3-2019

Adopting Civil Damages: Wrongful Family Separation in Adoption

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Abstract

The Trump Administration's new immigration policy of family separation at the U.S./Mexico border rocked the summer of 2018. Yet family separation is the prerequisite to every legal adoption. The circumstances are different, of course. In legal adoption, the biological parents are provided with all the constitutional protections required in involuntary termination of parental rights, or they have voluntarily consented to family separation. But what happens when that family separation is wrongful, when the birth mother's consent is not voluntary, or when the birth father's wishes to parent are ignored? In theory, the child can be returned to the birth parents when consent is invalid because of fraud, coercion, or deceit. In actuality, courts are very reluctant to undo an adoption. How, then, to deter adoption agencies and workers from wrongfully separating birth parents and their children?

Adoption agencies are not just social welfare institutions, but also businesses motivated by money. Lawsuits, as a cost of doing business, can affect their bottom line. The adoption industry has been responsive in the past to lawsuits from adoptive parents seeking money damages, which suggests that lawsuits from birth parents that affect the bottom line could incentivize better behavior from adoption agencies. This Article explores possible tort causes of action available to birth parents, including a proposed new tort of wrongful family separation, with the long-term objective of changing adoption agency behavior, potentially transforming adoption practice.

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I. Introduction

#FamiliesBelongTogether

—Twitter[1]

Is this what family is like: the feeling that everyone's connected, that with one piece missing, the whole thing's broken?

—Trenton Lee Stewart[2]

1. This is a popular hashtag posted by Twitter users on twitter.com.
2. TRENTON LEE STEWART, THE MYSTERIOUS BENEDICT SOCIETY 255 (2007).

The Trump Administration's new policy of family separation of immigrants crossing the U.S./Mexico border rocked the summer of 2018.[3] Stories of children held away from their families in cages,[4] audio recordings of children screaming as they are dragged away from their parents,[5] all serve as the backdrop for a policy deemed by many as cruel and inhumane.[6] Yet family separation is the prerequisite to every legal adoption.[7] The circumstances are different, of course. In adoption, the biological parents are provided with all the constitutional protections of parenthood required in involuntary termination of parental rights, or they have voluntarily consented to family separation—that, too, is a prerequisite to adoption.[8] But what happens when that family

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3. *See* Louise Radnofsky, Natalie Andrews & Farnaz Fassihi, *Trump Defends Family-Separation Policy*, WALL STREET J., https://www.wsj.com/articles/trump-administration-defends-family-separation-policy-1529341079 (last updated June 18, 2018) (last visited Jan. 10, 2019) (stating that the Trump Administration is blaming Congress for the family separation policy at the border) (on file with the Washington and Lee Law Review).

4. *See* Nomaan Merchant, *Hundreds of Children Wait in Border Patrol Facility in Texas*, ASSOCIATED PRESS (June 18, 2018), https://apnews.com/9794de32d39d4c6f89fbefaea3780769/Hundreds-of-children-wait-in-Border-Patrol-facility-in-Texas (last visited Jan. 10, 2019) (on file with the Washington and Lee Law Review).

5. *See* Ginger Thompson, *Listen to Children Who've Just Been Separated from Their Parents at the Border*, PROPUBLICA (June 18, 2018, 3:51 PM), https://www.propublica.org/article/children-separated-from-parents-border-patrol-cbp-trump-immigration-policy (last visited Jan. 10, 2019) (on file with the Washington and Lee Law Review).

6. *See* David Adler, *Trump's Family Separation Policy: Cruel, Inhumane, Tragic*, IDAHO ST. J. (June 26, 2018), https://idahostatejournal.com/opinion/columns/trump-s-family-separation-policy-cruel-inhumane-tragic/article_1f93cc9b-3918-550c-81b2-0f50ec16d9ab.html (last visited Jan. 10, 2019) (arguing that Trump's family separation policy is immoral) (on file with the Washington and Lee Law Review); Richard Wolffe, *Trump's Cruel Border Policies Created a Needless Crisis. It's Far from Over*, GUARDIAN (June 20, 2018, 5:25 PM), https://www.theguardian.com/commentisfree/2018/jun/20/trumps-cruel-border-policies-created-needless-crisis-far-from-over (last visited Jan. 10, 2019) (arguing that President Trump created the border crisis) (on file with the Washington and Lee Law Review).

7. *See* Malinda L. Seymore, *Sixteen and Pregnant: Minors' Consent in Abortion and Adoption*, 25 YALE J.L. & FEMINISM 99, 148 (2013) ("[For adoption,] a court must first terminate the parental rights of the birth parents before granting parental rights to the adoptive family." (citing 2 AM. JUR. 2D *Adoption* § 170 (2013)).

8. *See id.* ("The Supreme Court has long recognized parental rights as fundamental rights under the Constitution." (citing Stanley v. Illinois, 405 U.S.

separation is wrongful, when the birth mother's consent is not voluntary,[9] or when the birth father's wishes to parent are ignored?[10] In theory, the child can be returned to the birth parents when consent is invalid because of fraud, coercion, or deceit.[11] In actuality, courts are very reluctant to undo an adoption.[12]

Consider the case of Tammy Lemley in *Lemley v. Barr*.[13] Tammy's boyfriend convinced her to relinquish their child for adoption, but Tammy was upset and refused to sign the papers at the attorneys' office.[14] He convinced her to return the next day to sign the papers, which she did.[15] But she was underage, making her consent void under Ohio law.[16] The lawyers told her after she turned eighteen that she needed to sign more papers—actually, she needed to sign papers once she reached majority because the previous papers were void.[17] That same day, her parents went to the lawyers to ask for the return of the child and to point out that Tammy's consent was void because she was underage.[18] The lawyers refused, having already delivered the child to a couple in

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645, 651 (1972)).

9. *See id.* (stating that consent must be "freely and willingly" given).

10. *See id.* (arguing that a minor needs additional protection when signing a consent to adoption).

11. *See generally* Marywood v. Vela, 53 S.W.3d 684 (Tex. 2001) (holding that the adoption consent was involuntary when the birth mother was promised an open adoption that was not legally enforceable in Texas); Queen v. Goeddertz, 48 S.W.3d 928, 932 (Tex. App. 2001) (holding that the adoption consent was involuntary when the birth father was given an unenforceable promise of continued visitation post-adoption).

12. *See infra* note 24 and accompanying text (stating that courts are reluctant to undo adoptions because such actions infringe on the adopted child's rights).

13. 343 S.E.2d 101 (W. Va. 1986).

14. *See id.* at 102–03 ("Tammy Lemley became upset, refused to sign the papers and left with the child.").

15. *See id.* at 103 (stating that the couple later returned and signed the consent papers).

16. *See id.* (noting that an Ohio probate court judge had to witness and approve a minor's consent).

17. *See id.* (stating that the couple met again with the lawyers to sign papers after Tammy Lemley reached eighteen).

18. *See id.* (stating that Tammy Lemley's parents tried to explain that Tammy was only a minor at the time).

West Virginia for adoption.[19] Tammy sued in Ohio and the court found that the lawyers "had obtained Tammy's consent through duress, that she had no understanding of her position at the time she signed the adoption papers and, therefore, her consent was invalid."[20] Throughout the suit, the prospective adoptive parents refused to allow the lawyers to reveal their identities or the location of the child and during the pendency of the Ohio case, they went to court in West Virginia and finalized the adoption.[21] When the Ohio court ordered the attorneys to reveal the identity of their clients, Tammy then went to court in West Virginia to seek return of her child.[22] The West Virginia Supreme Court ruled that their state must give full faith and credit to the Ohio decree, making the West Virginia adoption void.[23] The story does not end there, however. The court refused to order the return of the child without first examining the best interest of the child:

> The record before us is devoid of detailed evidence concerning what is now in the best interests of Ryan Barr. But we do know from the facts of record that Ryan is a five-year-old child who has spent almost his entire life with an adoptive mother, father and siblings in Huntington, West Virginia. If we now transfer custody to Miss Lemley, who counsel informs us has married, he will be taken to another place and brought up by people who are complete strangers to him. Although we cannot say that this is not in his best interests, we can at least say that there is some question in our mind whether such action is appropriate. Consequently, we remand this case to the circuit court for a determination of what physical custody arrangement is in Ryan's best interests.[24]

Tammy's case is unremarkable in one sense—birth parents rarely succeed in reversing an adoption.[25] It is quite remarkable in

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19. *See id.* (stating that the lawyer said it was too late to do anything).

20. *Id.*

21. *See id.* (explaining that the adopting parents purposely avoided the Ohio court's jurisdiction).

22. *See id.* (detailing that the Lemley family sought relief in the West Virginia court).

23. *See id.* (stating that the West Virginia Supreme Court ordered that the lower court must give the Ohio court judgment full faith and credit).

24. *Id.* at 109.

25. *See id.* at 109–10 ("The court expressed an interest in protecting the state adoption system and stated that the 'system obviously could be greatly injured if prospective adoptive parents could not rely on the availability of children placed

another sense—she fought through numerous court battles, something most birth parents cannot afford. Lawyers to fight an adoption don't come cheap.

In this Article, I argue that adoption agencies and facilitators operate as businesses as much as child welfare organizations. As long as it remains profitable to behave as the attorneys in Tammy's case behaved, there is little downside to doing so. Courts are unlikely to disrupt the adoption,[26] so lawyers and agencies lack incentive to behave better in avoiding wrongful family separation. If birth parents sue for money damages, driving up the cost of fraudulent practices, agencies might be deterred from misconduct that leads to wrongful family separation. After all, "[a]gencies and social workers fear lawsuits."[27] Further, suing for money damages incentivizes lawyers to take the case because they will recover a contingency fee if successful.

In 1978, Elisabeth Landes and Richard Posner applied the lens of law and economics to adoption.[28] The explicit use of market terminology: "supply and demand for babies,"[29] "baby market,"[30] "free-market value of the child,"[31] and comparing adoptable children in foster care to "an unsold inventory stored in a warehouse,"[32] was disquieting for some readers. Many pushed back against the view that adoption of children in any way resembled a market.[33] Margaret Brinig's response to Posner's proposal to price

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in their custody.'" (quoting *In re* Revocation of Appointment of a Guardian, 271 N.E.2d 621, 624 (Mass. 1971)).

26. *Supra* note 24 and accompanying text.

27. Harvey Schweitzer & Daniel Pollack, *Ethical and Legal Dilemmas in Adoption Social Work*, 44 FAM. CT. REV. 258, 258 (2006).

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

29. *Id.* at 324.

30. *Id.*

31. *Id.* at 328.

32. *Id.* at 327.

33. *See* Richard A. Posner, *The Regulation of the Market in Adoption*, 67 B.U. L. REV. 59, 59 (1987) (arguing that many critics have criticized the article *The Economics of the Baby Shortage*). Almost ten years later, Posner followed up with an article in which he mentions scholarly criticism both temperate and intemperate. *See* Mark Kelman, *Consumption Theory, Production Theory and the Ideology of the Coase Theorem*, 52 S. CAL. L. REV. 669, 688 n.51 (1979); J. Robert

babies in an adoption market was different: "The truth is that an adoption market already exists, however distasteful that may seem."[34] It is impossible to ignore the fact that adoption is "a nearly $2 billion-a-year U.S. business that is growing fast."[35] In Dr. Elizabeth Raleigh's study of adoption agency workers, she found frequent references to the business nature of adoption.[36]

One element of proof that adoption is a consumer-driven market responsive to litigation risk is the response of agencies to the flurry of lawsuits brought in the 1980s against adoption agencies by adoptive parents alleging fraud and/or negligence in adoption placements.[37] Adoptive parents essentially claimed that adoption agencies failed to disclose information about the child's physical and/or mental health, and that if the adoptive parents had been informed they would not have gone through with the adoption.[38] These "wrongful adoption" lawsuits led to voluntary changes in agency practice and statutes mandating disclosure requirements,[39] allowing agencies to avoid the risk of further lawsuits.

This history suggests that adoption agencies—like most businesses—will be responsive to lawsuits that will affect their

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S. Prichard, *A Market for Babies?*, 34 U. TORONTO L.J. 341, 347–57 (1984). Indeed, a virtual cottage industry has sprung up to critique Posner's market theory of adoption. *See* Jane Maslow Cohen, *Posnerism, Pluralism, Pessimism*, 67 B.U. L. REV. 105, 105 (1987) (questioning Posner's economic approach to "baby markets"); John J. Donohue III & Ian Ayres, *Posner's Symphony No. 3: Thinking About the Unthinkable*, 39 STAN. L. REV. 791, 794 (1987) ("Our purpose, however, is to provide an internal critique."); Tamar Frankel & Frances H. Miller, *The Inapplicability of Market Theory to Adoptions*, 67 B.U. L. REV. 99, 99–103 (1987) (stating that economic theory is inapplicable to adoptions).

34. Margaret F. Brinig, *The Effect of Transactions Costs on the Market for Babies*, 18 SETON HALL LEGIS. J. 553, 554 (1994).

35. Sue Zeidler, *Internet Transforms U.S. Adoption Process*, REUTERS (July 23, 2004), https://www.smh.com.au/technology/net-transforms-us-adoption-process-20040723-gdjef1.html (last visited Jan. 10, 2019) (on file with the Washington and Lee Law Review).

36. *See* ELIZABETH RALEIGH, SELLING TRANSRACIAL ADOPTION: FAMILIES, MARKETS, AND THE COLOR LINE 30 (2018) ("'You know, it is a business. We provide a fabulous service, but at the end of the day, we are a business. Which I would never want you to quote, since it doesn't sound right.'").

37. *Infra* notes 134–146 and accompanying text.

38. *Infra* notes 134–146 and accompanying text.

39. *Infra* notes 134–146 and accompanying text.

bottom lines.[40] They have not been responsive, however, to lawsuits from birth parents who seek the return of a relinquished child, claiming that the relinquishment was involuntary.[41] These suits are rarely successful, with courts extremely reluctant to remove children from the adoptive parents they know to return them to biological parents who are strangers.[42] Even when courts find that the relinquishment was involuntary, even when procured by fraud, courts will still conclude that it would not be in the best interest of the child to disrupt the adoption.[43] 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.[44]

Adoption agencies may well be responsive, however, to litigation that increases their cost of doing business and eats into their profit margin. This Article explores possible litigation strategies by birth parents and adoptees, with the long-term objective of changing adoption agency behavior. There have been a few successful lawsuits for money damages brought by birth parents, alleging fraud and/or tortious interference with parental relations.[45] There may well be other successful tort claims possible, including legal malpractice and intentional infliction of emotional distress. This Article further suggests that courts should recognize a new cause of action for wrongful family separation in adoption.

While such lawsuits will not result in the objective most desired by the birth parents—return of the child—the lawsuits may have a long-term effect on agency practice and thus benefit all birth parents in the long run. After all, one function of tort law is to deter bad behavior.[46] Exploring the business nature of adoption

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40. *See* discussion *infra* Part II.A (listing how adoption agencies have minimized risk).

41. *Supra* notes 13–24 and accompanying text.

42. *Supra* notes 13–24 and accompanying text.

43. *Supra* notes 13–24 and accompanying text.

44. *Supra* notes 13–24 and accompanying text.

45. *See* discussion *infra* Part II.C (listing examples of possible remedies in adoption lawsuits).

46. *See* John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 525 (2003) (stating that the two goals of tort law are deterrence and

practice and suggesting litigation strategies to leverage best practices by adoption agencies could significantly change agency behavior, potentially transforming practice in adoption.

II. The Business Model of Adoption

> You know, it is a business. We provide a fabulous service, but at the end of the day, we are a business.
>
> —Alyssa Hollis[47]

> As for the children, they are subject to the same economic forces as automobiles or toasters. Supply and demand. Whatever the market will bear.
>
> —Adam Pertman[48]

There has long been an economic as well as child welfare model of adoption.[49] Justifications for adoption relied on the economic benefit it provided to the adoptive family.[50] In ancient Rome, adoption was a mechanism to secure services to a childless person[51] and ensure an heir for purposes of inheritance.[52] In early America, apprenticeship and "putting out" children for service was the precursor to adoption.[53] "The economic 'value' of the child was

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compensation).

47. Alyssa Hollis, adoption agency director, in RALEIGH, *supra* note 36, at 30.

48. ADAM PERTMAN, ADOPTION NATION: HOW THE ADOPTION REVOLUTION IS TRANSFORMING AMERICA 51 (2011).

49. *See* C.M.A. McCauliff, *The First English Adoption Law and Its American Precursors*, 16 SETON HALL L. REV. 656, 656 (1986) (tracing the legal history of adoption from antiquity to the modern period).

50. *See id.* at 657 ("[T]he concept underlying all adoption was the strengthening of the adopter's family.").

51. *See id.* at 656 (noting that an old, childless person was permitted to adopt so as to have a family member to perform important memorial services for a family's ancestors).

52. *See id.* at 658 (explaining how adoption "served as a will substitute").

53. *See* ELLEN HERMAN, KINSHIP BY DESIGN: A HISTORY OF ADOPTION IN THE MODERN UNITED STATES 23 (2008) ("[I]ndenture was not an unusual means of securing children for adoption: 36 percent were eventually adopted, and those children indentured at young ages were far more likely to become legal members of the families in which they were placed."); Susan L. Porter, *A Good Home: Indenture and Adoption in Nineteenth-Century Orphanages*, *in* ADOPTION IN AMERICA: HISTORICAL PERSPECTIVES 27, 27–28 (E. Wayne Carp ed., 2002) (noting

critical under these arrangements."[54] In one early account, these arrangements broke down when they were a "bad bargain"—"the great majority of children who are returned after being placed in homes are returned . . . because of their inability to render a certain amount of services which the foster parents rightfully expected."[55]

Adoption was "utilized more for the economic uses of child labor than for the good of the children."[56] There were "free homes" available, "in which children received care without monetary compensation," and thereby "approximated a modern adoption ideal founded on love rather than labor or exchange."[57] But these arrangements were rarer than arrangements based on fee-for-service or labor.[58] When older children were placed in homes, "the reasons had at least as much to do with labor as with love."[59] When prospective families petitioned orphanages and child welfare agencies for children, "inquiries about taking in older children frequently specified that children would work for wages, experience or a combination of both."[60] One petitioner bluntly stated that he was requesting an adolescent girl because his household lacked servants.[61]

The passage of the first formal adoption statute to incorporate the concept of "best interest of the child," the Massachusetts

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that adoption in this era was "understood more as an offshoot of indenture . . . rather than as a legal arrangement based on mutual sentiment"); Danielle Saba Donner, *The Emerging Adoption Market: Child Welfare Agencies, Private Middlemen, and "Consumer" Remedies*, 35 U. LOUISVILLE J. FAM. L. 473, 476 (1996) ("Early relationships within the adoption triad are traditionally characterized as economic in nature, as evidenced by the popular use of apprenticeship or indenture contracts well into the twentieth century.").

54. Donner, *supra* note 53, at 476.

55. *Id.* at 476–77 (quoting RICHARD P. BARTH & MARIANNE BERRY, ADOPTION AND DISRUPTION: RATES, RISKS AND RESPONSES 39 (1988)).

56. Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 459 (1971).

57. HERMAN, *supra* note 53, at 23.

58. *See id.* ("Many of these children were never legally adopted, however, and free homes were always scarcer than homes in which board was paid.").

59. *Id.* at 24.

60. *Id.* at 26.

61. *Id.*

statute of 1851, is said to have marked the transition from viewing adoption as an economic enterprise to a child welfare enterprise.[62] Modern adoption "rejected reciprocal economic obligations as a bogus basis for kinship and celebrated intimacy, emotion and desire. In the rhetoric of modern adoption law and reform, 'human values' trumped material considerations."[63]

But Julie Berebitsky notes that language of commodification of children was common in adoption dialogue in the early twentieth century:

> For example, we see this perspective in 1924, when reformer Josephine Baker told readers of *Ladies' Home Journal* that every child-caring agency she consulted emphasized that "there are not enough children to go around, for the demand is always greater than the supply." In a slightly different vein, the *Saturday Evening Post* published "The Baby Market in 1930, an article that used stock market metaphors to discuss the growing popularity of adoption. According to the author, it was a "big bull market," with "baby securities" promising "investors" plenty of "dividends" paid out in toothless smiles and endless giggles.[64]

There was explicit commodification of children in the practice of commercial adoption at this time as well.[65] "Baby farmers

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62. *See* E. Wayne Carp, *Introduction: A Historical Overview of American Adoption*, *in* ADOPTION IN AMERICA: HISTORICAL PERSPECTIVES 1, 6 (E. Wayne Carp ed., 2002) (noting that in the quarter century after the act's passage an additional twenty-four states enacted similar laws); HERMAN, *supra* note 53, at 21 (describing the Massachusetts act as the "opening bell of the modern adoption era"). Even today, adoption still can be seen as requiring service from the adoptee. *See* RICHARD P. BARTH & MARIANNE BERRY, ADOPTION AND DISRUPTION: RATES, RISKS AND RESPONSES 39 (1988)

> Parents continue to require that the placement result in some kind of "services" although the service has changed from an economic service to service to the cause of family efficiency, togetherness, and satisfaction. In a few placements, the service is more specific—"to be a companion to our only son," was the candid way one couple, who had a disrupted placement, described their reason for wanting to adopt an older child. Another adopting couple expressed the desire for a child "who could eventually go to Princeton."

63. HERMAN, *supra* note 53, at 28.

64. JULIE BEREBITSKY, LIKE OUR VERY OWN: ADOPTION AND THE CHANGING CULTURE OF MOTHERHOOD, 1851–1950, at 4 (2000).

65. *See* Carp, *supra* note 62, at 11 ("[N]otorious adoption mills . . . accepted

profited on both ends of child exchange, first extracting fees from desperate birth mothers and then demanding large sums from adopters."[66] Doctors and midwives at commercial maternity homes were paid "surrender fees" by unwed mothers and then offered the child for adoption for a fee from the adoptive parents.[67] Children available for adoption were advertised in newspapers, causing concern among reformers that they "reduced children's worth to money."[68] There were frequent incidents of baby-selling throughout the country starting in the 1920s, including some extensive organizations rather than isolated incidents.[69]

Even charitably-run "amateur" adoption agencies—run by wealthy, philanthropic women instead of professional social workers—were vulnerable to charges of baby selling. Professional agencies did not charge fees to adoptive families at this time, while charitable ones "openly solicited large donations from adopters."[70] Families of more modest means felt that wealthy prospective parents were able to buy children or ascend to the top of waiting lists because of such donations.[71] One of the most infamous adoption-for-profit schemes in America was operated by Georgia Tann through the Tennessee Children's Home and funneled children into the homes of celebrities and those able to pay large fees.[72] Before the scandal was uncovered, Tann had placed at least

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payment when adoptive parents received children, ignored commonly accepted social work practices, and provided inadequate safeguards for everyone directly involved in the adoption.").

66. HERMAN, *supra* note 53, at 36.

67. *Id.*; *see* Jonathan G. Stein, *A Call to End Baby Selling: Why the Hague Convention on Intercountry Adoption Should Be Modified to Include the Consent Provisions of the Uniform Adoption Act*, 24 T. JEFFERSON L. REV. 39, 50–51 (2001) (noting the primacy of doctors and lawyers in the black market baby trade).

68. HERMAN, *supra* note 53, at 39; *see* LINDA TOLLETT AUSTIN, BABIES FOR SALE: THE TENNESSEE CHILDREN'S HOME ADOPTION SCANDAL x (1993) (noting that the selling of children was a "widespread practice" in the latter half of the nineteenth century).

69. *See* PERTMAN, *supra* note 48, at 52 (detailing two large baby-selling operations in Tennessee and Georgia).

70. HERMAN, *supra* note 53, at 45.

71. BEREBITSKY, *supra* note 64, at 5 (noting that these lower-income parents often "expressed outrage at this material evaluation of family life").

72. AUSTIN, *supra* note 68, at 1 (describing how the scandal rocked the city

1,500 children illegally throughout the country,[73] including into the Hollywood homes of Lana Turner, June Allyson, Dick Powell, Joan Crawford,[74] and Smiley Burnette.[75] It was believed that Tann netted around one million dollars from the scheme,[76] and worked in conjunction with a prominent juvenile court judge to accomplish it.[77]

Professional adoption agencies did not initially charge fees to adoptive parents.[78] In the 1940s, social workers began to debate whether to charge such fees.[79] Some argued in opposition that such fees suggested that the agencies were serving the needs of adoptive parents instead of needy children or impoverished birth mothers.[80] If they charged fees, would they be "faced with the charge of giving human life for money?"[81] Others saw such fees as nothing more

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of Memphis and received extensive news coverage). *See generally* BARBARA BISANTZ RAYMOND, THE BABY THIEF: THE UNTOLD STORY OF GEORGIA TANN, THE BABY SELLER WHO CORRUPTED ADOPTION (2008); MADELYN FREUNDLICH, ADOPTION AND ETHICS: THE MARKET FORCES IN ADOPTION 5 (2000).

73. *See* AUSTIN, *supra* note 68, at 1 (noting also that the racket had existed for at least ten years); HERMAN, *supra* note 53, at 142–43 ("Problems included little advance investigation, no probationary oversight, and the exchange of large amounts of cash.").

74. The Joan Crawford adoption was made more notorious because of the film *Mommie Dearest*, the story told from the perspective of adoptee Christina who was abused and traumatized by her adoptive mother. MOMMIE DEAREST (Paramount Pictures 1981). The movie was based on the book of the same title. *See generally* CHRISTINA CRAWFORD, MOMMIE DEAREST (1978). Crawford did not meet the adoption standards of the day because she was twice divorced and a single working mother, necessitating the illegal adoption from Georgia Tann. *See* Brian Paul Gill, *Adoption Agencies and the Search for the Ideal Family, 1918–1965*, *in* ADOPTION IN AMERICA: HISTORICAL PERSPECTIVES 160, 170–71 (E. Wayne Carp ed., 2002) (noting that agencies largely refused to adopt children to single parents during this time period).

75. *See* AUSTIN, *supra* note 68, at 71 (noting that at the same time Tann was also actively lobbying the California legislature to close orphanages).

76. *Id.* at 1.

77. *Id.*; *see also* PERTMAN, *supra* note 48, at 52 (noting that Tann usually sold the babies to wealthy out-of-state couples for over $700 each); Stein, *supra* note 67, at 51 ("Tann perpetuated her scheme by convincing birth mothers to give up their babies at birth in exchange for payment, including room and board.").

78. *See* Donner, *supra* note 53, at 487 (accepting instead only "gratitude payments" from adoptive parents).

79. *See id.* (tracing the history of the debate).

80. *See id.* (explaining that many social workers resisted adoption services becoming an act "purely of business").

81. BEREBITSKY, *supra* note 64, at 5.

than payment for services, akin to the charges other professionals like lawyers and doctors charged clients.[82] Until 1945, professional adoption agencies "maintained that financial transactions between adopters and agencies were strictly unethical."[83] Thereafter, they began to charge nominal fees with the understanding that they represented a fee for services rather than a child's "sticker price."[84] Even today, large adoption fees in the U.S. raise questions:

> Big money threatens to undermine the confidence that prospective parents and the general public must have if adoption is to fit comfortably into America's cultural mosaic, without people developing a new set of negative views about the process. When the sums involved are so large, they also can blur the vision—and raise questions about the motive—of well-intentioned professionals.[85]

A social worker voiced concern about high fees today, saying, "The one thing that really bothers me is the amount of money exchanged. . . . I am afraid on some level, how much of those expenses cover real services, and how much does it feed an industry?"[86]

One of the arguments for charging fees for adoption services was that adoptive parents would prefer the "businesslike" footing fee-for-services would place them on: "[It] mirrored interactions in other areas of their lives. Whereas the recipient of charity was powerless, a couple paying a fee acquired the power of the consumer, which enabled them to demand better service from the agency."[87]

This new view of adopters as fee-paying consumers, coupled with the growing consumer rights movements in the U.S.,

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82. *See id.* at 5 (noting that social work was becoming increasingly recognized as a legitimate profession at this time).

83. HERMAN, *supra* note 53, at 45.

84. BEREBITSKY, *supra* note 64, at 5.

85. PERTMAN, *supra* note 48, at 51.

86. RALEIGH, *supra* note 36, at 59.

87. BEREBITSKY, *supra* note 64, at 5; *see also* JUDITH S. MODELL, KINSHIP WITH STRANGERS: ADOPTION AND INTERPRETATIONS OF KINSHIP IN AMERICAN CULTURE 51 (1994) (noting the view that adoption became a service for infertile couples rather than a service for needy children).

empowered prospective adoptive parents to see themselves "as equal to agencies or as their adversary."[88] "Adoptive applicants . . . demanded that agencies treat them as informed consumers rather than passive beneficiaries."[89] An adoption researcher writing in 1966 noted a change in prospective adoptive parents' "perception of their consumer's right to determine in part their treatment, and their organization and use of political activity."[90]

Part of the shift toward a consumer approach to adoption was a focus on remedies available to adoptive parents when adoptions failed.[91] Starting in the 1920s, there was statutory authority permitting adoptive parents to nullify an adoption if a child exhibited "feeble-mindedness" or insanity, as if breaching some implied warranty.[92] But those statutes were largely repealed in the 1960s and 1970s.[93] But starting in the 1980s, courts began to recognize another consumer remedy in the tort of wrongful adoption.[94]

Not only did prospective adoptive parents begin to see themselves as consumers in a commercial transaction with agencies, agencies began to see their enterprise as market-driven as well. In a fascinating recent study focused on adoption workers, Dr. Elizabeth Raleigh interviewed adoption social workers and

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88. Donner, *supra* note 53, at 494 (quoting Elizabeth S. Cole, *Societal Influences on Adoption Practice*, *in* ADOPTION: CURRENT ISSUES AND TRENDS 15, 18 (Paul Sachdev ed., 1984)).

89. *Id.* at 500.

90. *Id.* at 500 n.202 (quoting IRIS GOODACRE, ADOPTION POLICY AND PRACTICE 24 (1966)); *see also* RALEIGH, *supra* note 36, at 8 (describing situations when "the parent paying the bills becomes the de facto client").

91. *See* Donner, *supra* note 53, at 510 (noting that choosing the remedies for failed adoptions "evokes an equally important moral versus market discourse").

92. *Id.* (explaining that these statutes were potentially inspired by the eugenics theories that "pervaded" the adoption practice during the period).

93. *See id.* at 513 (noting that only a few jurisdictions continue to even "claim to reserve" the right to annul an adoption (citing Ann Harlan Howard, *Annulment of Adoption Decrees on Petition of Adoptive Parents*, 22 J. FAM. L. 549, 550 (1984))).

94. The first case to recognize the cause of action was Burr v. Board of County Commissioners, 491 N.E.2d 1101, 1107 (Ohio 1986) ("It would be a travesty of justice and a distortion of the truth to conclude that deceitful placement of this infant, known by appellants to be at risk, was not actionable when the tragic but hidden realities of the child's infirmities finally came to light.").

other agency personnel about their roles at the cross-section of business interests and child welfare.[95] While social workers will assert that adoption is child-focused, they must recognize that they "operate under a model of client services in which the revenue that they take in from paying customers forms the foundation of their organization's long-term solvency."[96] Social workers spoke frankly about non-child welfare factors the agencies considered in deciding "which children get served and why."[97] One explained with regard to international adoption: "There are tons of kids in need of homes in places where social workers don't want to go work in or where it is going to be too expensive."[98] The social worker continued, "We are opening and closing programs to see which ones we can afford. It is an industry at the end of the day, I suppose."[99]

Dr. Raleigh notes that the market focus of adoption agencies has become more acute in the past decade as the adoption marketplace has changed with reduced availability of the babies and toddlers that adoption consumers were interested in adopting.[100] When adoption was booming, agencies "were less interested in the financial considerations involved in sustaining a small business. . . . these workers did not have to worry about paying the rent or making payroll."[101] Now, with the downturn in adoption, the focus has to shift—as one worker put it, "This is a business, and we have to make business decisions."[102]

Dr. Raleigh's research is suggestive of the amenability of adoption agencies to the same profit-driven decision-making as other businesses. One element of business decision-making is avoiding costly litigation.[103] When courts began to recognize the tort

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95. *See generally* RALEIGH, *supra* note 36.

96. *Id.* at 2.

97. *Id.*

98. *Id.* at 3.

99. *Id.*

100. *See id.* at 4 (noting that the drop in international babies available for adoption has been especially pronounced).

101. *Id.*

102. *Id.*

103. *See* Schweitzer & Pollack, *supra* note 27, at 258 (stating that litigation risk is a factor affecting adoption agency behavior).

of wrongful adoption, adoption agencies significantly changed their practices to avoid such lawsuits.[104] If faced with new litigation risks from other sources—birth parents and adoptees—adoption agencies could be nudged into better practices to respect their rights going forward. The next Part of this Article will examine that history of responsiveness to adoptive parent suits for wrongful adoption before turning to theories of legal liability that might serve as grounds for birth parents and adoptees to subject agencies to legal risk.

III. Adoptive Parents Suing Agencies—Wrongful Adoption

> I didn't want to have to stand up in any courtroom and say, "I wouldn't have chosen this child." . . . How do you say that to your son—I never would have adopted you?
>
> —Phyllis Juman[105]

Adoption has long been perceived as risky for adoptive parents.[106] There was a strain of eugenics thinking and focus on heritability of bad character that often chilled interest in adoption.[107] "Strong beliefs in behavioral heredity—the children of

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104. *See* Donner, *supra* note 53, at 517 (noting that recognition of the tort of wrongful adoption "set the stage for a remarkable transformation in adoption practice").

105. Mother who ultimately sued agency for wrongful adoption, speaking about her reluctance to do so. Lisa Belkins, *What the Jumans Didn't Know About Michael*, N.Y. TIMES (March 14, 1999), https://www.nytimes.com/1999/03/14/magazine/what-the-jumans-didn-t-know-about-michael.html (last visited Jan. 10, 2019) (on file with the Washington and Lee Law Review).

106. *See* Sandra Sufian, *As Long as Parents Can Accept Them: Medical Disclosure, Risk, and Disability in Twentieth-Century American Adoption Practice*, 94 BULL. HIST. MED. 94, 97 (2017) (noting that the adoption service has long struggled with how much information prospective parents should receive about an adopted child's medical history).

107. *See* Donner, *supra* note 53, at 483–84 (noting that one commentator stated that to put a "mental defective" in a home that expected a "normal child" was a "social crime"). Prominent eugenicists of the 1920s and 1930s opposed adoption outright. *See* HERMAN, *supra* note 53, at 31 ("Anxieties regarding eugenics were a prominent feature of the antiadoption climate."). To adopt children with mental defects, according to one famous eugenicist, was to "contaminate the gene pool." *Id*. He was, however, willing to condone "risky" placements as long as the adoptive parents "were committed to keeping their children from marrying to avoid transmitting the 'defective' trait." Sufian, *supra*

women who had sex out of wedlock were thought to have 'bad blood,' and consequently, 'blood will tell.' Adoptive parents would be saddled with children genetically predisposed to bad behaviors 'which cause family heartache.'"[108] "Race, religion, physical health, mental health, criminality, educability, sexual morality, intelligence and temperament were all associated with blood."[109] Prominent eugenicists of the 1920s and 1930s opposed adoption outright.[110] To adopt children with mental defects, according to one famous eugenicist, was to "contaminate the gene pool."[111] He was, however, willing to condone "risky" placements as long as the adoptive parents "were committed to keeping their children from marrying to avoid transmitting the 'defective' trait."[112]

A. Agencies Mitigating Risk

To minimize the risk, adoption agencies undertook to screen children for adoptability.[113] In one child-placing manual for social workers, the author cautioned, "to put a low grade mental defective in a family home where a normal child was expected is . . . inexcusable in a well-ordered and progressive child-placing agency."[114] Preadoption investigation of a child's current health and heritable factors was considered crucial to "avoiding the error of placing unqualified children."[115] According to this thinking, agencies were looking to place only "the perfect child with the

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note 106, at 99.

108. Seymore, *supra* note 7, at 112 (citing ELLEN HERMAN, KINSHIP BY DESIGN: A HISTORY OF ADOPTION IN THE MODERN UNITED STATES 29–30 (2009)).

109. HERMAN, *supra* note 53, at 30.

110. *See id.* at 64 (basing much of this concern on the "quality" of available children).

111. *Id.* at 65.

112. Sufian, *supra* note 106, at 99; ELLEN HERMAN, KINSHIP BY DESIGN: A HISTORY OF ADOPTION IN THE MODERN UNITED STATES 65–66 (2008).

113. *See* Gill, *supra* note 74, at 166–67 (noting that both would-be adopters and adoptees had to meet the agency's approval).

114. Donner, *supra* note 53, at 484 (quoting WILLIAM H. SLINGERLAND, CHILD-PLACING IN FAMILIES: A MANUAL FOR STUDENTS AND SOCIAL WORKERS 69 (1919)).

115. HERMAN, *supra* note 53, at 64.

perfect background."[116] "Cradle adoptions," those adoptions of very young infants, were considered especially risky since the babies were being placed before there was sufficient time to evaluate their mental fitness.[117] One well-known adoption agency was criticized for keeping newborns for as little as forty days for observation, "an observation period considered dangerously short by social workers who stressed the enormous risks."[118] Eugenicists advised that parents should, if possible, only take the child "on approval," to avoid the risk of adopting a "bad seed."[119]

Preadoption screening of the child was the method for reducing the risk inherent in the eugenics view of adoption.[120] By the 1920s, it was believed that tests for intelligence and physical health were sufficiently accurate as to assure prospective adoptive parents that they were not participating in "a grab-bag" "eugenically speaking."[121] One orphanage physician was confident of his ability to screen out the risk, bragging that in all his experience with a great many adoptions, "I have yet to know one where the parents regretted the adoption."[122] It was one's biological children who presented the risk, he opined, not "the child who can be inspected and passed upon by competent authority."[123]

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116. *See* Donner, *supra* note 53, at 488; HERMAN, *supra* note 53, at 30 (explaining that adoptive parents and facilitators believed that "only normal, healthy children were suitable candidates for adoption").

117. *See* HERMAN, *supra* note 53, at 66 (detailing several examples of adopted children eventually diagnosed with various mental and health problems).

118. *Id.*

119. *See id.* (noting that this risk was one of adoption's "most obvious risks").

120. *See* FREUNDLICH, *supra* note 72, at 5 (stating that the screening included intelligence and physical health tests); Gill, *supra* note 74, at 167 (noting the types of screenings some argued agencies should use to keeping "defective" children off the adoption market).

121. *See* FREUNDLICH, *supra* note 72, at 5 (noting that the most desirable children at the time were baby girls with blue eyes and blonde hair); Sufian, *supra* note 106, at 104 (noting prevailing beliefs that testing of children even under one year of age could accurately account for mental and psychological abilities).

122. HERMAN, *supra* note 55, at 42.

123. *Id.*; *see* Gill, *supra* note 74, at 168 (explaining that "agencies 'were convinced and attempted to convince the public that they could guarantee them a perfect child . . . and adopting a child was a far less risky procedure than having one normally,'" according to Joseph Reid, Executive Director of the Child Welfare League of America).

Still, as a hedge against the risk, one agency would place a child with an uncertain genetic history only if the adoptive parents would sign a binding agreement to return the child "if and when abnormal characteristics appeared."[124] A right of rescission of an adoption decree if a child, unknown at the time of adoption, suffered from "retardation, epilepsy, insanity, venereal disease, and so on" became a part of statutory law as early as the 1920s.[125] While courts were generally reluctant to nullify adoptions, they would do so because they felt it was in the long-term interest of adoption as an institution—the possibility of annulment if the child fails to satisfy would make adoptive parents more willing to adopt in the first instance.[126] By the 1960s, however, most of these rescission statutes had been repealed, and agencies were reconfiguring their ideas of which children were adoptable.[127]

B. Adoptive Parents and Assumption of the Risk

The market in adoption had changed once again, with more couples looking to adopt post-World War II:

> The American eugenics movement tapered off, taking with it notions of biological determinism that had deterred adoption. Adoptive parents were offered an image of "transplanted flowers" that would thrive in the new family, and not revert to

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124. *See* HERMAN, *supra* note 55, at 65 (noting that some agencies offered written assurance of a right of return of the unsatisfactory child).

125. *See id.* at 171 (stating that state laws frequently allowed this kind of annulment); Donner, *supra* note 53, at 510 (noting that these statutory schemes likely reflected the concern for eugenics at the time).

126. *See* Donner, *supra* note 53, at 511–12 (discussing how some courts used a Posnerian theory and treated the adoption process as if it had a warranty).

127. *See id.* at 513 (citing Ann Harlan Howard, *Annulment of Adoption Decrees on Petition of Adoptive Parents*, 22 J. FAM. L. 549 (1984)); John R. Maley, Note, *Wrongful Adoption: Monetary Damages as a Superior Remedy to Annulment for Adoptive Parents Victimized by Adoption Fraud*, 20 IND. L. REV. 709, 715 (1987) (noting that the purpose of recent legislative trends "is to make no provision for annulment of the adoption"); Susan Kempf LeMay, *The Emergence of Wrongful Adoption as a Cause of Action*, 27 J. FAM. L. 475, 481 (1988) (noting that most annulment statutes have been repealed and that at the time the article was written, only California allowed adoption annulment based on the child's physical or mental condition).

> the "bad blood" of the birth parents. The importance of parenting—especially mothering—emerged with the post-war baby boom. Infertile couples wanted in on the baby boom, and with less concern that behavior was biologically determined, adoption became an appealing option.[128]

"Perfect" children were not as numerous as the families seeking to adopt, so agencies changed their focus to finding the right family for a child, rather than finding the perfect child for a family.[129] Rather than ensuring against risk for adoptive parents, willingness to accept the risk of a less-than-perfect child became the hallmark of an acceptable adoptive parent.[130] A prospective parent who balked at "the risks of reasonable unknowns" might not be the kind of parent capable of unconditional love necessary for adoption.[131] Under this view, there were some agencies that felt that "nothing should be told to adoptive parents regarding a child's background."[132] Not all agreed, but there were ongoing disagreements among adoption professionals about "what constitutes information that is dangerous or not necessary to share."[133]

In 1932, the adoption standards of the Child Welfare League of America (CWLA) provided that if there were risks involving a particular child, there should be disclosure so that "the adoptive parents thoroughly understand the child's condition and needs."[134]

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128. Seymore, *supra* note 7, at 114; *see* ELAINE TYLER MAY, BARREN IN THE PROMISED LAND: CHILDLESS AMERICANS AND THE PURSUIT OF HAPPINESS 127–49 (1995) (discussing the villainization of childless adults in the post-World War II era and post-war "baby craze").

129. *See* Donner, *supra* note 53, at 490 (discussing the child centered approach to adoption matching); Sufian, *supra* note 106, at 106 (noting that the new philosophy following World War II considered the child's right to have a stable home).

130. *See* Donner, *supra* note 53, at 490 (discussing the adoptive screening criteria that includes the prospective parents' ability to "accept a child wholeheartedly while knowing the risks" (internal citations omitted)).

131. *See id.* (noting that this ability to weigh risks was seen as a sign that the prospective parents were "normal" and "well-adjusted").

132. *See id.* (quoting the sentiment expressed at the Child Welfare League's 1955 Annual Conference).

133. *See id.* n.129 (quoting MICHAEL SCHAPIRO, A STUDY OF ADOPTION PRACTICE 87 (1956)).

134. CHILD WELFARE LEAGUE OF AM., STANDARDS FOR ADOPTION SERVICE 24 (1932); Sufian, *supra* note 106, at 99.

A physician warned in a 1937 Journal of the American Medical Association article that withholding information about a child's health and genetic risk "is tantamount to fraud," and that agencies would subject themselves to professional liability for their failure to disclose.[135]

But by the 1950s, agencies and adoption professionals had begun to restrict the information about health and social history shared with adoptive parents.[136] The CWLA standards had changed by 1959 to advise agencies not to provide "information which is not relevant to the child's development and would only arouse anxiety."[137] Social workers would provide "only 'selected background material,' with all 'sordid or irrelevant' details deleted," believing that "sharing only favorable information would assist the child in building a sense of positive self-esteem." [138] Adoptive parents also did not need to hear negative information: "Irrelevant or unverified information (which included background medical and genetic information) was of little benefit to the parent-child relationship, and such information could cause damage by arousing anxiety and apprehension."[139]

Given the prevailing notion that parents should accept the risk inherent in adoption, courts generally rejected suits for money damages for wrongful adoption.[140] In a 1958 case where the adoptive parents sought to annul an adoption and also sought "monetary damages from [an adoption agency] for medical costs

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135. *See* Sufian, *supra* note 106, at 102 (discussing the physician's opinion that adoption agencies must manage, amount other things, "the risk of professional liability").

136. *See* MADELYN FREUNDLICH & LISA PETERSON, WRONGFUL ADOPTION: LAW, POLICY & PRACTICE 2 (1998) (stating that two dynamics were at work: concerns about the stigma for adopted children and the adoptive parents' reluctance to discuss adoption with adopted children).

137. CHILD WELFARE LEAGUE OF AM., *supra* note 134, at 27.

138. *See* FREUNDLICH & PETERSON, *supra* note 136, at 3 (noting that social workers "largely rejected recommendations that background information be completely withheld" (internal citations omitted)).

139. *Id.*

140. *See* John Gibeaut, *Disclosing Birth Secrets: More States Allow Adoptive Parents' Suits when Agencies Lie*, 84 A.B.A.J. 34, 35 (1998) ("The first courts to confront wrongful adoption claims were leery of letting the genie too far out of the bottle.").

incurred in caring for the child," the court simply ignored the plea for money damages.[141] Two decades later, two California courts refused to recognize causes of action in tort against adoption agencies.[142] The tide was about to turn again, however, with social workers once again announcing that best practices required full disclosure by adoption agencies—"In 1978, CWLA again revised its adoption standards in response to these practice developments. The 1978 standards deleted references to withholding adverse information and emphasized the importance of providing adoptive parents with the child's developmental, medical, and genetic history . . . ."[143]

Despite the embrace of full disclosure of standards by adoption professionals, the actual practice did not mirror these idealized expectations.[144] Madelyn Freundlich, who literally wrote the book on wrongful adoption, states, "Although there may be a desire to consider failures to disclose as unusual deviations from standard agency practice, research suggests otherwise."[145] In one study, more than one-third of adoptive parents were not informed of a history of physical abuse and over one-half were not told of a child's history of sexual abuse.[146] Freundlich suggests multiple reasons for the failure of agencies to follow best practices on disclosure, from a fear that prospective adoptive parents will be scared away

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141. *See* Allen v. Allen, 330 P.2d 151, 154–57 (Or. 1958) (affirming that there is no right to set aside adoptions unless a statute says otherwise without discussing the appellants' petition for compensation for medical costs); Maley, *supra* note 127, at 716 (noting that "the Oregon Supreme Court held that absent statutory authority on the subject, the adoptive parents have no right to set aside adoptions, even in cases of fraud").

142. *See* Richard P. v. Vista Del Mar Child Care Serv., 106 Cal. App. 3d 860, 866 (1980) (finding that the adoption agency disclosed all the facts about the child's health as they existed when the agency placed the child with the plaintiffs); Smith v. Alameda Cty. Soc. Servs. Agency, 90 Cal. App. 3d 929, 941–43 (1979) (finding no valid claim for public policy reasons and because "the injury and damages are highly uncertain in terms of their nature, cause and existence"); *see also* LeMay, *supra* note 127, at 478–79 (discussing the *Richard P.* case).

143. FREUNDLICH & PETERSON, *supra* note 136, at 5.

144. *See infra* notes 145–146 and accompanying text (discussing research that suggests a significant portion of adoptive parents are not informed of their adoptive child's history of abuse).

145. FREUNDLICH & PETERSON, *supra* note 136, at 8.

146 *See id.* at 8 (discussing RICHARD P. BARTH & MARIANNE BERRY, ADOPTION AND DISRUPTION: RATES, RISKS AND RESPONSES (1988)).

by negative information to their failure to secure the needed information from birth parents to fully disclose.[147] One commentator has suggested that when the only remedy was annulment of the adoption, rather than money damages, agencies weren't incentivized to follow better practices:

> Still another downfall of the remedy is its inherent lack of deterrent value against future fraudulent practices. If, for instance, an adoption home misrepresents a child's background . . . an annulment proceeding merely requires the home to take over the care of the child until another adoption is perfected. Although this may inconvenience the home and force it to incur additional expense and paperwork, it is unlikely that it will bring about increased scrutiny of potential future abuses.[148]

But as courts began to impose legal liability for wrongful adoption and legislatures began to mandate disclosure, agencies showed better compliance with disclosure rules.[149]

C. Remedies when Risk was Realized

1. The Courts Respond

Ohio became the first state to recognize the tort of wrongful adoption.[150] It was a small opening: the Ohio Supreme Court

147. *See id.* at 9–10 (listing other reasons including breakdowns in communication because of high turnover at agencies and lack of access from sending countries).

148. Maley, *supra* note 127, at 718.

149. *See id.* at 711 ("Future acts of adoption fraud are also more likely to be deterred under the wrongful adoption theory because the wrongdoers will be subject to monetary liability for the damages they inflict.").

150. *See* Burr v. Bd. of Cty. Commissioners, 491 N.E.2d 1101, 1107 (Ohio 1986) (finding that the public adoption agency had to "be held accountable for injuries resulting from the deceitful and material misrepresentations which [the court found] were foreseeably and justifiably relied on by appellees"); *see also* Maley, *supra* note 127, at 710 (discussing the *Burr* case as a "novel case"); D. Marianne Brower Blair, *Getting the Whole Truth and Nothing But the Truth: The Limits of Liability For Wrongful Adoption*, 67 NOTRE DAME L. REV. 851, 854 (1992) (noting that the Ohio Supreme Court was the first court "to recognize a right to compensatory damages against an adoption agency for misrepresentations to

warned, "In no way do we imply that adoption agencies are guarantors of their placements. Such a view would be tantamount to imposing an untenable contract of insurance that each child adopted would mature to be healthy and happy. Such matters are solely in the hands of a higher authority."[151] Only in the face of "the deliberate act of misinforming this couple," not mere failure to disclose the inherent risks, could a suit be successful.[152]

a. Fraud and Deliberate Misrepresentation

In 1964, the Burrs adopted a seventeen-month-old boy on the representation from the agency that he "was a nice big, healthy, baby boy" who had been born at the local hospital to an eighteen-year-old mother who had been living with her parents.[153] In reality, the birth mother was a thirty-one-year-old patient at a mental hospital, as was the presumed father, and the child was actually born at the mental hospital.[154] When the boy developed Huntington's disease, a fatal, progressive, hereditary neurological condition, the adoptive parents sued to recoup medical expenses in excess of $80,000.[155] The attorneys for the Burrs coined the term "wrongful adoption," labeling their initial pleading, "Complaint in Fraud and Reimbursement of Expenses for Wrongful Adoption."[156] Mr. Burr testified at trial that he would never have adopted the boy if he had known his biological parents were mental patients: "If I had been handed the true facts and been given a right to make up my mind, 'cause all the woman would have had to said to me was that the parents was in Massillon State Hospital and I would

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adoptive parents concerning their child's medical history").

151. *See Burr*, 491 N.E.2d at 1109 (discussing the difference between failure to inform inherent risks and deliberately misinforming potential adoptive parents about a child's health).

152. *See id.* (affirming the lowers court's judgment in favor of the adoptive parents).

153. *See id.* at 1103 (discussing the agency's fraudulent statements).

154. *See id.* (discussing the contents of previously sealed records).

155. *See id.* (noting that the adoptive parents brought a civil suit against the public adoption agency).

156. *See* Maley, *supra* note 127, at 710 n.9 (noting that the term had not be used by any appellate court in the country before *Burr*).

have never never seen this child."[157] Finding the elements of fraud were met with the agency's outright misrepresentations, the court upheld the jury's $125,000 verdict.[158]

While *Burr* involved deliberate misinformation, courts soon began to recognize wrongful adoption when there was deliberate concealment as well.[159] In *Juman v. Louise Wise Services*,[160] for example, a New York adoption agency was sued for failing to disclose to adoptive parents their child's birth mother's long psychiatric history, including a lobotomy.[161] They had not lied, like the agency in *Burr*, but their failure to disclose what they knew led to liability.[162] Fraud is still the most common theory of liability in wrongful adoption cases.[163]

b. Negligent Misrepresentation

Later courts recognized the tort of wrongful adoption not just when agencies were deliberately deceptive, but also when they

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157. *See Burr*, 491 N.E.2d at 1106 n.3 (including Mr. Burr's direct testimony as a footnote in the opinion).

158. *See id.* at 1109 (affirming the lower's court's judgement for the adoptive parents).

159. FREUNDLICH & PETERSON, *supra* note 136, at 13 (noting that these claims must still establish the elements of fraud).

160. 608 N.Y.S.2d 612 (1994).

161. *See id.* at 613–14 (discussing plaintiffs' suit to recover damages for their adoptive son's medical treatment). For a deep dive into the sad history of Michael Juman, see Lisa Belkins, *What the Jumans Didn't Know About Michael*, N.Y. TIMES, https://www.nytimes.com/1999/03/14/magazine/what-the-jumans-didn-t-know-about-michael.html (last visited Jan. 2, 2019) (discussing Michael's story and his desire to learn more about his birth mother) (on file with the Washington and Lee Law Review).

162. *See Juman*, 608 N.Y.S.2d at 617 (noting that the agency had the statutory obligation to disclose information about the child's birth mother to the adoptive parents); *see also* Michael J. v. L.A. Cty. Dep't. of Adoptions, 201 Cal. App. 3d 859, 863–64 (1988) (recognizing a cause of action for deliberate concealment of the known fact that the child's port-wine birthmark was a symptom suggestive of a serious degenerative nerve disorder).

163. *See* D. Marianne Blair, *A Closer Look at Theories of Liability: Possibilities and Pitfalls*, *in* JOAN HEIFETZ HOLLINGER, 2 ADOPTION LAW AND PRACTICE § 16.03 (2015) (noting the prevalence of fraud in wrongful adoption suits and explaining that the elements set forth in *Burr* are the elements used in most jurisdictions).

were negligent regarding information sharing.[164] The first case to move from fraud to negligence as the basis for the cause of action was from Wisconsin.[165] The agency falsely told prospective adoptive parents that their child had no more risk of contracting Huntington's disease than any other child since his birth father had tested negative for the disease, despite the fact his grandmother had the disease.[166] The family later learned that there was no accurate test for Huntington's disease, and when the adopted child was diagnosed with Huntington's, the parents sued the agency for $10 million.[167] The court was careful to note that the agency's liability was not because of a failure to learn about the child's condition, but rather, "CSS affirmatively misrepresented Erin's risk of developing Huntington's Disease. The agency assumed the duty of informing the Meracles about Huntington's Disease and about Erin's chances of developing the disease. Having voluntarily assumed this duty, . . . CSS negligently breached it."[168] Thus, agencies could avoid liability under this legal theory "by refraining from making any representations at all . . . ."[169] Remaining silent was not enough for liability avoidance, however, as some courts began to impose an affirmative

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164. *See* FREUNDLICH & PETERSON, *supra* note 136, at 16 (noting that negligent agency conduct may have been just as harmful to adoptive parents as purposeful deception); Gibeaut, *supra* note 140, at 35 (describing how a Montana agency failed to inform adoptive parents that the child's biological mother had mental disabilities that required professional help). Courts have not gone so far as to recognize wrongful adoption where the agency has failed to investigate a child's background. *See* Blair, *supra* note 163, § 16.03[2][b] (listing the elements of negligent misrepresentation).

165. *See* FREUNDLICH & PETERSON, *supra* note 136, at 16 (discussing the history of negligent adoption cases).

166. *See* Meracle v. Children's Serv. Soc., 437 N.W.2d 532, 533 (Wis. 1989) (describing the adoptive parent's discussion with the agency's social worker regarding the child's biological family's history of Huntington's Disease and the child's risk of developing the disease).

167. *See id.* (noting how the adoptive family discovered the truth about the disease through a television program, the child's subsequent diagnosis, and the parent's decision to sue the agency).

168. *See id.* at 537 (emphasizing that this case was unique because it did not involve a duty to discover and disclose); *see also* M.H. v. Caritas Family Servs., 475 N.W.2d 94, 96–100 (Minn. Ct. App. 1991) (finding that the agency disclosed incest in child's background, but did so incompletely and thus negligently), *rev'd in part*, *aff'd in part*, 488 N.W.2d 282 (Minn. 1992).

169. FREUNDLICH & PETERSON, *supra* note 136, at 16.

duty to disclose information in the possession of the agency.[170] In *Roe v. Catholic Charities*,[171] the agency incurred liability for failing to disclose what they knew about serious behavioral problems (including that one child had stomped to death a dog of a former foster family).[172]

c. Damages

Wrongful adoption claims have resulted in significant money damages under a number of different theories.[173] The most common recoveries are for extraordinary medical expenses that adoptive parents have incurred and anticipate incurring in the future because of the wrongful adoption.[174] Also available are the costs of travel, lodging, and special equipment associated with medical care.[175] Lost wages associated with increased care needs are also recoverable.[176] Damages for emotional distress and loss of consortium have been successfully sought.[177] One commentator notes that damages for physical injury are available "if the adopted

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170. *See id.* at 20 (noting that this approach was a shift).

171. 588 N.E.2d 354 (Ill. App. Ct. 1992).

172. *See id.* at 356 (discussing the defendant agency's knowledge of an adoptive child's destructive, violent behavior). In a similar vein, see Jackson v. Montana, 956 P.2d 35, 40 (Mont. 1998) (describing the agency's failure to disclose an adopted child's family history of mental illness); McKinney v. Washington, 950 P.2d 461, 465 (Wash. 1998) (discussing Washington state agency's statutory duty to disclose a potential adoptee's relevant medical and social information).

173. *See infra* notes 174–183 and accompanying text (discussing the variety of wrongful adoption claims).

174. *See* Blair, *supra* note 163, § 16.05 (acknowledging that courts have "readily agreed such damages are compensable").

175. *See* FREUNDLICH & PETERSON, *supra* note 136, at 25 (listing the variety of damages that plaintiffs might seek in a wrongful adoption case).

176. *See id.* (stating that lost wages occur "when adoptive parents must provide the extra care that a child needs"); Blair, *supra* note 163, § 16.05 (discussing various courts' use of lost wages in the damages calculation).

177. *See* FREUNDLICH & PETERSON, *supra* note 136, at 25 (noting that some jurisdictions only allow damages for emotional distress when the distress manifests into physical ailments); Blair, *supra* note 163, § 16.05 (explaining that adoptive parents often seek emotional distress damages, but noting the limitations).

child harms an adoptive parent or a sibling."[178] In *Young v. Van Duyne*,[179] the adoptive father sued the adoption agency for the wrongful death of his wife, beaten to death with a baseball bat by their adoptive son.[180] Agencies have been liable for punitive damages as well, where the agency acted wantonly and/or willfully.[181] When the adoption agency in *Ross v. Louise Wise Services, Inc.*[182] sought to strike a prayer for punitive damages in a case involving their failure to disclose birth parents' history of schizophrenia, the court responded: "This court finds that, under the facts presented, a jury could conclude that defendant's acts were 'morally culpable' or 'actuated by evil or reprehensible motives' and that punitive damages are warranted to deter other adoption agencies from engaging in similar acts of deceit in the future."[183]

Damages awarded can be significant.[184] In one case, a jury awarded $3.8 million for psychiatric care for the plaintiffs' adult daughter (though the court reduced the award to $200,000 because of statutory limits imposed by a state tort reform statute.)[185] A California case included lifetime care for a psychiatric condition, and resulted in a settlement for $1.45 million.[186] In the LEXISNEXIS database "Verdict & Settlement Analyzer," a handful of cases are reported for wrongful adoption, including

178. FREUNDLICH & PETERSON, *supra* note 136, at 25.

179. 92 P.3d 1269 (N.M. Ct. App. 2004).

180. *See id.* at 1271 (noting that an adoptive father alleged that the adoption agency knew or should have known that the adopted child was violent and in need of therapeutic support).

181. FREUNDLICH & PETERSON, *supra* note 136, at 25 (noting that this happens in some jurisdictions); Blair, *supra* note 163, § 16.05174 (listing several instances in which courts have awarded punitive damages).

182. 777 N.Y.S.2d 618 (2004).

183. *See id.* at 623 (denying the agency's motion to dismiss the adoptive parents' demand for punitive damages).

184. *See infra* notes 185–188 (discussing instances in which courts have awarded damages in the hundreds of thousands or even million dollar range).

185. *See* Mohr v. Commonwealth, 653 N.E.2d 1104, 1106 n.4 (Mass. 1995) (finding that this amount would "fairly and adequately compensate the plaintiffs").

186. *See* Blair, *supra* note 163, § 16.05 n.3 (describing Trial Brief, Forter v. Cty. of San Mateo, No. 33207 (Cal. Super. Ct. July 6, 1992)).

some stating simply that there was a confidential settlement.[187] One case reports a recovery through jury verdict of $300,000.[188]

2. Legislatures Respond

As tort claims for wrongful adoption were recognized by courts, legislatures also acted to mandate disclosures by adoption agencies.[189] The Texas statutes, for example, require the preparation of a Health, Social, Educational, and Genetic History Report by the placing entity and that it be provided to the prospective adoptive parents "as early as practicable before the first meeting of the adoptive parents with the child."[190] The statute contains a long list of information that should be included in the report, including birth and neonatal history; current physical health; birth mother's use of alcohol during pregnancy; family relationships with siblings, birth parents and extended family; educational performance and special education needs, if any; physical, sexual or emotional abuse suffered by the child; and a litany of information about birth parents, extended family and siblings deemed "genetic history":

> (1) their health and medical history, including any genetic diseases and disorders;
> (2) their health status at the time of placement;
> (3) the cause of and their age at death;
> (4) their height, weight, and eye and hair color;
> (5) their nationality and ethnic background;

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187. *See, e.g.*, Wallerstein v. Chandler, No. 85 17406-04, 2009 Jury Verdicts LEXIS 135482 (settling for a confidential amount); Martin v. Methodist Home & Newman, No. 90-07815-A, 2009 Jury Verdicts LEXIS 90435 (June 1994) (settling for an undisclosed amount).

188. *See* Halper v. Jewish Family & Children's Serv. of Greater Phila., 2009 Jury Verdicts LEXIS 198796 (March 2004) (listing the verdict); Halper v. Jewish Family & Children's Serv. of Greater Phila., 963 A.2d 1282, 1289 (Pa. 2009) (reinstating the verdict).

189. *See* FREUNDLICH & PETERSON, *supra* note 136, at 33–34 (stating that these statutes have been in place in most states since the 1980s and discussing the content of the statutes).

190. TEX. FAM. CODE §162.005 (2017).

> (6) their general levels of educational and professional achievements, if any;
> (7) their religious backgrounds, if any;
> (8) any psychological, psychiatric, or social evaluations, including the date of the evaluation, any diagnosis, and a summary of any findings;
> (9) any criminal conviction records relating to a misdemeanor or felony classified as an offense against the person or family or public indecency or a felony violation of a statute intended to control the possession or distribution of a substance included in Chapter 481, Health and Safety Code; and
> (10) any information necessary to determine whether the child is entitled to or otherwise eligible for state or federal financial, medical, or other assistance.[191]

The report is to be retained for ninety-nine years so that it can be supplied not just to the adoptive parents, but also to adopted persons on reaching adulthood as well as the children of adopted persons.[192] The statutes further provide that prospective adoptive parents who indicate that they are interested in proceeding with the adoption after reviewing the agency-prepared report may also see the child's case record, and the agency "shall provide the prospective adoptive parents with access to research regarding underlying health issues and other conditions of trauma that could impact child development and permanency."[193] The Uniform Adoption Act also mandates disclosure of a report about the adoptee's current physical and mental health, as well as educational, social and genetic history.[194] The comment to this section describes the disclosure requirements as "the Act's most significant contributions to the improvement of contemporary adoption practice."[195] The Act goes on to provide sanctions for failure to disclose: civil penalties that "can be imposed against

191. *Id.* § 162.007(d).

192. *See id. §* 162.006 (mandating who does and does not have authority to access to health records).

193. *See id.* § 162.0062 (c-1) (2017) (discussing the prospective adoptive parents' rights to information about the child during the adoption process).

194. *See* UNIF. ADOPTION ACT § 2-106 (1994) (suggesting that the birth parents provide this report as early as practicable and before the adoptive parent accepts physical custody of the child).

195. UNIF. ADOPTION ACT § 2-106 cmt. (1994).

agencies, lawyers, evaluators, and other providers of professional services who fail to perform their responsibilities according to a generally acceptable standard of care."[196] In addition to civil fines, the Act acknowledges "wrongful adoption" causes of action: an adoptive parent "may maintain an action for damages or equitable relief against a person . . . who fails to perform the duties required by" the disclosure sections of the Act.[197]

D. Agencies Respond to New Legal Risk

At least one adoption physician warned as early as 1937 that withholding information about a child's health and genetic risk "is tantamount to fraud," and that agencies would subject themselves to professional liability for their failure to disclose.[198] But without a duty to disclose, legally acknowledged by tort liability for wrongful adoption and imposed by legislatures via statutory disclosure, agencies did not have the incentive to follow better practices.[199] Disclosure practices today have improved considerably as agencies respond to the risk of legal liability: "These rulings, accompanied by state statutes that variously determine the extent and kind of medical histories that must be collected and disclosed, have led adoption agencies subsequently to become extremely conscious about the legal liability and ethical ramifications of disclosure practices."[200] Organizations that offer

196. UNIF. ADOPTION ACT § 7-105 cmt. (1994).

197. *See* UNIF. ADOPTION ACT § 7-105(c) (1994) (extending the availability of damages for wrongful adoption to any person to whom the birth parents were supposed to disclose information to under the Act).

198. *See* Sufian, *supra* note 106, at 102 (reviewing cases where adoptive parents became disconcerted with their adopted child after learning of the child's family medical history).

199. *See* Maley, *supra* note 127, at 718 (arguing for legislative reform because the traditional remedy of an annulment of the adoption had little deterrent effect and was seldom used due to the harsh effects on the child).

200. *See* Sufian, *supra* note 106, at 122 (noting that the imposition of damages as the remedy for wrongful adoption lawsuits increased awareness about the issues caused by nondisclosure of pertinent information).

education for agencies now emphasize the legal liability in failure to disclose.[201]

"The possibility of being sued is . . . one of the factors affecting agency behavior. The desire to minimize exposure to liability is a constant reality."[202] Dr. Raleigh notes that the market focus of adoption agencies has become more acute in the past decade as the adoption marketplace has changed with reduced availability of the babies and toddlers that adoption consumers were interested in adopting.[203] When adoption was booming, agencies "were less interested in the financial considerations involved in sustaining a small business . . . .these workers did not have to worry about paying the rent or making payroll."[204] Now, with the downturn in adoption, the focus has to shift—as one worker put it, "This is a business, and we have to make business decisions."[205] Part of the business decision-making has to be reducing litigation risk.[206] The need to avoid liability for wrongful adoption has already changed agency practice with regard to information sharing.[207] But there

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201. *See, e.g.*, Michele Jackson, *Agency Liability: What Adoption Service Providers and Families Need to Know,* ADOPTION ADVOCATE NO. 73 (July 1, 2014), http://www.adoptioncouncil.org/publications/2014/07/adoption-advocate-no-73 (last visited Apr. 23, 2019) ("An adoption agency may be found liable for false statements or for not attempting to obtain information that and/or should have been known.") (on file with the Washington and Lee Law Review); *Wrongful Adoption Litigation and Practice*, ADOPTIVE & FOSTER FAM. COALITION, https://affcny.org/adoption/legal-issues/disclosure-of-information/wrongful-adoption-litigation-practice/ (last visited Apr. 23, 2019) (advising agencies on avoiding liability) (on file with the Washington and Lee Law Review).

202. Schweitzer & Pollack, *supra* note 27, at 258.

203. *See* RALEIGH, *supra* note 36, at 4 ("[T]he number of children available—especially overseas—trickled to a halt."); *see also* 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. L. 127, 141 (2017) ("Modern adoption . . . cases present practitioners with particularly challenging ethical dilemmas and liability risks.").

204. *See* RALEIGH, *supra* note 36, at 4 (noting that, before this shift, many adoption workers were drawn to the field because of their commitment to child welfare).

205. *See id.* (stating that the cause of this change is due to new regulations and a decrease in the number of young and healthy babies).

206. *See* Blair, *supra* note 150, at 855–56 (discussing the need for adoption agencies to reduce risk since courts began to impose liability for failure on the part of the agencies to provide essential information on the child's history).

207. *See* Blair, *supra* note 163, § 16.03 ("Claims against adoption

are other areas where wrongful agency practice persists.[208] Other theories of liability, subjecting agencies to litigation risk for wrongful family separation, could incentivize better treatment of birth parents.[209] This Article now turns to exploration of that potential liability.

IV. Legal Liability for Wrongful Family Separation

> Tort law is our primary fallback method of empowering ordinary people to remedy injustices to themselves through their courts.
>
> —Jack B. Weinstein [210]

There is no named tort of wrongful family separation as yet, but there are a number of potential causes of action to address agencies who defraud birth parents or interfere with parental rights.[211] Procuring consent to adoption by fraud, duress or coercion could create a cause of action similar to the fraud and misrepresentation actions in wrongful adoption.[212] Infliction of

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intermediaries seeking damages for misconduct in the disclosure of health-related information have been brought under a variety of legal theories.").

208. *See* 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, 181–83 (1999) (outlining adoption agency's liability for fraudulent and negligent misrepresentations and failures to investigate possible issues with the child's medical background).

209. *See* Elizabeth J. Samuels, *Time to Decide? The Laws Governing Mothers' Consents to the Adoption of Their Newborn Infants*, 72 TENN. L. REV. 509, 526–39 (2005) (advocating agency best practices in adoption procedures to ensure informed consent from biological mothers by providing counseling services, reducing conflicts of interest, and encouraging legal representation for the biological parents).

210. Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 243 (2008).

211. *See* Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994) (recognizing fraud and intentional misconduct as causes of action in the adoption context).

212.*See In re* Zschach, 665 N.E.2d 1070, 1078 (Ohio 1996) (stating that a biological parent's consent is not voluntary, and thus not valid, if given under duress or coercion).

emotional distress causes of action also seem applicable.[213] And several courts have recognized the tort of interference with parental rights in cases of adoption.[214] Attorneys who facilitate adoptions might also be subjected to liability for legal malpractice or other wrongdoing.[215] Finally, states may wish to adopt a new cause of action for wrongful family separation.[216]

A. Fraud and Misrepresentation[217]

> Fraud corrupts whatever it touches—the dishonesty involved in fraud simply cannot be condoned.
>
> —Saul Litvinoff[218]

In adoption, "consents may be set aside in all jurisdictions for fraud, duress, or undue influence."[219] As one court put it,

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213. *See* Ross v. Louise Wise Servs., 868 N.E.2d 189, 191 (N.Y. 2007) (acknowledging that a cause of action for intentional infliction of emotional distress can exist in wrongful adoption cases, although here it was barred by the statute of limitations).

214. *See* Coward v. Wellmont Health Sys., 812 S.E.2d 766, 770–71 (Va. 2018) (outlining a four-factor test for intentional interference with parental rights in the adoption context); Jenkins v. Miller, No. 2:12-cv-184, 2017 U.S. Dist. LEXIS 160793, at *27 (D. Vt. Sept. 29, 2017) ("[T]ortious interference with parental rights constitutes a cause of action cognizable in this state.").

215. *See* Prescott & Debele, *supra* note 203, at 131 (noting that adoption lawyers increasingly face substantial risk).

216. *See* Sonja Starr & Lea Brilmayer, *Stefan A. Reisenfeld Symposium 2002: Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213, 218–19 (2003) (discussing the right to keep the family together as a recognized right under the Universal Declaration of Human Rights and other international treaties).

217. Fraud encompasses a wide variety of deceitful and false conduct. It may encompass both intentional and negligent misrepresentation. *See* Frank J. Cavico, *Fraudulent, Negligent, and Innocent Misrepresentation in the Employment Context: The Deceitful, Careless, and Thoughtless Employer*, 20 CAMPBELL L. REV. 1, 3 (1997) (noting that misrepresentation can be categorized as intentional fraudulent misrepresentation, negligent misrepresentation, careless misrepresentation, or innocent misrepresentation).

218. Saul Litvinoff, *Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion*, 50 LA. L. REV. 1, 66 (1989).

219. Samuels, *supra* note 209, at 512; *see* KATHERINE G. THOMPSON & JOAN H. HOLLINGER, 2 ADOPTION LAW AND PRACTICE § 8.02 (2015) (discussing the rights of adoptive parents, biological parents, and stepparents to set aside adoption in the event of defective consent).

> The Private Adoption Act of 1979 does not provide for any method whereby the act of surrender may be set aside because of vitiated consent. However, the executed act of surrender, although highly regulated and specialized, is in essence a contract, namely an agreement by two or more parties whereby obligations are created, modified, or extinguished. Accordingly, as in other agreements, the consent necessary to the surrender of a child for private adoption may be vitiated by error, fraud or duress.[220]

When fraud induces consent, "though consent has come into existence, it is impaired, defective, it is tainted by a vice that affects its freedom."[221] In order for consent to adoption to be valid, it must be voluntary.[222] The same kind of fraud that should lead to invalidation of consent could serve as the basis of a fraud lawsuit.[223]

Even when the consent is invalid because of fraud or duress, courts are extremely reluctant to order the child removed from the adoptive parent and returned to the biological parent:

> Most jurisdictions will not allow a revocation to halt an adoption proceeding automatically if the adoptive parents oppose the revocation, even though the notice of revocation met all the statutory requirements. Instead, the attempted withdrawal of consent will trigger a hearing to determine whether the statutory grounds exist for an involuntary termination of parental rights, to the text of the note or whether a return of

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220. *See In re* J.M.P., 528 So. 2d 1002, 1007–08 (La. 1988) (discussing whether the eighteen-year-old birth mother's family's refusal to allow her to bring the baby home was akin to duress, vitiating the mother's consent to relinquish her parental rights).

221. Litvinoff, *supra* note 218, at 6.

222. *See* Seymore, *supra* note 7, at 150 ("Relinquishment of parental rights and consent to adoption must be knowingly and voluntarily given."); Samuels, *supra* note 209, at 511 (noting that a widely-accepted goal of infant adoption is to ensure that the birth parents' decisions are deliberate); 2 AM. JUR. 2D, *Adoption* § 23, Westlaw (database updated Feb. 2019) (noting that voluntary consent is jurisdictional).

223. *See* Harriet Dinegar Milks, Annotation, *"Wrongful Adoption" Causes of Action Against Adoption Agencies Where Children Have or Develop Mental or Physical Problems That Are Misrepresented or Not Disclosed to Adoptive Parents*, 74 A.L.R. 5th Art. 1 (1999) (discussing influential wrongful adoption cases where the causes of action were grounded in the elements of fraud).

> the child to the biological parents is in the best interests of the child.[224]

The case of J.M.P. illustrates the need for a cause of action for money damages in adoption cases.[225] Though the birth mother validly withdrew her consent to the adoption within the thirty days permitted by statute, that did not guarantee the return of her child.[226] The court simply stated, "the withdrawal of consent will not prevent the adoption if the adoption is found to be in the best interests of the child."[227]

A classic case of fraud in the inducement of consent in the adoption context is *Vela v. Marywood*.[228] Corina, age nineteen and unmarried, approached an adoption agency when she discovered she was pregnant.[229] Corina was a college student, and was described by the appellate court as "an exemplary young woman" from "a strong, stable, and supportive family."[230] When receiving counseling from Marywood, a child-placing agency, Corina was adamant that she wanted open adoption[231] and Marywood said it was able to provide that for her.[232] Marywood offered, as a standard

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224. THOMPSON & HOLLINGER, *supra* note 219, § 8.02(1)(a)(i).

225. *See In re J.M.P.*, 528 So. 2d at 1007–08 (acknowledging that the only remedy available for an act of surrender made under duress is to set aside the act and remove the child from the adoptive parents' custody if removal is in the child's best interests).

226. *See id.* at 1021 (Calogero, J., dissenting) ("[The biological mother] did in fact revoke her consent to the surrender within thirty days of signing the act.").

227. *See id.* at 1014 (noting the court's preference for consideration of the child's best interests in adoption proceedings).

228. *See* Vela v. Marywood, 17 S.W.3d 750, 761 (Tex. Ct. App. 2000) (finding that the adoption agency owed to the biological mother a duty to disclose and was bound to act in good faith in regards to her interests).

229. *See id.* at 753 ("In September 1997, Corina, then nineteen years of age and unmarried, learned she was pregnant.").

230. *See id.* (discussing Corina's educational accomplishments, volunteer experience, and family background).

231. *See id.* (noting that Corina expressed the type of couple she wanted her unborn child would go to and her desire to maintain a relationship with the child after adoption). "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. *See* Seymore, *supra* note 7, at 151 (acknowledging that the amount of contact a biological parent may have with the child through an open adoption agreement varies by state).

232. *See Vela*, 17 S.W.3d at 753 ("Corina reported . . . that she had bonded

practice, a "sharing plan," where adoptive parents agree to allow the birth mother to visit the child after the termination of her parental rights.[233] The arrangement is, however, an "empty promise," as Marywood admitted, since it is wholly unenforceable.[234] Marywood failed to mention the unenforceable nature of the agreement.[235] 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."[236] Corina cried throughout that visit.[237]

When Corina tried to withdraw her consent to adoption and regain possession of her child, the agency refused.[238] The trial court

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with her unborn child . . . and discussed what Marywood terms an 'open adoption.'").

233. *See id.* at 754 ("A sharing plan ostensibly allows the birth mother to select the adoptive family, visit her child on a regular basis after the adoption, and exchange letters and pictures.").

234. *See id.* (noting that while the adoptive parents agree in writing to conform to the arrangement, the birth mother does not sign the agreement, so neither the adoptive parents nor Marywood are in an agreement with the birth mother).

235. *See id.* ("[T]he executive director of Marywood admits that the sharing plan is an 'empty promise.'"). As I explained in a previous article, "it is common practice in states without enforceable open-adoption agreements, however, for agencies and adoptive parents to enter into such unenforceable 'agreements.'" Seymore, *supra* note 7, at 152. I reviewed agency websites in states where open adoption agreements are not enforceable and found many promises of continuing contact. *See id.* ("The birth parents may not be aware that the openness promised by these agencies may not be legally binding."). 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." *Id.* at 152. The websites were all silent on the fact that no such agreements were legally enforceable in their jurisdictions. *See id.* at 152–53 (discussing that, even where open adoption agreements are enforceable in a certain state, the adoption agency websites failed to disclose that such agreements have complex legal requirements to make them judicially enforceable).

236. *See Vela*, 17 S.W.3d at 755 (noting that the counselor made similar statements in a meeting shortly after the child's birth promising Corina that she would always be in the child's life).

237. *See id.* (discussing the one and a half hour visit where Corina ultimately signed a temporary foster-care request).

238. *See id.* at 756 (discussing a phone call where Corina claims she told her

upheld the adoption, and Corina appealed.[239] The appellate court found fraud.[240] The agency committed fraud because of its failure to disclose the unenforceability of the open adoption agreement.[241] Marywood "owed Corina a duty of complete disclosure when discussing adoption procedures, including any proposed post-adoption plan."[242] The agency had an obligation to fully disclose "the whole truth" about the open-adoption agreement, including the fact that it was not binding.[243] Further, the court held, 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."[244] 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."[245]

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 return of her child.[246] In another jurisdiction, return of the child might well have been blocked by a "best interest of the child" analysis[247] that privileged the fact that the child had been with the prospective

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counselor "she wanted [her] baby back" and had "changed [her] mind").

239. *See id.* at 752 (noting that the termination order was placed before Corina's counsel could intervene and Corina appealed the district court's judgment).

240. *See id.* at 765 (concluding that the adoption agency owed the expectant mother a high standard of care which it did not uphold when it did not disclose the unenforceability of the open adoption agreement).

241. *See id.* at 754 (stating that even the executive director of Marywood that the open adoption agreement is essentially an empty promise).

242. *Id.* at 761.

243. *See id.* (emphasizing that the birth mother placed special confidence in the adoption agency).

244. *See id.* at 765 (stating that this higher standard applies as soon as the expectant mother undertakes counseling with the adoption service).

245. *Id.* at 761.

246. *See id.* at 765 (finding that, because the relinquishment waiver was not voluntarily signed by the mother, her parental rights were never terminated).

247. *See* THOMPSON & HOLLINGER, *supra* note 219, § 8.02(1)(a)(i) (discussing situations where the biological parents revoke consent to the adoption within the statutory requirements, but the court will still require a "best interests" hearing to determine whether the biological parents can regain custody of the child).

adoptive parents for two years during the course of the litigation.[248] In such a jurisdiction, the adoption agency should face legal liability and money damages for fraudulent misrepresentation.[249]

"Fraud consists [of] deception practiced in order to induce another to part with property or surrender some legal right."[250] The Restatement (Second) of Torts provides:

> One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.[251]

The well-established elements of a fraud cause of action are as follows: "(1) a false representation; (2) in reference to a material fact; (3) made with knowledge of its falsity; (4) with the intent to deceive; and (5) on which an action is taken in justifiable reliance upon the representation."[252]

As the court in *Vela* noted, an adoption agency serving vulnerable women at a point of crisis owes a duty easily breached when seeking to secure consent to adoption.[253] False promises of continued contact amounted to fraud.[254] Promising the birth

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248. *See* Vela v. Marywood, 17 S.W.3d 750, 759 (Tex. Ct. App. 2000) (stating that Texas law requires a relinquishment affidavit and a finding that termination is in the best interest of the child before the court terminates parental rights). 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. *Id* at 765.

249. *See infra* notes 274–278 (discussing the loss of or interference with parental rights as being appropriate for an award of money damages).

250. Reid v. Landsberger, 123 Conn. App. 260, 281 (2010).

251. RESTATEMENT (SECOND) OF TORTS §525 (AM. LAW INST. 1977).

252. 37 AM. JUR. 2D *Fraud and Deceit* § 24, Westlaw (database updated Feb. 2019).

253. *See Vela*, 17 S.W.3d at 761 (emphasizing that the adoption agency's position of superiority and influence over the young, biological mother placed upon the agency a duty to act in good faith in regard to the mother's interests).

254. *See id.* (noting that the adoption agency owed, yet failed to perform, a duty of full disclosure to the biological mother, including a duty to explain that the continued contact agreement was not legally enforceable). Courts have reached similar results when the birth father consents after false promises of continuing contact were made. *See, e.g.*, *In re* Interest of S.A.B., No. 04-01-00795,

mother that the child would be placed with her cousin constituted fraud.[255] In *Huebert v. Marshall*,[256] the birth mother was deceived by a woman who was emotionally involved with the baby's father into consenting to an adoption.[257] The mother did not know that the woman and the baby's father had planned to get together after the father left her.[258]

In *In re Cheryl E.*,[259] the court found fraud where the adoption worker falsely told the mother that if she signed the relinquishment she could have the child returned to her within one year if she wished, but that if she did not sign, the child would be given to her estranged husband and his girlfriend.[260] The court noted that the agency's intent to defraud the mother was evident from the fact that the worker made false representations with the knowledge that the mother would rely on them, regardless of whether the worker knew they were actually false.[261] The worker

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2002 Tex. App. LEXIS 5053, at *9 (Tex. App. July 17, 2002) ("[F]raudulent representations made to a party to induce the party into executing an affidavit of relinquishment constitute extrinsic fraud."); Queen v. Goeddertz, 48 S.W.3d 928, 932 (Tex. App. 2001) (noting that an affidavit of relinquishment will be considered involuntary if procured by fraud).

255. *See* Jones v. Tex. Dep't of Protective & Regulatory Servs., 85 S.W.3d 483, 491 (Tex. App. 2002) (noting that the Department promised the birth mother that her cousin would care for the child and she would be able to see the child where, in reality, the Department gave the child to strangers and the birth mother had no right to visit the child (citing Vela v. Marywood, 17 S.W.3d 750 (Tex. App. 2000))).

256. 270 N.E.2d 464 (Ill. App. Ct. 1971).

257. *See id.* at 467 (discussing the woman's representations to the birth mother that the adoptive parents were good people and would make good parents despite the fact that the woman had only casually spoken with the adoptive parents). The court noted that the woman "was acting in a fiduciary capacity because of [the biological mother]'s total trust in her," and "violated that trust because she was secretly involved with [the biological mother]'s husband." *Id.*

258. *See id.* at 465 (discussing the timeline of events following the birth of the child, specifically that the biological mother was aware her husband was planning to leave her, but she did not know he would do so with the woman persuading her to give her child up for adoption).

259. 161 Cal. App. 3d 587, 599 (1984).

260. *See id.* at 596–99 (affirming the trial court's finding that the adoption worker either explicitly told the mother she could have her daughter returned to her or made statements causing the mother to reasonably believe she had a year to change her mind).

261. *See id.* at 599 ("[R]epresentations need not be made with knowledge of actual falsity, but need only be a false assertion of fact by one who has no reasonable grounds for believing his own statements to be true, and made with

had "no reasonable grounds for believing his own statements to be true," and were made with the intent to induce the mother to consent.[262] The mother justifiably relied on the agency's representations, to her detriment.[263]

Courts have also held that "undue influence and overreaching are species of fraud and will vitiate a transaction," and found fraud where the birth mother was overwhelmed by the agency and over-persuaded to consent.[264] One court noted the following 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."[265] 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.[266] In another case, after the mother decided to keep her child, the maternity home embarked on a course of

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intent to induce the other to alter his position, to his injury.").

262. *See id.* (noting that it is irrelevant whether the adoption worker knew or believed the mother had one year to change her mind and reclaim her child).

263. *See id.* at 600 ("Implicit in the trial court's finding that [the mother] relinquished her child for adoption *as a result of fraud* is the inference that she would *not* have relinquished her child *but for* the fraud.").

264. *See* Sorentino v. Family & Children's Soc., 367 A.2d 1168, 1169 (N.J. 1976) (finding the adoption agency exerted unwarranted pressure on the mother when an adoption worker threatened her with harassment and litigation if she did not relinquish parental rights); Methodist Mission Home v. N.A.B., 451 S.W.2d 539, 544 (Tex. App. 1970) (noting that the adoption agency "subjected [the mother] to an intensive campaign, extending over a five-day period, designed to convince her to give up her baby"); *In re* Interest of Perry, 641 P.2d 178, 180 (Wash. Ct. App. 1982) (finding undue influence where every time the mother expressed uncertainty about giving up her child, the adoption agency provided counseling to encourage her to sign the relinquishment papers).

265. *See In re Cheryl E.*, 161 Cal. App. 3d at 601 (relying on factors to find undue influence because direct evidence of it is rarely obtainable).

266. *See In re Perry*, 641 P.2d at 181 ("[T]his environment created in [the mother's] mind an obligation, without option, to repay the agency's expenses by relinquishing her rights to her child.").

conduct to persuade her to relinquish the child for adoption.[267] She was told that she was being selfish, and had no right to keep the child.[268] 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.[269] 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?'"[270] 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 hours a night.[271] 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."[272]

All of the cases discussed above, where the court found fraud, led to rescission of consent.[273] But the facts and law of these cases

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267. *See Methodist Mission Home*, 451 S.W.2d at 541 (discussing the Home's counseling policy to encourage unwed women to give up their children rather than to discuss their options).

268. *See id.* at 542 n.7 (detailing the conversations between the mother and the adoption worker where the adoption worker tried to persuade the mother to give her child up for adoption).

269. *See id.* (noting that the adoption worker told the mother she was unaware of any unwed mother happy with her decision to keep her child).

270. *See id.* (discussing one counseling session where the adoption worker told the mother a story about another unwed mother whose child asked her the meaning of "bastard").

271. *See id.* at 543–44 ("She testified that, as a result of her discussions with [the adoption worker], she felt 'trapped,' and that . . . she consented to the adoption of her child to avoid 'harassment.'").

272. *Id.* at 544.

273. *See Sorentino*, 367 A.2d at 1170 (stating that the trial judge had sufficient evidence for his finding that the agency coerced the mother into relinquishing her child after she expressed her desire to keep the child); Vela v. Marywood, 17 S.W.3d 750, 764 (Tex. App. 2000) (holding the relinquishment affidavit void because the mother signed it based on misrepresentations by the agency that she would have an enforceable open adoption agreement with the adoptive parents); *Methodist Mission Home*, 451 S.W.2d at 544 (concluding that the evidence was sufficient for the jury to find the adoption agency exercised undue influence over the mother when she executed agreements to surrender custody of her newborn child); *In re Perry*, 641 P.2d at 181 (noting that the undue influence by the adoption agency was exacerbated by the fact that the expectant mother spent the last months of her pregnancy completely surrounded by and in the care of the agency).

also support the kind of fraud that gives rise to civil liability for damages.[274] But how would damages be calculated in such cases? "Proof of damages is essential in an action for fraud or deceit, and generally, the loss or injury must be a pecuniary injury or an economic loss. However, it is generally sufficient if the fraud has resulted in the loss of a right which the law recognizes as of pecuniary value."[275] The right of parenthood is clearly a right which the law recognizes as of pecuniary value.[276] Cases of tortious interference with parental rights lead to pecuniary damages,[277] as do cases involving the wrongful death of a child.[278] Further, many frauds in the adoption context involve breach of a fiduciary duty owed by the agency or adoption workers, and "in some jurisdictions, a cause of action may be made for a breach of fiduciary duty even without actual damages or the showing of an economic loss." [279] And fraudulent inducement cases are not subject to the economic loss doctrine. [280] Indeed, in some jurisdictions "a

274. *See* 37 AM. JUR. 2D *Fraud and Deceit* § 346, Westlaw (database updated Feb. 2019) ("Because fraud of all kinds is abhorrent to the law, if one person is injured by the fraud of another, the courts have jurisdiction to afford a proper remedy.").

275. *Id.* § 266.

276. *See* McCurdy v. Dodd, 2000 U.S. Dist. LEXIS 2333, at *2 (E.D. Pa. Feb. 28, 2000) (bringing a claim for pecuniary damages for loss of parenthood against the police officers who shot and killed her child).

277. *See infra* note 278 (discussing parents' claims for damages after the loss of their child).

278. *See* 10 PERSONAL INJURY—ACTIONS, DEFENSES, DAMAGES § 45.08[11] (stating that the measure of damage in wrongful death of a child includes "the parents' loss of the pecuniary value of the child's earnings and services during minority, less the cost of maintaining the child during that period, plus contributions reasonably to be expected after the child reaches majority"). "However, some courts have not permitted the expense of rearing and educating the child to be used as a setoff, and other courts have limited the loss for the death of a minor to the period of the child's minority." *Id.*; *see also* Wangen v. Ford Motor Co., 294 N.W.2d 437, 466 (Wis. 1980) (holding that parents of an injured child can recover punitive damages incident to their action for compensatory damages).

279. *See* 37 AM. JUR. 2D *Fraud and Deceit*, § 268, Westlaw (database updated Feb. 2019) (stating that the requirement to show actual damages sustained from fraudulent actions may vary by jurisdiction).

280. *See id.* § 270 ("[C]laims for the tort of fraudulent inducement are not barred by the economic loss doctrine."); R. Joseph Barton, *Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent*

non-compensable violation of a legally protected right"[281] is enough to trigger nominal damages, and once nominal damages are awarded, punitive damages are supported.[282] Fraud can also give rise to non-economic damages, including emotional distress.[283]

Fraud actions can give rise to punitive damages.[284] Where there is a fiduciary duty, "punitive damages can be awarded when the defendant violates a fiduciary duty owed to the plaintiff."[285] In cases where the courts describe the vulnerable state of birth mothers, and their reliance on adoption agencies and workers, they

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Misrepresentation Claims, 41 WM. & MARY L. REV. 1789, 1803–11 (2000) (discussing the applicability of the economic loss rule to fraud claims in various jurisdictions, noting that several jurisdictions find fraudulent inducement claims to be in conflict with the economic loss doctrine).

281. *See* 37 AM JUR 2D, *supra* note 274, § 269 (noting that recovery for fraud requires more than a showing of nominal damages); First Bank of Boaz v. Fielder, 590 So. 2d 893, 898 (Ala. 1991) ("Punitive damages may be awarded by the jury in a fraud action if the plaintiff makes a sufficient evidentiary showing that he has been injured as a result of the fraud and that the defendant's conduct warrants punishment.").

282. *See* AM JUR 2D, *Damages*, § 570, Westlaw (database updated Feb. 2019) (observing that once actual damages, even nominal damages, are established, some jurisdictions may award punitive damages it is a proper case to do so); *Fielder*, 590 So. 2d at 898 (finding that although the jury's award of punitive damages to the plaintiffs was not accompanied by nominal or compensatory damages, this was not grounds to set aside the verdict because there was sufficient evidence that the plaintiffs were harmed, at least nominally, by the defendant's fraudulent acts).

283. *See* Andrew L. Merritt, *Damages for Emotional Distress in Fraud Litigation: Dignitary Torts in a Commercial Society*, 42 VAND. L. REV. 1, 31 (1989) ("Rather than ignoring the claims of fraud plaintiffs who have suffered substantial frustration or severe emotional distress, courts should recognize that fraud is at least in part a dignitary tort and should award damages for that distress."); Steven J. Gaynor, Annotation, *Fraud Actions: Right to Recover for Mental or Emotional Distress*, 11 A.L.R. 5th 88 (1995) (noting that some courts have held that a wrongdoer should be held liable for all the "ordinary, natural, and proximate consequences of his actions," including those that caused the plaintiff "shame, humiliation, and mental anguish"); *see, e.g.*, McGhee v. McGhee, 353 P.2d 760, 764 (Idaho 1960) (noting that plaintiff could recover damages for humiliation, disgrace, and mental anguish in husband's failure to disclose he was already married).

284. *See* 4 DAMAGES IN TORT ACTIONS § 40.03 ("Most jurisdictions impose punitive damages for conduct that evinces malice, fraud, oppression, or willful and wanton disregard of the rights and safety of others."); 1-9 PUNITIVE DAMAGES § 9.7 ("Generally, the court will award punitive damages in fraud cases if the plaintiff shows that the defendant committed the misrepresentation with a malicious or willful intent.").

285. 1-9 PUNITIVE DAMAGES § 9.7.

are using language of fiduciary duty: "courts regularly impose fiduciary obligations ad hoc in relationships where one person trusts another and becomes vulnerable to harm as a result."[286]

B. Tortious Interference with Parental Rights

In a previous article, I noted that thwarted birth fathers had had some success in bringing lawsuits for tortious interference with parental rights.[287] Such a cause of action could be brought by birth mothers and birth fathers alike. The Restatement (Second) of Torts describes the cause of action as follows: "One who, with knowledge that the parent does not consent, abducts, or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has been left him, is subject to liability to the parent."[288] The elements of the cause of action require that: (1) the parent has a legal right to a parental relationship with the child; (2) the other party abducted the child or compelled the child to leave the parent's custody; (3) such action was willful; and (4) the action was done with notice or knowledge that the parent did not consent.[289]

Cases of adoption where a parent appears to have consented to the adoption do not facially look to satisfy the final element of the tort.[290] But where consent was adduced by fraud, duress,

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286. *See* D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1400 (2002) (discussing the typical characteristics of relationships upon which courts typically impose fiduciary duties).

287. *See* Malinda L. Seymore, *Grasping Fatherhood in Abortion and Adoption*, 68 HASTINGS L.J. 817, 861 (2017) (noting that fathers have succeeded in their claims for tortious interference with parental rights where the birth mother never informed the father that she was pregnant with his child, depriving him of the opportunity to assert his parental rights).

288. RESTATEMENT (SECOND) OF TORTS § 700 (AM. LAW INST. 1977).

289. *See* 59 AM. JUR. 2D *Parent and Child* § 113 (Supp. 2018) (providing the four elements necessary to establish a claim of tortious interference with child custody); *see, e.g.*, Wolf v. Wolf, 690 N.W.2d 887, 892 (Iowa 2005) (same); Wyatt v. McDermott, 725 S.E.2d 555, 563–64 (Va. 2012) (recognizing a cause of action for tortious interference with parental rights for the first time under Virginia law).

290. *See Wyatt*, 725 S.E.2d at 556 (clarifying that the facts of this case arose from an unauthorized adoption).

coercion, or undue influence, that consent is void.[291] As one adoption law expert notes, "a finding that a consent is invalid is equivalent to a finding that there was never any consent at all."[292]

In two cases involving birth fathers, courts recognized that the tort applied to their adoption cases.[293] In *Kessel*, the West Virginia Supreme Court of Appeals approved significant damages.[294] In both cases the birth mothers, together with adoption agencies and/or adoption attorneys, sought to hide the birth and location of the child despite knowing that the birth fathers intended to assert an interest in parenting.[295] In *Wyatt v. McDermott*,[296] John Wyatt's child was placed for adoption without his knowledge or consent.[297] In fact, the birth mother, at the urging of an adoption attorney, made false statements to John about her intentions regarding adoption and her due date so that he would not try to prevent the

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291. *See* Samuels, *supra* note 209, at 512 ("As a general rule, consents may be aside in all jurisdictions for fraud, duress, or undue influence, usually for a limited period of time after consent has been given or after the adoption has been granted.").

292. KATHERINE G. THOMPSON & JOAN H. HOLLINGER, 2 ADOPTION LAW AND PRACTICE § 8.02 (Victor Dorff ed., 1991).

293. *See* Kessel v. Leavitt, 511 S.E.2d 720, 765 (W. Va. 1998) ("[W]e hold that a parent may maintain a cause of action against one who tortuously interferes with a parent's parental or custodial relationship with [his] minor child."); *see also Wyatt*, 725 S.E.2d at 563–64 (recognizing a cause of action for tortious interference with parental rights for the first time under Virginia law).

294.*See Kessel*, 511 S.E.2d at 819 (upholding a jury award of $2 million in compensatory damages and $5.85 million in punitive damages). Wyatt reached a confidential settlement.

295. *See id.* at 734–39 (noting that the father of the unborn child "opposed any adoption" and subsequently sought legal advice regarding his parental rights as the child's biological father); *see also Wyatt*, 725 S.E.2d at 556–57 (explaining that the father accompanied the mother to multiple doctors' appointments and "made plans with [the mother] to raise their child together"). In a case with strikingly similar facts to *Kessel*, the Mississippi Supreme Court recognized a cause of action for a birth father who alleged conspiracy to interfere with parental rights, though the court did not describe it as a case of tortious interference with parental rights. *See* Smith v. Malouf, 722 So. 2d 490, 497 (Miss. 1998) (recognizing that the father had a "constitutional right to be notified of or to withhold his consent to the adoption of his child" in light of his efforts to establish a relationship with the child).

296. 725 S.E.2d 555 (Va. 2012).

297. *See id.* at 557 (certifying two questions to the Virginia Supreme Court by the federal district court where John Wyatt filed actions against the adoption attorney and adoption agency for tortious interference with the parental relationship).

adoption.[298] The birth mother went into labor two weeks early and even concealed the fact that she was in labor when she spoke to John on the phone.[299] Prospective adoptive parents from Utah traveled to Virginia to take custody of the child and traveled back to Utah.[300] John, not knowing of the adoption plans or that the child was in Utah, took steps in Virginia to establish paternity and filed in the Virginia putative father registry.[301] The prospective adoptive parents filed their petition for adoption in Utah, their state of residence.[302] Although the Virginia Juvenile and Domestic Relations Court granted John custody of Baby E.Z.,[303] the Utah Supreme Court held that he had not strictly complied with the Utah adoption statutes and thus could not block the adoption.[304]

John then brought suit in federal court in Virginia against the Utah adoption attorneys and adoption agency that facilitated the adoption.[305] The federal court certified the question to the Virginia Supreme Court of whether Virginia recognized a cause of action for tortious interference with parental relationships.[306] The Virginia Supreme Court recognized a cause of action for tortious interference with parental rights.[307] The court noted the

298. *See id.* ("[The mother] continued to assure Wyatt that she still planned to raise the baby with him.").

299. *See id.* ("[The child] was born two weeks early . . . and Wyatt was not informed of the birth.").

300. *See In re* Baby E.Z., 266 P.3d 702, 705 (Utah 2011) (noting that the prospective parents obtained appropriate agency approval to travel back to Utah with Baby E.Z.).

301. *See id.* (acknowledging that Wyatt initiated custody and visitation proceedings in a Virginia juvenile and domestic relations court the day after the prospective parents received travel approval).

302. *See id.* (clarifying that the Petition for Adoption in the Utah district court was filed "while the Virginia custody and visitation action was proceeding").

303. *See id.* (finding exclusive jurisdiction to determine the custody of baby E.Z. from reliance on the federal Parental Kidnapping Prevention Act (PKPA)).

304. *See id.* (determining "that . . . Wyatt waived his rights to the child, that he could not intervene, and that his consent to the adoption was not required" because of his failure to raise a challenge to the PKPA or to the Utah court's jurisdiction to hear the adoption proceeding).

305. Wyatt v. McDermott, 725 S.E.2d 555, 556 (Va. 2012).

306. *See id.* at 556 ("[A]nd, if so, what elements constitute such a tort.").

307. *See id.* at 564 (answering the district court's first certified question in the affirmative).

importance of the parent–child relationship and recognized "the essential value" of protecting a parent's right to form a relationship with his or her child.[308] Flowing from that right, then, was "a cause of action against third parties who seek to interfere with this right."[309] The court had strong words condemning the actions of the birth mother, the adoption agency, and the attorneys in this case.

> It is both astonishing and profoundly disturbing that in this case, a biological mother and her parents, with the aid of two licensed attorneys and an adoption agency, could intentionally act to prevent a biological father—who is in no way alleged to be an unfit parent—from legally establishing his parental rights and gaining custody of a child whom the mother did not want to keep, and that this father would have no recourse in the law. The facts as pled indicate that the Defendants went to great lengths to disguise their agenda from the biological father, including preventing notice of his daughter's birth and hiding their intent to have an immediate out-of-state adoption, in order to prevent the legal establishment of his own parental rights. This Court has long recognized that the rights of an unwed father are deserving of protection . . . . The tort of tortious interference with parental rights may provide one means of such protection. Finally, we hope that the threat of a civil action would help deter third parties such as attorneys and adoption agencies from engaging in the sort of actions alleged to have taken place.[310]

The court recognized that available damages included "both tangible and intangible damages, including compensatory damages for the expenses incurred in seeking the recovery of the child, lost services, lost companionship, and mental anguish."[311]

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308. *See id.* at 558 ("[R]ejecting tortious interference with parental rights as a legitimate cause of action would leave a substantial gap in the legal protection afforded to the parent-child relationship.").

309. *Id.* at 558.

310. *Id.* at 564 (internal citations omitted).

311. *Id.* at 563. According to the Restatement,

> The parent can recover for the loss of society of his child and for his emotional distress resulting from its abduction or enticement. If there has been a loss of service or if the child, though actually not performing service, was old enough to do so, the parent can recover for the loss of the service that he could have required of the child during the period of its absence. He is also entitled to recover for any reasonable expenses incurred by him in regaining custody of the child and for any reasonable expenses incurred or likely to be incurred in treating or caring for the child if it has suffered illness or other bodily harm as a

The *Wyatt* court further noted that punitive damages would also be available under this tort.[312] In *Kessel v. Leavitt*,[313] the appellants—the birth mother, her parents, and her brother (who happened to be an attorney)—sought to challenge a West Virginia circuit court's finding of tortious interference with the biological father's parental rights.[314] The jury in the lower court awarded the father $2 million in compensatory damages and $5.85 million in punitive damages.[315]

C. Intentional/Negligent Infliction of Emotional Distress

Once the American Law Institute recognized an independent tort of intentional infliction of emotional distress in 1948's publication of the Restatement (Second) of Torts, states followed suit.[316] Most jurisdictions have now recognized the existence of an

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result of the defendant's tortious conduct.

RESTATEMENT (SECOND) OF TORTS § 700 cmt. g. (AM. LAW INST.1977); *see also* Dale Margolin Cecka, *Terminating Parental Rights Through a Backdoor in the Virginia Code: Adoptions Under Section 63.2–1202(H)*, 48 U. RICH. L. REV. 371, 410 (2013) ("Potential damages for tortious interference with parental rights include not only the cost of securing the parent's rights but also mental anguish and lost companionship.").

312. *See Wyatt*, 725 S.E.2d at 563 ("If a tortfeasor's tort was intentional . . . and if the evidence is sufficient to support an award of compensatory damages, the victim's right to punitive damages and the quantum thereof are jury questions." (citing Smith v. Litten, 507 S.E.2d 77, 80 (Va. 1998))).

313. 511 S.E.2d 720 (W. Va. 1998).

314. *Id*. at 734. On appeal, the West Virginia Supreme Court of Appeals dismissed the cause of action against the birth mother because her equal custody rights meant that she could not tortuously interfere with the father's rights. *See id*. at 766 ("[W]e hold that a parent cannot charge his/her child's other parent with tortious interference . . . if both parents have equal rights, or substantially equal rights, . . . to establish or maintain a parental or custodial relationship with their child.").

315. *Id.* at 734.

316. One commentator traces the tort to an 1897 case, while noting the role of the Restatement (Second) of Torts. *See* John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 795–99 (2007) (discussing the seminal case of *Wilkinson v. Downton*, (1897) 2 Q.B. 57, and the tort's refinement in § 46 of the Restatement (Second) of Torts in 1965).

independent tort of intentional infliction of emotional distress.[317] The cause of action generally requires the following elements: "(1) a person acted intentionally or recklessly, (2) the conduct was extreme and outrageous, (3) the conduct caused the plaintiff's emotional distress, and (4) the emotional distress was severe."[318] A person who acts recklessly or intentionally is liable under this tort.[319] Further, "intent is defined to include situations in which the actor does not desire a certain result, but is substantially certain that a given result may occur."[320] Since the emotional distress associated with rightful separation in adoption is well-known,[321] there would be little difficulty in establishing that an adoption agency worker could be substantially certain that a wrongful separation would cause emotional distress.[322] As I wrote in a previous article,

> Mothers considering relinquishment report "conflicting feelings of shame, pride, desolation, excitement, fear, terror, and denial," which "can be overwhelming and disruptive." In the period immediately following relinquishment, birth mothers report that relinquishment brings "a powerful sense of loss and isolation." Birth mothers reported traumatic dreams, sleep

317. *See id.* at 852–83 (providing a state-by-state catalogue of each jurisdiction's law on intentional infliction of emotional distress); *see also* Annotation, *Modern Status of Intentional Infliction of Mental Distress as Independent Tort; "Outrage"*, 38 A.L.R. 4th 998, §§ 4–5 (1985) (collecting and analyzing cases decided since 1970 in which courts recognized or refused to recognize intentional infliction of emotional distress or outrage as an independent tort).

318. Milo v. Martin, 311 S.W.3d 210, 217 (Tex. App. 2010) (citing Bradford v. Vento, 48 S.W.3d 749, 758 (Tex. 2001)); *see also* Reagan v. City of Knoxville, 692 F. Supp. 2d 891, 905 (E.D. Tenn. 2010) ("[T]he plaintiff must show that a defendant's conduct was (1) intentional or reckless; (2) so outrageous that it cannot be tolerated in a civilized society; and (3) the cause of serious mental injury to the plaintiff." (quoting Bain v. Wells, 936 S.W.2d 618, 622 (Tenn. 1997))).

319. *See* Kircher, *supra* note 316, at 798 ("[T]he actor is subject to liability if he intentionally or recklessly causes severe emotional distress . . . ." (quoting RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW. INST. 1965))).

320. *See id.* at 799 (quoting RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW. INST. 1965)).

321. *See* Seymore, *supra* note 7, at 138–40 (reviewing psychological studies showing both short-term and long-term psychological effects of relinquishing a child for adoption).

322. *See id.* at 138 (describing the "powerful sense of loss and isolation" and other traumatic effects that birth mothers reported experiencing following a rightful relinquishment).

> disruption, and "a sense that the experience is surreal." One study reported that fifty-five percent of birth mothers found signing the adoption papers to be "one of the most difficult parts of the adoption process," and sixty-five percent of birth mothers reported feeling grief six months after birth . . . . In one study of birth mothers who returned to school after relinquishment, researchers found that the negative emotions felt by birth mothers adversely affected school performance. The birth mothers who experienced the most deterioration in school performance were preoccupied with grief and regret concerning the relinquishment decision and thought frequently about their personal loss. The majority of birth mothers expressed negative expectations about the future, expecting the bleakness they currently experienced to continue into the future.[323]

In addition to immediate emotional distress, birth mothers experience long-term negative effects of adoption relinquishment on their emotions and psychological well-being that can last a lifetime.[324] Birth fathers who lost a child to adoption report similar psychological effects.[325]

In *Smith v. Malouf*,[326] the Mississippi Supreme Court recognized that a birth father stated a cause of action for intentional infliction of emotional distress when the birth mother and her parents conspired to deny him his parental rights.[327] In that case, the birth parents were teenaged and unwed.[328] Upon learning of the pregnancy, Joey, the birth father, offered marriage

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323. *See id.* at 138–39 (internal citations omitted).

324. *See* ROBIN WINKLER & MARGARET VAN KEPPEL, RELINQUISHING MOTHERS IN ADOPTION: THEIR LONG-TERM ADJUSTMENT 15 (1984) (conducting a study that revealed women who had relinquished a child fifteen to nineteen years earlier reported still experiencing intermittent or sustained mild depression, generalized anxiety disorder, and borderline personality or dependent personality disorder); George M. Burnell & Mary Ann Norfleet, *Women Who Place Their Infant Up for Adoption: A Pilot Study*, 16 PATIENT COUNSELING & HEALTH EDUC. 169 (1979).

325. *See* Seymore, *supra* note 287, at 848–49 (observing that birth fathers report feeling emotional distress after the adoption if they acquired a sense of fatherhood during the pregnancy, and describe the adoption as producing "deep and long-lasting feelings").

326. 722 So. 2d 490 (Miss. 1998).

327. *See id.* at 493 ("The court erred in ruling that . . . [the plaintiff] . . . has no parental rights to receive notice of any adoption of, or to object to any adoption of, or to seek legal custody upon the birth of, his biological child.").

328. *Id.*

but Natalie, the birth mother, said no.[329] Joey said that he wished to raise the child on his own, but Natalie and her parents, the Maloufs, insisted that the child be placed for adoption.[330] His attempts to change their minds were to no avail.[331] When he went to Natalie's home one last time, her parents told him "that Natalie was gone and that she would not be back until the child was born."[332] At that point, Joey initiated legal proceedings for paternity and custody and sought an injunction to prevent any adoption.[333] A mutual friend called Joey and asked him to drop the suit, informing him that Natalie said she would not put the child up for adoption if he did so.[334] The court granted a temporary restraining order to prevent any adoptive placement and issued a permanent injunction, which Joey sent to every office of Vital Statistics in Mississippi in an attempt to prevent an adoption.[335] Natalie ultimately moved to Georgia, where she gave birth.[336] Joey discovered her location after hiring a private investigator and went to Georgia to start legal action, but by then Natalie and her mother had traveled to California and placed the child for adoption in Canada.[337]

In recognizing that the facts as pled gave rise to a cause of action for intentional infliction of emotional distress, the court noted

> It is irrefutable that appellees' behavior was intentional and that the foreseeable result of their actions was that the child would be adopted by strangers, thereby depriving Joey of an opportunity to veto the adoption and vie for custody. It is also axiomatic that any father—especially a father who has gone

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329. *See id.* at 492 (noting that the couple did discuss their options regarding the baby, although no immediate decision was made).

330. *Id.*

331. *See id.* (stressing that the Maloufs remained firm regarding the child's adoption, even after Joey's parents allegedly "kidnapped and badgered" Natalie about their decision).

332. *Id.*

333. *Id.*

334. *Id.*

335. *See id.* (noting that the injunction enjoined Natalie "and all who might assist her" from proceeding with an adoption).

336. *Id.*

337. *See id.* (detailing Joey's travels to Georgia to retain an attorney to assist in obtaining custody of the child and the child's adoption to Canadian parents).

> that "extra mile" to gain custody of his child—would suffer severe emotional distress due to the child he wanted being secretly placed for adoption.[338]

The court also found that Joey stated a cause of action for conspiracy to deprive him of his lawful rights as natural parent of the child.[339]

When the interference with the parent–child relationship is wrongful, courts have accepted causes of action for intentional infliction of emotional distress.[340] In *Gouin v. Gouin*,[341] a mother stated a cause of action against her estranged husband for intentional infliction of emotional distress when he tried on six occasions to coerce her into relinquishing custody of their children.[342] He filed unsupported criminal charges against her and then "Gouin and his attorney visited Dori's divorce counsel at her office and offered to drop the application in exchange for Dori granting legal custody of their children to Gouin."[343] Cases where adoption agencies use undue influence and coercion to secure release of a child for adoption could similarly give rise to liability for intentional infliction of emotional distress.[344] Similar to *Gouin*,

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338. *Id.* at 498.

339. *See id.* ("The instant claim is that the defendants conspired to unlawfully violate the outstanding injunction and to deprive Joey of his lawful rights as natural parent of the child. These allegations are sufficient to pass Rule 12(b)(6) muster . . . ."). Without terming this cause of action "tortious interference with parental rights," as recognized in the Restatement (Second) of Torts, the action seems to qualify. For further discussion of tortious interference with parental rights, see discussion *supra* Part III.B.

340. *See, e.g.*, Raftery v. Scott, 756 F.2d 335, 337 (4th Cir. 1985) (finding that the birth mother wrongfully prevented rehabilitation of the relationship between the father and his child following a divorce supported the claim of intentional infliction of emotional distress); Bhama v. Bhama, 425 N.W.2d 733, 737 (Mich. Ct. App. 1988) (choosing not to address the issue of a psychiatrist father allegedly brainwashing his children into rejecting their mother).

341. 249 F. Supp. 2d 62 (D. Mass. 2003).

342. *See id.* at 73 ("[Plaintiff] cites to six separate incidents in which she claims [the defendant] knew or should have known that his conduct would have caused her emotional distress.").

343. *Id.* at 68.

344. *See* discussion *infra* Part V (proposing a cause of action for wrongful separation where an agency or adoption worker attempts to secure a relinquishment of parental rights through fraud or trickery, or through coercion

the Supreme Court of Louisiana found consent to adoption invalid due to duress when the birth mother signed after a lengthy discussion and warning by the attorney for the adoptive parents that she could face criminal charges for child neglect if she did not relinquish the child.[345] Threats of criminal charges could well amount to intentional infliction of emotional distress.[346]

D. Legal Malpractice/Lawyer Misconduct

Lawyers frequently facilitate adoption placements and, of course, provide the legal work necessary to make children available for adoption and to create new permanent parent–child relationships.[347] Thus, lawyers can incur significant legal risks themselves for any misconduct in that regard.[348] Legal malpractice is a risk of doing business for lawyers. One long-time legal malpractice defense attorney wrote

> Malpractice is becoming increasingly widespread, lawyers hardly ever win in jury trials, and settlement amounts are skyrocketing. An analysis of the 106 legal malpractice jury

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or undue influence).

345. *See* Wuertz v. Craig, 458 So. 2d 1311, 1313 (La. 1984) ("There is no evidence that such [criminal] charges were justified. She signed the act under the immediate influence of [the attorney's] threat. Such a threat by law invalidates the consent procured.").

346. *See, e.g.*, Nigro v. Pickett, No. 9435/05, 2006 WL 940636, at *4 (N.Y. Sup. Ct. Mar. 17, 2006) ("[U]nder some circumstances threats of unjustified criminal charges . . . may rise to the level of outrageousness to sustain a cause of action for intentional infliction of emotional distress.").

347. *See, e.g.*, Lemley v. Kaiser, No. 1804, 1987 WL 10774, at *1 (Ohio Ct. App. Apr. 30, 1987) (involving the actions of two duly licensed and practicing Ohio attorneys who failed to follow the state's private adoption placement provisions); Wyatt v. McDermott, 725 S.E.2d 555, 557 (Va. 2012) (describing the role of the attorneys and the Utah adoption agency in facilitating the adoption of Baby E.Z.).

348. *See, e.g.*, *supra* notes 305–310 and accompanying text (condemning the actions of the adoption agency in intentionally trying to prevent the biological father from legally establishing his parental rights and subjecting the adoption attorneys to harsh criticism where they urged the birth mother to make false statements to the birth father regarding the child's adoption); *Lemley*, 1987 WL 10774, at *1 (referring to the matter as a "tragic illegal adoption dispute" facilitated by the adoption attorneys); *In re* Krigel, 480 S.W.3d 294, 302 (Mo. 2016) (en banc) (suspending the birth mother's adoption attorney from the practice of law for six months for committing multiple violations of the rules of professional conduct in an adoption proceeding).

> verdicts in Los Angeles County in 1988 and 1989 showed that lawyers lost ninety-three percent of the time. Similarly, the Author's own analysis of forty-two legal malpractice cases in southern California, thirty-three of which were disposed of between 1991 and 1992, showed that, consistent with his prior experience in over nine-hundred cases, an overwhelming eighty-eight percent of the clients or non-clients suing for legal malpractice were compensated, and the average settlement was a significant $60,393.[349]

Generally, legal malpractice requires the following elements:

> (1) the duty of an attorney to use such skill, prudence, and diligence as members of the profession commonly possess and exercise, (2) a breach of that duty, (3) a proximate causal connection between the breach and the resulting injury, and (4) actual loss or damage resulting from the attorney's negligence.[350]

Legal malpractice actions, where birth parents are represented by counsel, might provide recourse for wrongful family separation. However, several issues might prevent such liability. Oftentimes, birth parents are not represented by counsel during an adoption and state laws rarely require such representation.[351] Oftentimes, even if birth parents are represented by counsel, they are not provided independent counsel and instead are represented by the same attorney representing the adoptive parents.[352] In Maryland, for example, the statute providing for appointed counsel for minor mothers does not explicitly require counsel to be independent and allows the attorney to represent the adoption agency or prospective adoptive parents to the extent that the general conflict of interest rules of professional conduct would

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349. Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1661 (1994) (internal citations omitted).

350. 7 AM. JUR. 2D *Attorneys at Law* § 192 (Supp. 2018).

351. *See* Seymore, *supra* note 7, at 129 ("Independent legal counsel for a prospective birth mother is not universally required in the United States.").

352. *See id.* at 129–30 (noting that only four states require minors to have independent legal counsel, meaning that the attorney cannot also represent the adoptive parents or the adoption agency facilitating the placement).

permit.[353] In *In re J.M.P.*,[354] the birth mother was represented by the law partner of the lawyer representing the prospective adoptive parents.[355] While Louisiana's state statute required that she be represented by counsel, it did not require independent counsel.[356] The Supreme Court of Louisiana concluded that the lawyer was not prohibited from representing the birth mother, Dawn, despite the potential that his representation could be "materially limited by his own interest in preventing abortions by promoting adoptions."[357]

In *Lemley v. Barr*,[358] Tammy, the minor birth mother, was deceived by the lawyers handling the adoption.[359] She subsequently brought a legal malpractice action against the lawyers.[360] She sought recovery of legal fees expended to recover

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353. *See* MD. CODE ANN. FAM. LAW § 5-307(c) (2008) ("An attorney or firm may represent more than one party in a case under this subtitle only if the Maryland Lawyers' Rules of Professional Conduct allow.").

354. 528 So. 2d 1002 (La. 1988), *superseded by statute*, LA. CHILD. CODE ANN. art. 1143 (2013), *as stated in In re* A.J.F., 764 So. 2d 47 (La. 2000).

355. *See id.* at 1005 ("[Counsel for the adoptive parents] brought along his law partner . . . to act as [the birth mother's] attorney and to advise her of her rights.").

356. *See id.* at 1010 ("At the time of the act of surrender [the statute] . . . provided simply that 'the surrendering parent or parents shall be represented by an attorney at the execution of the act of surrender.'" (citing LA. STAT. ANN. § 9:422.7 (repealed 1992)). After the time the birth mother, Dawn, executed her consent, the legislature explicitly added language requiring that an attorney for a birth mother "shall not be the attorney who represents the person or persons who are the prospective adoptive parents, or an attorney who is a partner or employee of the attorney or law firm representing the prospective adoptive parents." *Id.* (citing LA. STAT. ANN. § 9:422.7 (repealed 1992)). However, there was no such language at the time Dawn executed her consent. *Id.*

357. *Id.* at 1012. The court did not rest its decision on whether a conflict of interest existed, but rather looked to determine "if there was any other factor which may have prevented Dawn from making a voluntary and knowing surrender" and concluded that there was none. *See id.* ("The record reflects that Dawn was a young adult capable of exercising her own judgment.").

358. 43 S.E.2d 101 (W. Va. 1986).

359. *See id.* at 103 ("[T]he young couple returned to the law offices, executed the papers, and relinquished the child . . . . At no time did [the adoption attorney] explain to Tammy . . . or Tammy's parents that under [applicable state] law, a[] . . . Probate Court judge had to witness and approve a minor's consent.").

360. Lemley v. Kaiser, No. 1804, 1987 WL 10774, at *1 (Ohio Ct. App. Apr. 30, 1987). She also brought causes of action for breach of fiduciary duty and negligent or intentional interference with right to custody. *Id.* at *2.

her child, other compensatory damages, and punitive damages.[361] The trial court initially granted her motion for summary judgement on liability against the Kaiser firm.[362] However, the lower court *sua sponte* reconsidered and entered summary judgement in favor of the lawyers.[363] The Ohio Court of Appeals agreed, finding that no attorney-client relationship existed between Tammy and the lawyers.[364] It was not enough that Tammy might have believed the lawyers were representing her, since "[t]he Kaiser firm here engaged in no representations or conduct which could reasonably induce [Tammy] to believe they represented her."[365]

It may not, however, be so straightforward as to who the attorney is representing in the adoption. As two adoption law attorneys note

> For example, some attorneys easily slip into taking on dual roles or become overly zealous in representing a client's interests, possibly leading to lack of clarity as to who is owed the duty of care. 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.[366]

The New York Supreme Court, Appellate Division found, in circumstances similar to the *Lemley* case, that the attorney was, in fact, representing the birth mother.[367] The case was not a legal

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361. *Id.* at *2.

362. *Id.*

363. *Id.*

364. *See id.* at *4 ("It is clear that no formal, explicit relationship existed. A retainer was never signed, [Tammy] paid no legal fees to the Kaiser firm, nor did the firm ever send her a bill.").

365. *Id.* at *5.

366. *See* 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. MATRIMONIAL LAW. 127, 153 (2017) (discussing both ARTs and adoption cases).

367. *See* Tierney v. Flower, 32 A.d.2d 392, 396 (N.Y. App. 1969) ("[W]hile [the lawyer-appellant] maintained that he never represented the petitioner and her parents and acted only for his anonymous clients, it is our view that actually the

malpractice case, but resolution did turn on whether the lawyer was representing the birth mother.[368] The court held that the attorney was representing "both sides of the transaction in which he acted" where the birth mother had no attorney of her own and the prospective adoptive parents' attorney prepared papers for the birth mother's signature.[369] He advised the birth mother of her legal rights with respect to the adoption process, including her right to appear and to object in the adoption proceeding.[370]

The *Lemley* court was following the traditional rule that "an attorney is not liable to a non-client for malpractice in the performance of professional services."[371] There is an exception to this rule, however, where the attorney committed fraud or collusion or other intentional misconduct.[372] There, the lawyer may be liable to non-clients.[373] In a non-adoption case, the New York Supreme Court, Appellate Division found a viable cause of action where the attorney took affirmative steps to prevent the proceeds from a settlement agreement from being disbursed to a non-client.[374] He "afforded substantial assistance to his client by concealing the sale of the property from third-party plaintiff and her attorney and directing the buyer to wire the sale proceeds

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appellant represented both sides of the transaction . . . .").

368. *See id.* (involving the lawyer's duty to reveal the adoptive parents' identity to the birth parents where the adoptive parents requested "a veil of secrecy").

369. *Id.*

370. *Id.*

371. Alan L. Cohen, *Liability to Non-Clients for Malpractice*, 3 PERSONAL INJURY—ACTIONS, DEFENSES, DAMAGES § 11.06 (2018).

372. *See id.* ("An adversary party may have a cause of action against an attorney for fraudulent, malicious, or intentional misrepresentations."); *Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses,* 107 HARV. L. REV. 1547, 1551 (1994) ("Where once only the client could bring a malpractice action against the lawyer, now third parties can bring lawsuits . . . .").

373. *See* Cohen, *supra* note 371 (discussing other unprofessional or intentional conduct for which the attorney may be liable to third parties, including conspiracy, "insulting and abusive language that causes mental distress," and false imprisonment); *see, e.g.*, Goerke v. Vojvodich, 226 N.W.2d 211, 215 (Wis. 1975) (stating the seller's lawyer could be liable to the buyers for misrepresentations with intent to mislead or misinform during negotiations for a property transaction).

374. *See* Sayles v. Ferone, 137 A.D.3d 486, 486 (N.Y. App. Div. 2016) (finding a viable claim against the attorney for aiding and abetting conversion).

directly into plaintiff's account at a small out-of-state bank, rather than depositing the proffered check into his escrow account."[375] The facts translate into the adoption context, sounding eerily familiar to a recent case where a long-time adoption attorney was sanctioned for concealment on behalf of his birth mother client from the birth father.

In *In re Krigel*,[376] an experienced adoption law attorney was suspended from the practice of law because of his conduct directed at the birth father.[377] The attorney represented the birth mother, but knew (1) the identity of the birth father, (2) that he did not consent to the adoption, and (3) that he was represented by counsel.[378] Nonetheless, at the hearing on the birth mother's relinquishment of her parental rights, her attorney solicited testimony from the birth mother that the birth father had been consulted and that he had "not stepped forward since the birth of the child claiming any rights to the child."[379] It would have been difficult for the birth father to step forward, since he was deceived as to the due date of the child, was not told that the child was born and was not informed of the hearing. The court found violations of the duty of candor in lawyer Krigel's representation to the trial court: "by permitting false and misleading testimony to be presented, [it] was designed to portray the false impression that Birth Father was not interested in the child or in asserting his parental rights."[380] The lawyer also lied to the birth father's lawyer when he assured him that the child would not be placed for

375. *Id.*

376. 480 S.W.3d 294 (Mo. 2016) (en banc).

377. *See id.* at 302 (staying the suspension subject to successful completion of a two-year term of probation).

378. *See id.* at 309 (Fischer, J., dissenting)

> [G]iven [the attorney's understanding of the father's identity and wishes], Respondent's conduct, including his conversation with [the birth father's attorney], his instructions to the mother and her family to have no communication with the father, and his overall implementation of his "passive strategy" to "actively do nothing," had no substantial purpose other than to impair and delay the father's assertion of his parental rights . . . .

379. *Id.* at 298.

380. *Id.* at 299.

adoption without the father's consent, and had already at that time told the birth mother to cut off all contact with the birth father about the child's birth and the adoption.[381] When the birth father learned of the birth of the child and that the child had been placed with prospective adoptive parents, he intervened and the trial court denied the adoption and awarded the birth father legal and physical custody of the child.[382] Without that resolution, the lawyer might well have faced a lawsuit for tortious interference with parental rights together with the sanction from the disciplinary authorities. Furthermore, the case falls squarely within the general rule that "attorneys may owe a duty of care to nonclients when the attorneys know, or should know, that nonclients will rely on the attorney's representations and the nonclients are not too remote from the attorneys to be entitled to protection."[383]

V. Proposing a New Cause of Action: Wrongful Family Separation

> Ever has it been that love knows not its own depth until the hour of separation.
>
> —Kahlil Gibran[384]

Torts can be viewed as simply a way to redress private grievances. But it can also be theorized, as John Goldberg notes, as "occasions for judges and juries to regulate behavior on a forward-looking basis."[385] In this view, "tort had transformed itself from private to 'public' law, whereby it functioned to achieve collective, not corrective, justice."[386] From this perspective, tort law "can, in principle, deter the defendant and other similarly situated actors from engaging in conduct [the courts] deem undesirable."[387] A social justice variant of this view considers that tort law "permits

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381. *See id.* at 298 ("Krigel represented to Zimmerman that the child would not be adopted without Birth Father's consent.").

382. *Id.*

383. 7 AM. JUR. 2D *Attorneys at Law* § 221, Westlaw (database updated Feb. 2019).

384. KHALIL GIBRAN, THE PROPHET 9 (1973).

385. John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 524 (2003).

386. *Id.*

387. *Id.* at 525.

independent judges and especially juries to hold corporate America and other powerful actors accountable."[388] And, praising the flexibility of tort law, Michael Rustad noted, "The great value of torts lies in its ability to evolve to meet the emergent harms of each era."[389] As one court noted, "Although loathe to create new causes of action in tort, the law must nevertheless adapt to the society in which it exists."[390] Scholars and reformers have proposed the creation of new torts to address changes in society: a tort for private suppression of speech;[391] a tort action for racial insults;[392] for spoliation;[393] for workplace sexual harassment;[394] for negligent interference with credit;[395] for computer and software malfunction;[396] and for seduction.[397] Some calls for new torts have

388. Michael L. Rustad, *Torts as Public Wrongs*, 38 PEPP. L. REV. 433, 460 (2011).

389. *Id.* at 521.

390. Silver v. Levittown Union Free Sch. Dist., 692 N.Y.S.2d 886, 887 (N.Y. Sup. Ct. 1999).

391. *See* Rory Lancman, *Protecting Speech From Private Abridgement: Introducing the Tort of Suppression*, 25 SW. U. L. REV. 223, 242 (1996) ("Like all torts, a mixture of justice and policy combine to make suppression a worthwhile tort action.").

392. *See* Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 149 (1982) (arguing that "[t]he psychological, sociological, and political repercussions of the racial insult demonstrate the need for judicial relief").

393. *See* Terry R. Spencer, *Do Not Fold Spindle or Mutilate: The Trend Towards Recognition of Spoliation as a Separate Tort*, 30 IDAHO L. REV. 37, 39 (1993) (noting that some states have recognized spoliation as a distinct tort due to its regularity and frequency in civil litigation).

394. *See* Krista J. Schoenheider, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461, 1462 (1986) (stating that "tort law is the only body of law that provides a private remedy for personal harm caused by sexual harassment," but that "[i]n its present form . . . tort law fails to deal with the full effects of harassment on the individual victim").

395. *See* Leonard J. Long, *An Uneasy Case for a Tort of Negligent Interference with Credit Contract*, 22 QUINNIPIAC L. REV. 235, 236 (2003) ("[T]he thesis of this paper is that the law should at least recognize a very narrow and circumscribed tort of negligent interference with [credit] contract.").

396. *See* Rustad, *supra* note 388, at 548 ("The courts have all said no to recognizing a new tort of computer malpractice and the result is that software makers disclaim all liability and limit their warranties and enjoy a lawsuit immunity zone.").

397. *See* Jane E. Larson, *"Women Understand So Little, They Call My Good*

been quite successful, including in 1939, William Prosser's call for a new tort for intentional infliction of emotional suffering,[398] and in 1890, Samuel D. Warren's and Louis D. Brandeis' call to recognize a right to privacy.[399]

All these proposals begin with a recognition of some significant right that needs protection through tort remedy. The right of parents in their children is such a right, elevated to constitutional importance.[400] The rights of parents vis-à-vis their children include the right to custody and visitation,[401] the right to control education

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Nature 'Deceit'": A Feminist Rethinking of Seduction, 93 COLUM. L. REV. 374, 382– 412 (1993) (noting the history of the tort of seduction and its current application in modern law).

398. *See* William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 874 (1939) ("It is time to recognize that the courts have created a new tort. . . . It consists of the intentional, outrageous infliction of mental suffering in an extreme form.").

399. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy,* 4 HARV. L. REV. 193, 214 (1890) (arguing for a right to privacy, such as the right found at the time in France).

400. *See* M.L.B. v. S.L.J., 519 U.S. 102, 107 (1996) (noting that Mississippi cannot deprive M.L.B. "because of her poverty, [of] appellate review of the sufficiency of the evidence on which the trial court found her unfit to remain a parent"); Stanley v. Illinois, 405 U.S. 645, 651 (1972) ("The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) ("[W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (guaranteeing as fundamental an individual's right to "establish a home and bring up children").

401. *See* Troxel v. Granville, 530 U.S. 57, 64 (2000) (affirming the Washington Supreme Court's holding that "parents have a right to limit visitation of their children with third persons"); *Stanley*, 405 U.S. at 651 (recognizing a parent's interest in "the companionship, care, custody, and management of his or her children"); *In re* Pensom, 126 S.W.3d 251, 254 (Tex. App. 2003) (citing *Troxel* in saying that "[e]ncompassed within the well-established fundamental right of parents to raise their children is the right to determine with whom their children should associate").

and training,[402] the right to the earnings of the child,[403] and the right to inherit from or through the child.[404] Additionally, it includes "the necessity for the parent to consent to the adoption of the child."[405] Because of the fundamental nature of parental rights, when a state seeks to terminate parental rights involuntarily (without the parent's consent), the Constitution requires a heightened standard of proof—clear and convincing evidence.[406] Before a parent can relinquish that right, the relinquishment must be fully voluntary.[407] Existing tort law may not fully vindicate these rights, calling for recognition of a new tort to fully protect parental rights when interfered with by adoption agencies and adoption workers, including lawyers.

Wrongful separation of children and parents needs a new tort to supplement existing tort causes of action. As discussed previously, existing causes of action may present issues because of questions as to consent, legal right to establish a relationship for unwed fathers, relationship between birth parents and the lawyers involved in the adoption, measures of damages, and the like.

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402. *See Pierce*, 268 U.S. at 534–35 (identifying directing the upbringing and education of children as a liberty interest of parents and guardians); Barrett v. Steubenville City Schs., 388 F.3d 967, 972 (6th Cir. 2004) ("[I]t is clearly established that parents have a fundamental right to direct the education of their children."); J.W.J. v. P.K.R., 999 So. 2d 943, 951 (Ala. Civ. App. 2008) ("It is a custodial parent's fundamental right to direct and control the upbringing and education of his or her child.").

403. *See* Michael H. v. Gerald D., 491 U.S. 110, 118–19 (1989) (listing the right to a child's services and earnings as a right of parenthood); N.A.H. v. S.L.S., 9 P.3d 354, 359 (Colo. 2000) ("The determination of parenthood includes the right to parenting time; the right to direct the child's activities; the right to make decisions regarding the control, education, and health of the child; and the right to the child's services and earnings.").

404. *See, e.g.*, McCabe v. McCabe, 78 P.3d 956, 958 (Okla. 2003) (observing the right of a parent to inherit from or through their child); *see also* Paula A. Monopoli, "*Deadbeat Dads": Should Support and Inheritance Be Linked?*, 49 U. MIAMI L. REV. 257, 262 (1994) (noting the long-standing common law rule that fathers had "the right to inherit their children's estates in intestacy.").

405. *McCabe*, 78 P.3d at 958.

406. *See* Seymore, *supra* note 7, at 148 ("When a state seeks to terminate parental rights involuntarily (without the parent's consent), the Constitution requires a heightened standard of clear and convincing evidence.").

407. *See id.* (stating that "[v]oluntary relinquishment of parental rights cuts off all parental rights").

Although those issues are not insurmountable, a new cause of action could be constructed to avoid these issues, and in so doing deter the kind of misconduct that has led to wrongful family separation. The elements of such a cause of action would be as follows: (1) a duty owed by adoption professionals to preserve parental rights to biological parents, including birth fathers; (2) a breach of that duty by fraud, trickery, deceit, duress, coercion, undue influence or other wrongful act; (3) a resulting harm to the parent–child relationship; and (4) a finding of damages, including noneconomic damages.

A new cause of action should recognize a duty owed by adoption professionals to birth parents to preserve parental rights. The duty should be owed to both birth parents, even biological fathers who have not yet been recognized as having legal rights.[408] The duty must be strong enough to offset the agency's profit motive to serve those paying the fees, adoptive parents.[409] An agency or adoption worker owes that duty to birth parents regardless of whether the birth parent is formally a client of the agency or adoption worker or adoption lawyer.[410] An agency or adoption worker breaches the duty when it attempts to secure a relinquishment of parental rights through fraud or trickery, or through coercion or undue influence.[411] Adoption counseling should be truly neutral, without an agenda to secure consent to adoption and only after a birth parent has been fully informed of his or her parental rights.[412] An agency would fulfil its duty to fully

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408. As previously noted, some courts reject claims for tortious interference with parental rights for birth fathers who have not yet secured legal recognition of rights. Under this new cause of action, such result should be foreclosed.

409. *See supra* Part II for a discussion of the business motivation of adoption agencies.

410. For further discussion concerning the difficulty of legal malpractice actions when birth parents are not seen as the client of the lawyer handling the adoption for adoptive parents, see *supra* notes 376–383 and accompanying text. The new cause of action seeks to avoid that result.

411. *See supra* Part IV for a discussion of fraud, coercion and undue influence.

412. *See, e.g.*, Methodist Mission Home v. N.A.B., 451 S.W.2d 539, 543 (Tex. App. 1970) (examining a case where the plaintiff was coerced by her counselor into consenting to the adoption of her child); *In re* Interest of Perry, 641 P.2d 178 (Ct. App. Wash. 1982), discussed, *supra* at text accompanying footnotes 264, 266, and 273. For a description of adoption counseling that masquerades as non-directive, while steering a prospective birth mother toward relinquishment, see Seymore, *supra* note 7, at 117–19 (describing counseling materials provided

inform birth parents of their parental rights if it provided independent legal counsel for each birth parent. In a previous article, I outlined the advice such an attorney should provide:

> a. legal rights and responsibility of parents;
> b. consequences of termination of parental rights for the legal rights and responsibility of parents, including rights of inheritance, confidentiality of adoption records, and legal requirements for future contact between parent and child;
> c. circumstances in which the relinquishment of parental rights can be revoked and consent to adoption can be withdrawn;
> d. availability or unavailability of post-adoption contact agreements in the relevant jurisdiction and the legal enforceability of such agreements;
> e. legal obligation of both parents to provide financial support for their child and the availability of state services to determine paternity and enforce child support orders;
> f. eligibility of birth parent and child for state and federal welfare assistance;
> g. right of the parent to be present in court for termination of parental rights and/or finalization of adoption and the right to waive such right; and
> h. limitation on any representation of the parent, including a statement that the attorney will not be representing the parent in any contested adoption.[413]

When there has been a breach of the duty owed, the harm to the parent–child relationship should include any family separation, even if birth parents ultimately regain custody and retain parental rights. In a case like *In re Krigel*,[414] for instance, where the adoption attorney systematically worked to exclude the birth father but the birth father ultimately prevailed and gained custody, the lawyer should be liable for the period of separation

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by the National Council for Adoption, an advocacy group for adoptive parents and adoption agencies).

413. Seymore, *supra* note 7, at 154–56.

414. 480 S.W.3d 294 (Mo. 2016).

before the child was returned to the parent.[415] Damages should include loss of consortium, emotional pain and suffering, and the costs associated in seeking to regain custody of children.[416] Punitive damages should also be available.

VI. Conclusion

Arguing for ethical adoption practices should be as simple as doing the right thing because it is right. After all, the well-being of families and children is of paramount importance to society. But when one recognizes that adoption practitioners are motivated by the same business issues facing any corporation making and selling widgets, we recognize that the incentives may change perversely. As business ethicists Ronald Francis and Anona Armstrong put it, "Ethics has often been seen as something outside normal business practice—something that is good and proper, good to have, but something of a luxury in the turmoil and competitive environment of the business world."[417] But ethical practice can be viewed as part of an effective risk management strategy.[418] Francis argues for ethical principles that seem equally relevant to adoption agencies and widget-makers, such as dignity in treating disempowered suppliers, prudence in making bad situations no worse, avoidance of suffering, and honesty and openness in "not concealing that which should be revealed."[419] To the extent that aspirational ethical standards are not persuasive to a business, he reminds us that "legal compliance must have primacy."[420]

Tort law is about more than compensation for victims. "Civil justice for plaintiffs derives from the fairness of the process, the right to have one's story told, meaningful remedy, and one

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415. For discussion of *Krigel*, see *supra* notes 376–383 and accompanying text.

416. This would be in line with damages awardable in causes of action for tortious interference with parental rights and intentional infliction of emotional distress. In addition, this would avoid any problems of economic damages in fraud actions.

417. Ronald Francis & Anona Armstrong, *Ethics as a Risk Management Strategy: The Australian Experience*, 45 J. BUS. ETHICS 375, 375 (2003).

418. *See id.* at 376 (arguing "that there are compelling reasons to consider good ethical practices to be an essential part of risk management").

419. *Id.*

420. *Id.* at 378.

additional factor: plaintiffs ask the legal system to take steps to prevent repetition of their tragedy."[421] Wrongful family separation in adoption can be deterred by lawsuits for money damages. Agencies are not exclusively social welfare institutions, they are businesses. Recall that one adoption worker conceded, ruefully, "We provide a fabulous service, but at the end of the day, we are a business."[422] As businesses, they need to maximize profits by reducing costs. Minimizing the risk of litigation has motivated adoption agencies to change behavior in the past, in the context of wrongful adoption, and will likely do so in the future. Agencies, adoption workers, and adoption lawyers that do not prioritize family preservation face legal risk in lawsuits for fraud, intentional infliction of emotional distress, tortious interference with parental rights, and legal malpractice. Further, courts may well be persuaded to recognize a new tort for wrongful family separation.

421. Andrew F. Popper, *In Defense of Deterrence,* 75 ALB. L. REV. 181, 182 (2011).

422. Alyssa Hollis, *Adoption Agency Director*, *in* ELIZABETH RALEIGH, SELLING TRANSRACIAL ADOPTION: FAMILIES, MARKETS, AND THE COLOR LINE 30 (2018).