparent when some adoption agencies unjustly escape liability for failing to disclose pertinent medical information in some states, while agencies in other states are held accountable under similar facts for comparable forms of misrepresentation.[127] This disparity signifies that—depending on the state—for some adoptive parents, there may never be redress for the adoptee's medical burdens as well as their own emotional and financial distress.

1. The Effects of Nondisclosure on an Adoptee

When adoptive parents are misinformed about the adoptee's medical information through the adoption agency's negligent or deliberate misrepresentation, the impact on the adoptee can be damaging.[128] Adoptive parents who are unprepared to care for a special needs child may inadvertently harm the adoptee by failing to meet his or her medical needs.[129] Some courts have considered the adoptee's suffering in these situations in finding an agency accountable for misrepresentation. For example, in *J.A. v. St. Joseph's Children's & Maternity Hospital*, the adoptive parents and adoptee sued the adoption agency for intentionally concealing the biological mother's prenatal substance abuse.[130] The court noted that it is reasonable to assume that an adoptee with special needs can suffer when placed with adoptive parents who are unwilling and physically unable to care for him.[131] It was also noted that a higher duty of care is imposed when there is a "special relationship" existing between the adoption agency and the adoptive parents.[132] Therefore, the court held that St. Joseph's Center did owe a duty of care to the adoptee in placing him for adoption.[133]

In addition to the harm an adoptee can suffer as a result of adoptive parents' lack of preparation for raising a special needs child, when parents first notice the child's health complications, they may unintentionally subject him or her to improper treatments that are not tailored to his or her medical needs.[134] Despite the severity of this consequence, some courts have not granted relief to the parents. For example, in *MacMath v. Maine Adoption Placement Services* ("MAPS"), the

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[126] *Id.*

[127] *Id.*

[128] Blair, *supra* note 8, at 684.

[129] *Id.*

[130] J.A. v. St. Joseph's Children's & Maternity Hosp., 52 Pa. D. & C.4th 142 (Pa.Com.Pl. 2001). The subject adoptee was diagnosed with FAS. *Id.*

[131] *Id.* (holding that the adoption agency had not taken steps to ascertain the adoptive parents' fitness to care for a child with FAS).

[132] *Id.* A special relationship is one that exists between adoption agencies and adoptive parents, which creates a duty to exercise reasonable care in disclosing pertinent information that would enable the parents to make an informed adoption decision and to obtain appropriate medical care for the child. Price v. State, 57 P.3d 639, 641 (Wash. Ct. App. 2002).

[133] *St. Joseph's Children's & Maternity Hosp.*, 52 Pa. D. & C.4th 142.

[134] Blair, *supra* note 7, at 429-30.

adoptive parents had subjected their adopted son to several months of extensive testing when they first realized his developmental delays.[135] He was tentatively and improperly diagnosed despite a long period of thorough medical testing.[136] Unfortunately, the court held both that MAPS had not assumed a duty to provide complete medical information and one would not be imposed upon them.[137] Therefore, MAPS was able to escape liability for withholding information about the adoptee's health problems.[138]

The unnecessary and painful procedures that adoptees endure have in some cases resulted in the adoptee's permanent disability.[139] For example, in *Foster v. Bass*, the lack of medical information about the adoptee led to a misdiagnosis, which resulted in the child's permanent brain damage that could have been avoided with proper treatment.[140] Despite this tragic occurrence, the adoptive parents were not able to recover compensatory or punitive damages for their child's affliction.[141] Similar to *MacMath*, the court reasoned that it would not hold the agency liable for failure to disclose the medical risks of the adoptee, but would only recognize a cause of action if the agency had intentionally misinformed the parents.[142]

While the *St. Joseph's* court correctly found for the adoptive parents, conflicting results in *MacMath* and *Foster* illustrate how adoptive parents in some states can be left without a remedy.[143] The courts' failure to impose a duty on the adoption agencies to investigate an adoptee's medical background—while using a foreseeability analysis—ignores the adoptees' plight.[144] As noted in *Foster*, the court held that since the adoptee's illness did not manifest itself in the biological parents, it was unforeseeable to the agency that the child would later suffer because of nondisclosure.[145] Similarly, a pregnant woman's substance abuse may also not manifest itself, and further, a child who had been exposed to drugs or alcohol in

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135 MacMath v. Me. Adoption Placement Servs., 635 A.2d 359 (Me. 1993). When the adoptee was diagnosed with global neurodevelopmental dysfunction—a disorder that would prevent him from leading a normal life—the adoptive parents sued MAPS, arguing that they had explicitly informed the agency that they were not interested in adopting a baby who had been exposed to drugs in utero. When the adoptive parents sought to find more information about the birth mother's prenatal care, it was "sketchy and subject to differing interpretations" and "of little help in forming a diagnosis." *Id.* at 360.

136 *Id.* at 360.

137 *Id.*

138 *Id.*

139 Blair, *supra* note 7, at 430.

140 Foster v. Bass, 575 So.2d 967 (Miss. 1990). The adoptive parents sued the agency for failing to disclose that the adoptee had Phenylketonuria ("PKU"), a genetic disorder that can be treated with a low-phenylalanine diet. *Id.* at 971.

141 *Id.* at 983-84.

142 *Id.* Although the case concerned a genetic disorder and not one stemming from prenatal substance abuse, the general idea is that whenever medical information is lacking, parents may not always tend to the adoptee's medical needs in a timely or proper manner.

143 *See* MacMath v. Me. Adoption Placement Servs., 635 A.2d 359 (Me. 1993); *Foster*, 575 So.2d 967.

144 *Id.*

145 *Foster*, 575 So.2d at 975-76.

utero may not immediately display indications of a medical problem.[146] Under a foreseeability analysis, without imposing an investigatory duty on adoption agencies, an agency can always escape liability by arguing that they could not have foreseen that nondisclosure would adversely affect the adoptee's health.[147] By requiring agencies to examine and disclose the adoptee's prenatal history through mandated testing, adoptive parents would have a cause of action on behalf of adoptees in these jurisdictions, thereby eliminating inconsistent analyses across state lines.[148]

2. The Effects of Nondisclosure on Adoptive Parents

When an adoptee's health worsens as a result of an agency's misrepresentation, adoptive parents inevitably encounter emotional suffering.[149] A child harmed by in utero alcohol or drug exposure can have behavioral or psychiatric problems and may display violent and self-destructive behavior,[150] thereby emotionally destroying adoptive parents who are unprepared for these repercussions.[151] In deciding whether or not a cause of action for wrongful adoption exists, some state courts have acknowledged the anguish adoptive parents experience when raising an adoptee who—unbeknownst to them—has special needs.[152] In *Roe v. Catholic Charities*, the court found the agency liable for intentionally misrepresenting the adoptee's health and psychological background, noting that a special needs child can cause emotional damage to a family unit.[153] In recognizing a cause of action for an agency's negligent failure to disclose information, the court in *McKinney v. State* stressed that adoptive parents need to be "emotionally equipped to provide an atmosphere that is optimally conducive to that special child's growth and development."[154] The court appropriately recognized a cause of action against the adoption agency, and acknowledged that prospective adoptive parents are entitled to this type of medical information.[155]

However, in *Sherman v. Adoption Center of Washington, Inc.*, despite the adoptive parent's claim for emotional distress based on the agency's failure to reveal the adoptee's diagnosis of FAS, the court did not find that a cause of action

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[146] Elstein, *supra* note 87 (as in cases of children with ARND).

[147] *See Foster*, 575 So.2d at 975-76.

[148] Blair, *supra* note 8, at 745.

[149] *Id.* at 701.

[150] Weber, *supra* note 85.

[151] Blair, *supra* note 8, at 701 (noting that families have been torn apart by the adoptees' violent behavior when, in some cases, they have physically harmed the adoptive parents, or tortured and sexually molested their adoptive siblings).

[152] *Infra* notes 153-55.

[153] Roe v. Catholic Charities of the Diocese of Springfield, Ill., 588 N.E.2d 354 (Ill. App. Ct. 1992).

[154] McKinney v. State, 950 P.2d 461, 467 (Wash. 1998). Only after the adoption was finalized, did the adoptive parents learn that the child—who was diagnosed with FAS—was exposed to alcohol in utero. *Id.*

[155] *Id.*

existed.[156] Further, the court held that even if an adoption agency falls short of its best efforts in obtaining medical information on the adoptee, causation cannot be proven when the adoptive parent is aware that risks may be involved.[157] Similarly, in *M.H. v. Caritas Family Services*, the adoptive mother filed claims against the adoption agency for emotional distress when she discovered the adoptee's medical background.[158] Despite the fact that the adoptive mother was physically harmed by the adoptee, the court found for the adoption agency, holding that while agencies cannot mislead adoptive parents, only evidence of intentional misrepresentation would create a cause of action.[159]

While the *Roe* and *McKinney* courts recognized the adoptive parents' emotional distress, and reasoned that adoption agencies can be held liable for both intentional and negligent misrepresentation of an adoptee's medical history, the *Sherman* and *Caritas* courts relied on flawed reasoning and reached contrary results.[160] Although adoptive parents always assume a risk when adopting children with ambiguous backgrounds, they cannot be expected to assume the range and depth of emotional struggles that entail adopting a child with these types of medical histories.[161] Therefore, the *Sherman* court erroneously reasoned that an adoptive parent's assumption of risk extinguishes his or her claim against the adoption agency for misrepresenting medical information.[162] In addition, by expecting adoptive parents to prove intentional misrepresentation when an adoption agency misreports an adoptee's medical background as in *Caritas*, adoption agencies in some states can always escape liability by simply arguing that the misrepresentation was an unintended error.[163]

Finally, as a result of nondisclosure, adoptive parents can also suffer from unanticipated financial burdens as they struggle to meet the high medical expenses associated with a special needs child.[164] Some courts have emphasized these undue expenses and have appropriately held agencies liable for their misrepresentations.[165] For example, in *Morris v. State*, the adoptive parents sued the state adoption agency for failing to properly investigate the adoptee's medical history and for failure to disclose information about his biological parents.[166] The

156 Sherman v. Adoption Ctr. of Wash., Inc., 741 A.2d 1031 (D.C. 1999).

157 *Id.* at 1036.

158 M.H. v. Caritas Family Servs., 488 N.W.2d 282 (Minn. 1992).

159 *Id.* at 289.

160 *Supra* notes 153-59

161 Blair, *supra* note 8, at 700-02. For example, one set of adoptive parents had not anticipated that their adopted daughter would attempt to poison them, set fire to their home, and steal from classmates and family. The adoptee's psychiatric problems were not previously revealed to her adoptive parents. *Id.*

162 *Sherman*, 741 A.2d 1031.

163 *Caritas*, 488 N.W.2d 282.

164 Connelly, *supra* note 71, at 796.

165 *Infra* notes 166-69.

166 Morris v. State, No. 47964-4-I, 2003 WL 220958 (Wash.App. Div. 1 Feb. 3, 2003). The adoptee—who had mutilated the family cat and allegedly sexually assaulted his adoptive sister—had

court discussed the Morris' claim for past economic damages for the costs of the adoptee's treatment as well as future financial damages for medical care, and it found sufficient evidence to affirm the trial court's finding of misrepresentation.[167] Similarly, in *Wolford v. Children's Home Society of West Virginia*, West Virginia, for the first time, recognized negligence claims brought against adoption agencies for misrepresentation or failure to disclose medical information to prospective adoptive parents.[168] In finding that a cause of action existed against the agency, the court noted that the parents' reliance on the agency's misrepresentation had led them to incur extraordinary medical expenses that would continue into the future to treat the adoptee's FAS.[169]

However, not all state courts will recognize the adoptive parents' claim for recovery in medical costs. In the Rhode Island case of *Rowey v. Children's Friend and Services*, when the adoptive parents learned that the agency had misrepresented the biological mother's prenatal history, they sued the agency for the high costs of the adoptee's medical and psychiatric treatment, and they also sought compensation for the costs of her future care.[170] However, the court granted summary judgment for the defendants, holding that the Roweys' action was time-barred since they should have known that the agency had failed to provide them with accurate medical information at some point sooner after placement.[171] A similar problem also arose in *April v. Associated Catholic Charities of New Orleans* when the adoptive parents sued the agency for intentional misrepresentation upon discovering that their adopted son suffered from FAS.[172] The Aprils sought damages for the high costs of medical care and for their lost wages due to the time needed to supervise the child.[173] Despite the parents' burden of substantial costs, the court found for the agency, holding that the adoptive parents should have sought legal action once they learned of their son's symptoms.[174]

Although both the *Morris* and *Wolford* courts recognized the adoptive parents' monetary damages in holding adoption agencies liable for misrepresenting information, the reasoning in the *Rowey* and *April* cases overlooked the gravity of this problem in finding that the actions were time-barred.[175] However, because

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developmental delays, and had been exposed to drugs and alcohol in utero. *Id.*

[167] *Id.*

[168] Wolford v. Children's Home Soc'y of W. Va., 17 F. Supp. 2d 577, 579 (S.D. W. Va. 1998). Although the parents had been assured that the adoptee's biological mother had not used alcohol while pregnant, the child was diagnosed with FAS four years after placement. *Id.*

[169] *Id.* at 585.

[170] Rowey v. Children's Friend and Servs., No. C.A. 98-0136, 2003 WL 23196347 (R.I. Super. Ct. 2003 Dec. 12, 2003).

[171] *Id.* (reasoning that the Roweys had witnessed the adoptee's behavioral problems and were aware that she suffered from two illnesses).

[172] April v. Associated Catholic Charities of New Orleans, 629 So.2d 1295, 1296 (La. Ct. App. 1993).

[173] *Id.* at 1296-98.

[174] *Id.*

[175] *Supra* notes 166-74.

adoptive parents are constantly gathering as much medical information as possible about their child, they cannot always be expected to comprehend the magnitude of a health problem under a rigid statute of limitations.[176] Further, since many of these illnesses and conditions are not immediately apparent, or take longer periods of time to develop and emerge, it would be difficult for adoptive parents to determine when an agency's misrepresentation is the cause of their grievances and when to bring the claim to court.[177] Finally, it should also be noted that monetary burdens do not always stem from an adoptee's medical needs, but rather, parents also lose the opportunity to apply for state adoption subsidies if they do not make this request prior to the finalization of the adoption.[178]

While the impact of financial burdens is a catalyst behind many wrongful adoption claims, most adoptive parents want justice for being misled by an agency when making their adoption decision.[179] Whether the medical information was deliberately or negligently misrepresented, or whether the medical data was simply absent from the records, adoptive parents are caught between refusing to annul the adoption and the struggle of raising a special needs child without notice or preparation.[180] As long as adoption agencies fail to provide adoptive parents with necessary information, parents will continue to suffer and wrongful adoption cases will persist.[181] In addition, the lack of uniformity in courts' analyses in these cases creates uncertainty as to whether and if adoptive parents can ever recover for grievances stemming from an adoption agency's nondisclosure.[182] However, as mentioned earlier, agencies may not have the relevant information from biological mothers—specifically about their prenatal drug or alcohol use—to disclose to prospective adoptive parents.[183] To control the number of wrongful adoption cases and to effectuate uniformity in all state courts, states should implement procedures to mandate medical information from pregnant women who wish to surrender their children, and impose a duty upon agencies to disclose this information.

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[176] *Collection of Family Information About Adopted Persons and Their Birth Families*, Washington, D.C.: U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU (2012), *available at* http://www.childwelfare.gov/systemwide/laws_policies/statutes/collection.cfm.

[177] Blair, *supra* note 7, at 438.

[178] Connelly, *supra* note 71, at 797.

[179] *See supra* Part II.C.

[180] *Id.*

[181] *See, e.g.*, Jackson v. State, 956 P.2d 35 (Mont. 1998), Siler v. Lutheran Soc. Servs. of Metro. N.Y., 782 N.Y.S.2d 93 (App. Div. 2004), Ferenc v. World Child, Inc., 977 F. Supp. 56 (D.D.C. 1997), Harshaw v. Bethany Christian Servs., 714 F. Supp. 2d 771 (W.D. Mich. 2010), Cesnik v. Edgewood Baptist Church, 88 F.3d 902, 903 (11th Cir. 1996).

[182] *Compare* MacMath v. Me. Adoption Placement Servs., 635 A.2d 359 (Me. 1993), *with* Wolford v. Children's Home Soc'y of W. Va., 17 F. Supp. 2d 577 (S.D. W. Va. 1998).

[183] Blank, *supra* note 12.

III. ARGUMENT AND ANALYSIS

A. Proposal

Since the adoption agency is often the adoptive parents' only source of information on the adoptee's medical background, there is a compelling need for an agency to obtain complete and accurate information.[184] In order to collect pertinent medical information on both the adoptee and the biological parents—specifically when it comes to a mother's in utero drug and alcohol use—states should mandate drug and alcohol testing as a condition for pregnant women who wish to surrender their newborns to an adoption agency.[185] Therefore, when a pregnant woman who has already decided to place her baby for adoption contacts the agency to discuss placement, the agency's personnel would conduct tests for substance use.[186] Results obtained from mandated drug and alcohol testing can be recorded in the adoptee's file to alert the adoption agencies, health professionals, and prospective adoptive parents of the potential risks that may ensue.

Women who decide to surrender their babies after they have given birth should not be subjected to mandatory testing. For one, since alcohol can exit the body quickly, typically it would not be detectable in urine after twenty-four hours; therefore, it would be more difficult to detect prenatal alcohol use after a woman has already given birth.[187] Also, since the agency will perform standard diagnostic testing on the newborn,[188] and would be able to detect in utero drug exposure through a sample of the newborn's urine,[189] the biological mother should not be required to submit to testing, unless she decides to at her own discretion. If the biological mother does volunteer this information,[190] or if the agency obtains prenatal substance abuse history through other means, state statutes should be amended to require disclosure of this data to prospective adoptive parents.

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184 M.H. v. Caritas Family Servs., 488 N.W.2d 282, 288 (Minn. 1992).

185 Lindsay J. Mather, *The Impact of the Genetic Information Nondiscrimination Act on the Disclosure of Information in Adoption Proceedings*, 78 U. CIN. L. REV. 1629, 1644-45 (2010) (arguing that states should require birth parents to undergo genetic testing at the time of adoption for the purpose of providing the adoptee and adoptive parents with accurate health information). In a similar sense, states should also require drug and alcohol testing of the birth mother for the purpose of collecting prenatal information on the adoptee for prospective adoptive parents.

186 Blair, *supra* note 8, at 743-44 (discussing how it would not be difficult to provide training to personnel of adoption agencies licensed by the state in the procedure and skills necessary to collect data and prepare reports since they are often already trained to deal with difficult interpersonal situations).

187 *How Long Does Alcohol Stay in Your System or Urine?* ALCOHOL WITHDRAWAL SYMPTOMS http://www.alcoholwithdrawalsymptoms.org/193/how-long-does-alcohol-stay-in-your-system-or-urine/ (last visited Oct. 20, 2012). Although alcohol exits the body at different rates depending on a variety of factors, in general, for a healthy individual, it takes one hour for one standard drink to exit the system. *Id.*

188 Blair, *supra* note 8, at 758.

189 Meghan Horn, Note, *Mothers Versus Babies: Constitutional and Policy Problems with Prosecutions for Prenatal Maternal Substance Abuse*, 14 WM. & MARY J. WOMEN & L. 635, 650 (2008).

190 *See id.* at 638 (recommending funding for voluntary drug treatment for pregnant women).

Although these proposals may raise concerns about privacy, deterrence, and the accuracy of alcohol detection, by implementing certain appropriations, the problems from these concerns can be resolved.

B. Privacy Concerns with Mandated Drug Testing

Since state and federal courts protect individuals against required or unreasonable drug testing,[191] privacy issues will inevitably arise if drug testing is required of pregnant women when they decide to surrender their babies.[192] Pregnant women may argue that they do not want adoption agencies to investigate their background and history of substance abuse.[193] However, one way to protect the privacy of a pregnant woman who is undergoing a drug and alcohol test would be to keep her identity anonymous, which would serve to safeguard this fundamental right.[194] Any identifying information about the results would also be redacted to ensure the birth mother's anonymity.[195] Not only would the biological mother's identity be protected, but test results would be accessible only to those authorized to receive it.[196] By concealing a pregnant woman's identity when undergoing drug and alcohol testing, she would be less likely to seek alternate routes for placing her baby for adoption.[197]

The benefits and the compelling need of mandated testing also outweigh privacy concerns since adoptive parents should be provided with the most complete medical history possible to prepare them for the risks that the adoptee may encounter.[198] Yet another benefit is that test results can better prepare health professionals in providing preventive care, which can lead to significant health care savings.[199] Preventive care can also protect against improper medical treatment.[200] Moreover, when a pregnant woman approaches an adoption agency with regard to placing her baby for adoption, she should expect some limits on her privacy since agencies will necessarily follow certain standard procedures for

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[191] Blair, *supra* note 8, at 760-61 (noting that the U.S. Supreme Court grants constitutional protection to the privacy interest in autonomous personal decision-making).

[192] Stephanie Yu Lim, *Protecting the Unborn as Modern Day Eugenics*, 18 HEALTH MATRIX 127, 131 (2008) (explaining that the U.S. Supreme Court recognized that involuntary drug testing of pregnant women is a Fourth Amendment violation).

[193] Mulligan, *supra* note 42, at 832.

[194] Mather, *supra* note 185.

[195] *Id.* at 1645 (noting that if states were to require biological parents to undergo genetic testing, their identities would be kept anonymous).

[196] Blair, *supra* note 8, at 765.

[197] Mather, *supra* note 185, at 1641-42.

[198] *Id.* at 1630-31 (explaining that requiring genetic testing provides "adoptees with the most complete medical and genetic history possible, while simultaneously side-stepping concerns that disclosing such information would violate biological parents' privacy rights"). In a similar sense, requiring drug testing would also provide adoptees and their adoptive parents with the most complete medical history possible.

[199] *Id.* (noting that the results of genetic tests could create health care savings, which would ultimately benefit the state). Drug test results can have similar effects.

[200] *Id.*

adoption placement.[201] The state should recognize that any privacy expectation in these situations is reduced and outweighed by the significance of an adoptee's health, as well as the importance of providing adoptive parents with relevant information to use to tend to the adoptee's welfare.[202]

In addition to a reduced expectation of privacy, individuals do not have an absolute right to withhold health information of a personal nature unless there is a threat of self-incrimination.[203] Restrictions can be imposed on birth parents' right to privacy when a state has a compelling reason to require disclosure of information, and can show that the measures for disclosure can be implemented in least intrusive manners.[204]

Further, when the government interest is not related to law enforcement purposes, concerns for human safety—even in the absence of particularized suspicion—can outweigh privacy intrusions, such as required urine tests.[205] Using that same rationale, states should have a perpetual interest in protecting the adoptee's health and welfare,[206] as well as the interests of the adoptive parents. Therefore, these paramount interests override the privacy issues with mandated testing.[207] Finally, invading a parent's privacy interests can be justified by the fact that the intrusion is necessary to prevent harm to the adoptee.[208] Under these circumstances, interfering with a pregnant woman's privacy interest through mandated drug and alcohol testing would be necessary to protect the adoptee and adoptive parents.[209]

C. Immunity from Criminal Liability

Privacy issues should also not be a significant concern since mandated drug and alcohol testing would not be used to bring criminal charges against the

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201 *Supra* note 33.

202 Blair, *supra* note 8, at 771.

203 *Id.* at 764-65. For example, government agencies can require disclosure of health information for employment benefit purposes. Courts may also require testimony from witnesses concerning their medical histories before the court. Therefore, the state may impose limitations on privacy rights. *Id.*

204 R. Scott Smith, *Disclosure of Post-Adoption Family Medical Information: A Continuing Birth Parent Duty*, 35 Fam. L.Q. 553, 561 (2001) (arguing that a state has a health and safety interest in requiring disclosure of family medical history, specifically when it comes to genetically-related illnesses).

205 Julie Slayton, *Ferguson v. City of Charleston: The Supreme Court's Departure from Established Special Needs Analysis*, 22 QLR 855, 859-60 (2004).

206 Smith, *supra* note 204.

207 *Id.* (arguing that when risks to an adoptee's health are great, the birth parents' privacy right to keep their medical history secret from the adoptee pales in comparison to the benefit that a state can accrue from obtaining that information). Similarly, the benefit of collecting information about a biological mother's prenatal drug or alcohol use can protect the inflicted adoptee. This benefit outweighs the privacy concern that a pregnant mother may have in regards with mandated drug testing.

208 Blair, *supra* note 8, at 751 (emphasizing that harm to an adoptee can occur when health records about his or her prenatal treatment and care are absent).

209 Mather, *supra* note 185, at 1631.

biological mother.[210] Prosecuting pregnant women for prenatal substance abuse can deter them from seeking health care during their pregnancies, placing the fetus at greater risk, while violating their due process rights.[211] Instead, when pregnant women contact state adoption agencies to discuss adoption placement when their babies are born, the state should offer her the option of registering with a treatment program should there be positive test results.[212] Since many pregnant women who use drugs or alcohol are addicted to these substances, treatment programs, rather than criminal charges, can provide assistance in overcoming the addiction.[213]

Available evidence indicates that if women can obtain treatment services, most can improve their circumstances.[214] A wide variety of treatment services such as detox, outpatient, and residential treatment programs can assist pregnant women with their drug addictions in order to protect both the biological mother and the fetus.[215] Specific programs such as prenatal care interventions would be best tailored toward providing optimal care for a fetus at risk.[216] As of 2007, there are 1,926 treatment programs specifically designed for pregnant and postpartum women.[217] Therefore, the state should give pregnant women with positive test results the opportunity to participate in treatment without the threat of criminal liability, not only to help them cope with drug and alcohol abuse, but also to allay any fears of mandated testing.[218]

D. Concerns About Alcohol Detection in Mandated Testing

Since alcohol can exit the system in a relatively short period of time,[219] it may be easier to detect drugs[220]—which can remain in the body for up to a month—than it would be to detect alcohol use, since pregnant women may abstain from drinking until after completing the mandated testing. Despite this possibility, testing for alcohol use should still be performed for several reasons. First, studies have shown that the use of tobacco or alcohol is related to the subsequent use of

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[210] Blair, *supra* note 8, at 765 (arguing that medical or social history provided to the agency should not be used in criminal prosecution or civil suits against the birth parents).

[211] Lim, *supra* note 192.

[212] Janet W. Steverson & Dr. Traci Rieckmann, *Legislating for the Provision of Comprehensive Substance Abuse Treatment Programs for Pregnant and Mothering Women*, 16 DUKE J. GENDER L. & POL'Y 315, 317 (2009) ("In order to protect as many children as possible from prenatal drug or alcohol exposure, the state must ensure that a sufficient number of appropriate treatment programs exist for all pregnant and mothering substance abusers.").

[213] *Id.* at 316.

[214] *Id.*

[215] *Id.* at 319.

[216] *Id.*

[217] *Id.* at 323.

[218] Horn, *supra* note 189, at 655-56 (discussing that giving pregnant substance users treatment options without the threat of jail or confinement would not drive them away from seeking prenatal care).

[219] *How Long Does Alcohol Stay in Your System or Urine?*, *supra* note 187.

[220] *How Long Do Drugs Stay in Your System?* DETOX DRUG TESTING http://detoxdrugtesting.com/how-long-do-drugs-stay-in-your-system/ (last visited Oct. 20, 2012).

other illicit drugs.[221] Therefore, if women are abusing alcohol during their pregnancies, there exists a chance that they are also abusing drugs.[222] Pregnant women who are abusing both drugs and alcohol would have difficulty eradicating the presence of drugs anyway,[223] and thus, they may have less of an incentive to hide the presence of alcohol abuse. Therefore, alcohol testing should still be mandated, despite the possibility that pregnant women may refrain from drinking until after the test.

In addition, any difficulty with alcohol detection should not deter the state from mandating testing since the purpose of testing is to make every reasonable effort to obtain the most accurate and complete medical information possible. In general, information about prenatal substance abuse can facilitate the diagnosis of FAS *or* other drug-related problems,[224] since "[t]he only way to confirm the presence of FAS is to obtain accurate information about the quantity and nature of the alcohol that the mother consumed while pregnant."[225] In fact, complications arising from a pregnant woman's alcohol and illicit drug use are among the most frequently missed diagnoses in prenatal medicine.[226] Therefore, despite the possibility that alcohol may not be detected when a pregnant woman is actually abusing it, the state should not be dissuaded from performing these tests.

Ultimately, most women want to give birth to healthy babies.[227] Accordingly, since prenatal information is so vital to the diagnosis of FAS and other alcohol and drug-related conditions, the results from mandated testing would provide the kind of information that is required to attend to the adoptee's medical needs.[228] Further, even if the child is not born with FAS, test results indicating the biological mother's alcohol abuse can provide crucial medical information for the adoptee's future.[229] Therefore, despite the concerns raised by opponents to mandatory testing, appropriate safeguards can be implemented to mitigate those concerns in order to accommodate the need for obtaining medical information for not only the adoptee's sake, but for the prospective adoptive parents as well.

E. Amending Statutes

In order to ensure that information obtained through these test results is relayed to adoptive parents, states would also need to amend their statutes to make

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[221] *The Gateway Theory: Marijuana Use and Other Drug Use*. DRUGSCIENCE.ORG http://www.drugscience.org/Petition/C6C.html (last visited Oct. 20, 2012).

[222] *Id.*

[223] *How Long Does Alcohol Stay in Your System or Urine?*, *supra* note 187.

[224] Blair, *supra* note 8, at 703.

[225] *Id.* at 733.

[226] Weber, *supra* note 85, at 791.

[227] Horn, *supra* note 189, at 656.

[228] Blair, *supra* note 8, at 703.

[229] *Id.* at 705 (noting that data about a biological mother's alcohol use can convince the adoptee to be cautious about his or her drinking pattern as an adolescent or adult).

disclosure of the information mandatory. Even where medical reports are not obtained through testing, but rather through an adoption agency's alternate efforts, statutory provisions should reflect the requirement of disclosure. Statutes should require a more detailed medical report than just a mere "medical history of the child."[230] The importance of collecting prenatal and neonatal information may be overlooked if the topic is not included in the statute.[231] Since studies have shown that about twenty percent of birth defects may be traced to the biological mother's drug or alcohol ingestion or poor prenatal care, prenatal information should be explicitly required in the disclosure provisions.[232] If a birth mother contacts the adoption agency with information about her prenatal drug or alcohol use after the adoption has been finalized, then statutes should also provide mechanisms for supplementing adoption records to preserve and transmit this particular information.[233] If information about a biological mother's drug or alcohol use is not at all available, statutes should be amended to require the adoption agency to alert prospective adoptive parents to this fact.[234]

The language in disclosure statutes should also clarify the adoption agencies' duties so as to provide guidelines for when and how personnel should test pregnant women for drugs or alcohol.[235] The statute should clearly require adoption agencies to investigate the adoptee and the biological parents' health and background information.[236] Methods of collection and retention of this information should be adequately inscribed into the statute.[237] If the duties of the adoption agency are not clearly specified, the means of gathering information will be left to the discretion of the agency, which can lead to the continuing problem of untreated or misdiagnosed children as well as wrongful adoption suits.[238]

Not only should statutes be amended to mandate disclosure of prenatal information, but adoptive parents should also have an available remedy when adoption agencies fail to disclose information, whether intentionally or not, about the adoptee's in utero drug or alcohol exposure.[239] Adoptive parents should be able to sue the agencies because this would encourage adoption agency workers to disclose information properly and in a timely manner.[240] Moreover, adoptive

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230 *Id.* at 733.

231 *Id.* at 735.

232 *Id.* at 733.

233 Blair, *supra* note 7, at 458.

234 Emmaneel, *supra* note 116, at 228 (noting that adoption agencies can issue "a disclaimer of any information that was not included in the investigation or any tests that were not performed").

235 Mulligan, *supra* note 42, at 840 (discussing that an adoption agency's duty to investigate should not be ambiguous and unpredictable).

236 *Id.* at 832.

237 Blair, *supra* note 8, at 686.

238 *Id.* at 714-15.

239 Susan G. James, *Disclosure of the Mental Health of Biological Families in Adoptions*, 34 U. LOUISVILLE J. FAM. L. 717, 729 (1995-1996).

240 *Id.*

parents should be able to recover for unanticipated past and future medical expenses as well as punitive damages for mental anguish.[241] As discussed earlier, not holding adoption agencies liable for failing to exercise due care can leave many adoptive parents without a remedy.[242]

Finally, amending statutes to require disclosure of prenatal drug or alcohol use, to clarify the adoption agencies' duties to investigate, to provide guidelines on how to supplement adoption records, and to create remedies for breaching these duties, would decrease the number of wrongful adoption lawsuits.[243] Given that many states are currently revising their adoption statutes and disclosure provisions,[244] they should consider expanding the statutory language to provide prospective adoptive parents with as much information as possible. Since the state's goal is to preserve and strengthen the family unit, by amending statutes to accurately delineate an adoption agency's duties, prospective adoptive parents can make an informed adoption selection and enjoy the addition to their family without the need to dispute the decision in a courtroom.[245]

CONCLUSION

Although states may vary in how they address issues that arise from different spheres of the law, it is undisputable that all have an interest in the welfare of children.[246] Despite this compelling interest, however, in the field of adoption law, not all state statutes embody provisions that protect adoptive children when it comes to their medical needs.[247] Given the intimate physical connection between a pregnant woman and her fetus, anything harmful that the mother may engage in, such as drug or alcohol use, can place the unborn child at some risk of harm that can possibly last a lifetime.[248] Therefore, when states do not require disclosure of these details, it is the children in these cases who suffer the most as a result.

Consequently, those who decide to adopt these children without learning of these details must also endure a wide range of encumbrances.[249] Heartbreaking stories of subjecting the adoptee to improper treatments and of their emotional and financial burdens inundate courtrooms as parents seek justice for being

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241 Connelly, *supra* note 71, at 797.

242 *See supra* Part II.C.

243 Mulligan, *supra* note 42, at 841 (discussing that in Illinois, because of inconsistent adoption legislation, wrongful adoption lawsuits are likely to continue due to the number of children with emotional and physical disabilities). However, with the recommended amendments, there may be a decrease in the filing of these suits.

244 Mary L. Saenz Gutierrez, *Oklahoma's New Adoption Code & Disclosure of Identifying Information*, 34 TULSA L.J. 133, 156 (1998).

245 Blank, *supra* note 12, at 1708.

246 *Determining the Best Interests of the Child: Summary of State Laws*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (2010) *available at* http://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm.

247 *See supra* Part I.B.

248 Nelson, *supra* note 6, at 186.

249 *See supra* Part II.C.

misinformed or uninformed about the health of children brought into their homes.[250] Depending on the state, courts may or may not recognize the burdens felt by these parents, leaving some with the subdued gratification of a favorable judgment and others with no remedy at all.[251]

Though these adoptive parents are at the mercy of agencies for the adoptee's complete and accurate medical information, in many instances, an agency simply does not have an adoptee's prenatal history to disclose to the parents.[252] Therefore, to best inform and prepare prospective adoptive parents about the children that they hope to welcome into their families, states should obtain relevant information by requiring mandatory testing of pregnant women who wish to place their babies for adoption. To ensure that these women are not discouraged from contacting agencies, appropriate measures should be implemented to both protect their privacy and to address issues of deterrence.[253] Further, states should also amend their statutes to explicitly require disclosure of prenatal drug or alcohol use to provide adoptive parents with a remedy if the adoption agency fails to abide by its duties.

Mandating testing to detect prenatal substance abuse provides information that ultimately strengthens adoptive families by notifying parents of the adoptee's medical needs and by preventing unfortunate surprises as to the adoptee's health.[254] When prospective adoptive parents make the life-altering decision to bring a new child into their lives, they need assurance that the decision will be the best one for their families. As one judge noted,

> [t]he adoption of a child is an act of compassion, love and humanitarian concern where the adoptive parent voluntarily assumes enormous legal, moral, social and financial obligations. Accordingly, a trustworthy process benefits society, as well as the child and parent. As keepers of the conscience of the community, we cannot countenance conduct which would allow persons who desire entrance into the emotional realm of parenting to be unprotected from schemes or tactics designed to discharge societal burdens onto the unsuspecting or unwary.[255]

Not having access to an adoptee's medical records prevents adoptive parents from preparing for difficult circumstances. Furthermore, potential burdens imposed upon biological mothers by reform are slight in comparison to the monumental burdens borne by adoptees and their adoptive parents when information is unavailable to them. Adoptive parents are an exceptional group of people: they stand ready and willing to receive and love a child as if biologically

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250 *Id.*

251 *Id.*

252 Connelly, *supra* note 71, at 795.

253 *See supra* Part III.A.

254 Waldman, *supra* note 37, at 531.

255 Michael J. v. Cnty. of L.A., Dep't of Adoptions, 247 Cal.Rptr. 504, 513 (Cal. Ct. App. 1998) (Arabian, J.).

their own. To recognize their altruistic characters and benevolent acts, the state should make every effort possible to provide these parents with the very information that they seek and deserve to know.