

SAFE HAVEN, ADOPTION AND BIRTH RECORD LAWS: WHERE ARE THE DADDIES?

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INTRODUCTION

In this Paper we explore the difficulties in American state safe haven, adoption and birth record laws, crystallized in the question: “Where are the daddies?” After briefly reviewing safe haven laws, we demonstrate how paternity interests are unreasonably, if not unconstitutionally, foreclosed when children are abandoned by their mothers. Comparable paternity losses due to maternal acts are then shown in adoption and birth record laws. Lost daddies are unwarranted because laws should not allow maternal privacy rights and interests to so easily foreclose chances for responsible fatherhood, especially in settings where births result from consensual sex between unwed partners. We conclude with suggestions on paternity law reforms.

I. SAFE HAVEN LAWS AND LOST PATERNITY

A. *Equality for Mothers and Fathers*

The pursuit of greater equality between genetic mothers and genetic fathers, regardless of marital status, has long been an important American goal.¹ For example, in 2003 in *Rosero v. Blake*² the North Carolina Supreme Court eliminated the common law rule that the custody of a non-

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¹ We do not herein explain the merit in our underlying assumption that, at least for children born as a result of consensual sex, i.e., no rape or other violence or fear of harm, usually there should be a mother and a father under law. On the value of two parents for each child, see, e.g., Margaret F. Brinig and Steven L. Lock, “Legal Status and Effects on Children,” available at SSRN <http://ssrn.com/abstract=973826> (2007).

² *Rosero v. Blake*, 581 S.E.2d 41 (N.C. 2003).

marital child presumptively vests in the mother.³ Relying on U.S. Supreme Court rulings, the court said “absent a showing that the biological or adoptive parents are unfit, that they have otherwise neglected their children’s welfare, or that some other compelling reason exists, the paramount rights of both parents to the companionship, custody, care and control of their minor children must prevail.”⁴ The North Carolina court concluded, “the father’s right to custody of his illegitimate child is legally equal to that of the child’s mother.”⁵ In an earlier U.S. Supreme Court case, *Stanley v. Illinois*,⁶ the Court in 1972 found equal protection violations in a statute declaring that children whose genetic mother had died had no “surviving parent” because their genetic father had never married their mother, though the father had lived off and on with her for eighteen years and had undertaken significant childrearing responsibilities.⁷

Today, there are many express statutes on the desired equality between female and male parents. For example, an Illinois Probate Act provision says:

If both parents of a minor are living and are competent to transact their own business and are fit persons, they are entitled to the custody of the person of the minor and the direction of his education. If one parent is dead and the surviving parent is competent to transact his own business and is a fit person, he is similarly entitled. The parents have equal powers, rights and duties concerning the minor.⁸

A Delaware Domestic Relations provision says:

The father and mother are the joint natural guardians of their minor child and are equally charged with the child’s support, care, nurture, welfare and education. Each has equal powers and duties with respect to such child, and neither has any right, or presumption of right or fitness, superior to the right of the other Where the parents

³ *Id.* at 50.

⁴ *Id.* at 47.

⁵ *Id.* at 50.

⁶ *Stanley v. Illinois*, 405 U.S. 645 (1972).

⁷ *Id.* at 657–58.

⁸ 755 ILL. COMP. STAT. 5/11-7 (1993).

live apart, the Court may award the custody of their minor child to either of them and neither shall benefit from any presumption of being better suited for such award.⁹

These equality principles have resulted in American governmental policies favoring two parents under law at birth for each child born as a result of consensual sex, whether or not the genetic parents were ever married to one another. Birth record laws automatically recognize women giving birth as mothers under law.¹⁰ As to legal fathers, American laws usually presume the husbands of married mothers are the genetic fathers.¹¹ Where the mothers are unmarried, a California Family Code provision illustrates the two parent goals. It says:

There is a compelling state interest in establishing paternity for all children. Establishing paternity is the first step toward a child support award, which, in turn, provides children with equal rights and access to benefits, including, but not limited to, social security, health insurance, survivors' benefits, military benefits, and inheritance rights Additionally, knowing one's father is important to a child's development.¹²

With unwed mothers, the genetic fathers are usually subject to paternity designations.¹³

Notwithstanding the cases and statutes on equality, there is not, and should not be, absolute or near absolute equality between unwed genetic parents, nor between unmarried and married heterosexual couples, who have children the old-fashioned way. There are some necessary inequalities in American maternity and paternity laws. Differing treatment of unwed women and men in governmental procedures for designating

⁹ DEL. CODE ANN. tit. 13, § 701(a) (1999).

¹⁰ See, e.g., *Amy G. v. M.W.*, 47 Cal. Rptr. 3d 297, 303–04 (Cal. Ct. App. 2006) (reviewing state parentage act) and CAL. FAM. CODE § 7610(a) (West 1992) (parent and child relationship established by proof of woman giving birth).

¹¹ Relevant marriages can occur during pregnancy, or even after pregnancy at times, as well as prior to conception. Compare, e.g., 750 ILL. COMP. STAT. 45/5(a)(1) (1993) (born or conceived during marriage) with (a)(2) (postbirth marriage and man's name on birth certificate).

¹² CAL. FAM. CODE § 7570(a) (1992).

¹³ W. Craig Williams, Note, *The Paradox of Paternity Establishment: As Rights Go Up, Rates Go Down*, 8 U. FLA. J.L. & PUB. POL'Y 261, 266–68 (1997).

parent-child connections based on genetic ties was condoned by the U.S. Supreme Court in 2001 in *Nguyen v. INS*.¹⁴ There the Court said:

The first governmental interest to be served is the importance of assuring that a biological parent-child relationship exists. In the case of the mother, the relation is verifiable from the birth itself. The mother's status is documented in most instances by the birth certificate or hospital records and the witnesses who attest to her having given birth.

In the case of the father, the uncontestable fact is that he need not be present at the birth. If he is present, furthermore, that circumstance is not incontrovertible proof of fatherhood. . . . Fathers and mothers are not similarly situated with regard to the proof of biological parenthood. The imposition of a different set of rules for making that legal determination with respect to fathers and mothers is neither surprising nor troublesome from a constitutional perspective.¹⁵

Differing treatment of unmarried and married heterosexual couples in proof of paternity settings was condoned by the U.S. Supreme Court in 1989 in *Michael H. v. Gerald D.*¹⁶ There the Court allowed American states to create irrebuttable presumptions of paternity for husband within marital couples,¹⁷ though there need not be similar presumptions for unmarried men within heterosexual couples.¹⁸ Today there are many

¹⁴ *Nguyen v. INS*, 533 U.S. 53 (2001).

¹⁵ *Id.* at 62–63. See also *Dubay v. Wells*, 442 F. Supp. 2d 404, 406 (E.D. Mich. 2006) (no constitutional right for a man to terminate child support duties, though a woman has the right to abort).

¹⁶ *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

¹⁷ *Id.* at 129–30 (“It is a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted.”). The relevant state in *Michael H.* was California, whose marital paternity presumption has since operated differently, with both conclusive and rebuttable dimensions. See, e.g., *Dawn D. v. Superior Court*, 952 P.2d 1139 (Cal. 1998) (conclusive where wife is cohabitating with her husband who is neither impotent nor sterile; rebuttable where married couple is not cohabitating).

¹⁸ *Dawn D.*, 952 P.2d at 1141.

marital paternity presumptions and far fewer paternity presumptions for the unmarried.¹⁹

B. Unwarranted Inequalities in Safe Haven Laws

Unfortunately, these equality principles have generally been ignored in American state safe haven laws. Though often written in gender-neutral terms, many safe haven laws now effectively permit the abandonment of many newborns solely by genetic mothers regardless of paternity interests.²⁰ These maternal acts usually foreclose any later legal parenthood for genetic fathers who are fit and willing to parent, including men who have attained federal constitutional childrearing rights through marital presumptions or through providing child support.²¹ Mothers can walk away from parental responsibilities early on in a child's life, though comparable desertions are usually forbidden for fathers in cases where

¹⁹ On marital paternity presumptions, covering marriage at conception, during pregnancy, or immediately before birth, *see, e.g.*, 750 ILL. COMP. STAT. 45/5(a)(1) (1993) ("child is born or conceived during such marriage."). Those fewer paternity presumptions, covering unmarried couples at conception, during pregnancy, or immediately before birth, typically are also tied to marriage (occurring some time after birth). *See, e.g.*, 750 ILL. COMP. STAT. 45/5(a)(2) (1993) (marriage after birth and man's name on birth certificate). While there are many marital paternity presumptions nationwide, there are no marital maternity presumptions (wife is the presumed mother of a child conceived by her husband with another woman). *Amy G.*, 142 Cal. App.4th, at 15 (married woman cannot be presumed mother of child born to her husband's paramour who promptly asserted her own maternity rights; no equal protection problems though unwed men at times can become presumed fathers to children born to married women). Marital presumptions are reviewed and criticized in Veronica Sue Gunderson, *Personal Responsibility in Parentage: An Argument Against the Marital Presumption*, 11 U.C. DAVIS J. JUV. L. & POL'Y 335, 366 (2007) ("The marital presumption is outmoded, ineffective, and cumbersome due in large part to the current modern technological ease of proving and disproving paternity. It . . . sets up a system where women have nothing to lose by lying to their husbands and boyfriends. . . . In the end, the parties that pay the high cost . . . [are] the wronged husband and the unknowing child.")

²⁰ *See, e.g.*, Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753, 765 and 789–90 (2006). *See also* Laura Oren, *Thwarted Fathers or Pop-Up Pops?: How to Determine When Putative Fathers Can Block the Adoption of Their Newborn Children*, 40 FAM. L.Q. 153, 189 (2006) ("infant abandonment laws are of questionable constitutional validity" as they "create thwarted fathers by legal design who do not enjoy even a modicum of procedural due process").

²¹ Oren, *supra* note 20, at 162–63.

mothers maintain custody.²² Desertions are also foreclosed for mothers once their children are a little older.²³ Only the very, very young can be abandoned, and only by mothers.²⁴

American safe haven laws were chiefly enacted following the 1999 “Baby Moses” law in Texas.²⁵ They were relatively noncontroversial and typically justified on child protection grounds.²⁶ They typically guarantee anonymity to the relinquishers.²⁷ Safe haven laws do vary somewhat from state to state, differing on such matters as which children may be left²⁸ (i.e., younger than three days, seven days, thirty days, ninety days, or three hundred sixty days, and abused children); where children may be left²⁹ (i.e., hospitals only, or also at adoption agencies, or police or fire stations); who may leave children³⁰ (i.e., genetic parent only, mother only, any

²² *Id.* at 188.

²³ Sanger, *supra* note 20, at 766.

²⁴ *Id.*

²⁵ *See, e.g.*, Sanger, *supra* note 20, at 773–80 (noting that between 1999 and 2005 only three state legislatures failed to pass safe haven laws and that in many places claims about safe haven successes were “accepted uncritically”).

²⁶ *See, e.g.*, GA. CODE ANN. § 19-10A-3 (2007) (“It is the express purpose and intent of the General Assembly in enacting this chapter [“Safe Place for Newborns”] to prevent injuries to and deaths of newborn children that are caused by a mother who abandons the newborn.”); and WYO. STAT. ANN. § 14-11-101 (2007) (“The purpose of this act [“Safety for a Newborn Child”] is to provide to a parent of a newborn child the means to relinquish the child so that the child may be cared for and protected in a safe haven.”).

²⁷ *See, e.g.*, AZ. REV. STAT. ANN. § 13-3623.01(D) (2007) (relinquishing parent or agent of parent can remain anonymous and need not give any information); IND. CODE § 31-34-2.5-1(c) (2007) (no obligation to disclose name of parent or child); W. VA. CODE § 49-6E-1 (2007) (government must respect desire to remain anonymous).

²⁸ *See, e.g.*, AZ. REV. STAT. ANN. § 13-3623.01(G)(1) (2007) (infant under three days); CONN. GEN. STAT. § 17a-58(a) (2007) (child under thirty days); MASS. GEN. LAWS ch. 119, § 39½ (2007) (child under a week); N.M. STAT. § 24-22-3(A) (2007) (child under ninety days and no evidence of child abuse); OR. REV. STAT. § 418.017(1)(a)–(b) (2007) (child under thirty days and no evidence of abuse); GA. CODE ANN. § 19-10A-4 (2007) (“no more than one week old . . .”); IND. CODE § 31-9-2-0.5 (2007) (less than twelve months old).

²⁹ *See, e.g.*, ARK. CODE ANN. § 9-34-202 (2007) (medical provider or law enforcement agency); CONN. GEN. STAT. § 17a-57 (2007) (hospital operating an emergency room); 325 ILL. COMP. STAT. LCS 2/20(a)–(c) (2007) (hospital, fire station, emergency medical facility or police station); MINN. STAT. § 145.902(a) (2007) (licensed hospital); MISS. CODE ANN. § 43-15-207 (2007) (licensed adoption agency).

³⁰ *See, e.g.*, AZ. REV. STAT. ANN. § 13-3623.01(B) (2007) (parent or agent of parent); COLO. REV. STAT. § 19-3-304.5(1) (2007) (parent); GA. CODE ANN. § 19-10A-4 (2007)

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person, or any person with lawful custody); and, the procedures for accepting children³¹ (i.e., anonymity always, or may questions be asked by the recipients?); and, the possibility of reunification of the newborn with the person who abandons.³²

Notwithstanding these variations, all American safe haven laws effectively permit abandonment of newborns by mothers without requiring these mothers to reveal much, if anything, about the fathers.³³ Though often written in gender-neutral terms, safe haven laws are almost exclusively employed by new mothers.³⁴ The lost fathers need not be rapists or deadbeats. They can be married men with both genetic ties and positive feelings about fatherhood who supported their wives through pregnancy. They can be unmarried men who not only supported their partners during pregnancy, but who also eagerly awaited fatherhood. In most safe haven settings, the identities of genetic fathers will be undiscoverable in later proceedings, although perhaps very relevant, as in adoptions. For example, a West Virginia statute declares that a hospital taking possession of an abandoned child from a parent “may not require” the parent to identify himself or herself and shall “respect the person’s

(mother); MO. REV. STAT. § 210.950 (2),(3) (2007) (biological parent or person acting on such parent’s behalf); KAN. STAT. ANN. § 38-15, 100(b) (2007) (repealed) (parent or other person having legal custody); ME. REV. STAT. ANN. tit. 22, § 4018 (2007) (“person”).

³¹ See, e.g., AZ. REV. STAT. ANN. § 13-3623.01(D) (2007) (anonymity allowed); GA. CODE ANN. § 19-10A-4 (2007) (mother must show proof of her identity, if available, and give a name and address); OHIO REV. CODE ANN. § 2151.3517(A)(5) (West 2007) (if child appears abused, identity of parents can be investigated); WYO. STAT. ANN. §§ 14-11-103(d)–109 (2007) (recipient can obtain, but not require, medical history and identity of non-relinquishing parent); ME. REV. STAT. ANN. tit. 22, § 4018(2) (person “may be requested to provide information helpful to the welfare of the child”, but may not be detained if no information is given).

³² See, e.g., MONT. CODE ANN. § 40-6-405(2)(b) (2007) (sixty days to petition to regain custody); N.J. STAT. ANN. § 30:4C-15.8 (West 2007) (no duty “to attempt to reunite the child with the child’s parents”); IDAHO CODE ANN. § 39-8206(1) (2007) (before parental rights are terminated).

³³ See Alayna Demartini, *Unwed Dads Get State’s Help Finding Kids*, THE COLUMBUS DISPATCH, June 4, 2006, at A1, available at <http://www.columbusdispatch.com/live/contentbe/dispatch/2006/06/04/20060604-A1-05.html> (mother gave child to adoption agency and did not reveal father’s identity).

³⁴ See *id.*; see also Tamar Lewin, *Unwed Fathers Fight for Babies Placed for Adoption by Mothers*, N. Y. TIMES, Mar. 19, 2006, at A1, available at <http://www.nytimes.com/2006/03/19/national/19fathers.html> (mother’s attempt to put child up for adoption without informing father she was pregnant).

desire to remain anonymous.”³⁵ A New Mexico statute appears sympathetic to potential lost fathers, but ultimately provides little practical help. It states: “A hospital may ask the person leaving the infant for the name of the infant’s biological father or biological mother, the infant’s name and the infant’s medical history, but the person leaving the infant is not required to provide that information to the hospital.”³⁶

In Florida, safe haven procedures seemingly include requirements on diligent searches for, and notices to, interested men.³⁷ They also allow potential lost fathers certain opportunities to void earlier parental rights terminations or adoptions where a court finds persons “knowingly gave false information that prevented the birth parent from timely making known his or her desire to assume parental responsibilities toward the minor or from exercising his or her parental rights.”³⁸ However, another Florida provision states that, except “where there is actual or suspected child abuse or neglect, any parent who leaves a newborn infant . . . and expresses an intent to leave the newborn infant and not return, has the absolute right to remain anonymous and to leave at any time and may not be pursued.”³⁹ Thus, under Florida laws, there are usually no real opportunities for diligent searches for genetic fathers. By contrast, when a mother places for adoption an older child in Florida, the proceeding to terminate all parental rights in anticipation of a later adoption requires judicial inquiry and, perhaps, an adoption entity search for the father.⁴⁰ Such a father includes a man married to the mother, a man who earlier acknowledged paternity, or a man who cohabitated with the mother at the time of conception.⁴¹

There is much wrong with American safe haven laws allowing newborn abandonment by mothers. While these laws might promote child protection by allowing at-risk children to be placed in safety easily, and thus, while some children might be saved from abuse or neglect or adopted quickly, safe haven laws also promote the social norm that women can comparably terminate the actual or potential childrearing interests of men before and after birth. However, notwithstanding their prebirth abortion

³⁵ W. VA. CODE § 49-6E-1 (2007).

³⁶ N.M. STAT. § 24-22-3(B) (2007).

³⁷ FLA. STAT. § 63.0423(4) (2007).

³⁸ FLA. STAT. § 63.0423(9)(a) (2007).

³⁹ FLA. STAT. § 383.50(5) (2007).

⁴⁰ FLA. STAT. § 63.088(1)–(2) (2007).

⁴¹ FLA. STAT. § 63.088(4)–(5) (2007).

rights under *Roe v. Wade*,⁴² women generally have never been accorded veto powers over the childrearing interests of genetic fathers of children born alive, especially where the women are unwed mothers whose pregnancies resulted from consensual sexual intercourse. The result of a safe haven maternal desertion and child abandonment is typically the loss of a child to a genetic father⁴³ and the loss of the genetic father to a child.⁴⁴ Safe haven laws effectively foreclose the benefits, but not necessarily the financial obligations,⁴⁵ of paternity. This is true even for men who

⁴² *Roe v. Wade*, 410 U.S. 113, 163 (1973) (prior to the point of compelling necessity, women have an unrestricted right to abortion).

⁴³ Beyond public policies supporting the interest of men in their genetic offspring, there are both federal and some state constitutional law protections. *See, e.g.*, *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 207 (Fla. 2007) (Lewis, C.J., concurring) (federal due process and Florida's "independent Right to Privacy Clause" protect an "inchoate interest in the opportunity to develop" a parent-child relationship for an unwed genetic father whose child is placed for adoption).

⁴⁴ A child at times has independent legal rights or interests in developing a parent-child relationship with an unwed genetic father (especially where the mother is also unwed so that there is no marital paternity presumption). *See, e.g.*, *FAMILY LAW: CASES, COMMENTS, AND QUESTIONS* 441 (Krause et al. eds., 6th ed. 2007). A child's statutory interest in a relationship with a genetic parent is illustrated by a New Jersey law stating that a "parent and child relationship" [under the Parentage Act] "extends equally to every child and to every parent, regardless of the marital status of the parents." N.J. STAT. ANN. § 9:17-40 (West 2007). Somewhat different is a child's interest in knowing his or her origins. *See, e.g.*, Samantha Besson, *Enforcing the Child's Right to Know Her Origins: Contrasting Approaches Under the Convention on the Rights of the Child and the European Convention on Human Rights*, 21 INT'L J. L., POL'Y AND THE FAMILY 137, 138-39 (2007) (stating that a child's right to know her origins "is now broadly recognized and respected" through European countries' "constitutional and legislative guarantees" and "by international human rights law" found in decisions by the European Court of Human Rights). *Cf. Sutton v. Diane J.*, No. 273519, 2007 WL 840900, at *1 (Mich. Ct. App. Mar. 20, 2007) (minor could not sue his mother in order to learn about his biological father, where the minor had earlier been declared "an issue" of his mother's marriage in a dissolution proceeding but later learned her ex-husband was not his biological father; court notes General Assembly had authority to recognize such a claim). We do not here explore the differences we presume would attend traditional paternity proceedings (where support, custody and visitation are possible) and paternity proceedings where the only possible remedy under law would involve information about the genetic ties between men and children. Yet we believe that the emerging understandings about genetic ties and diseases make it probable there will be increasing medical information during paternity inquiries.

⁴⁵ Generally, the husbands of married mothers and the biological fathers of children born to unmarried mothers (as a result of consensual sexual encounters) are responsible for
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established, either prebirth or postbirth, “actual” parent-child relationships or were subject to marital paternity presumptions.

A few contemporary legal principles outside of safe haven settings demonstrate the limits on maternal (and paternal) decisionmaking about children after birth. For example, the parent of a minor suffering tortious injury cannot settle that minor’s claim in or outside of a lawsuit without judicial approval.⁴⁶ Public policy protects “the best interests of the child under the *parens patriae* doctrine.”⁴⁷ Judicial approval is only available where the settlement is fair and reasonable, with judges having broad discretion to protect the rights of those who cannot protect themselves.⁴⁸ Additionally, in marriage dissolution proceedings, parents cannot themselves determine child visitation, custody, or support.⁴⁹ Again, judicial approval of agreements between parents is needed.⁵⁰ Approval is usually secured only after consideration of a variety of factors, including parental competency and fitness, parental willingness to accept all the responsibilities of parenting, and the ability and willingness of each parent to allow the other parent to provide child care while respecting the other parent’s rights and responsibilities, including the right to privacy.⁵¹ Finally, after birth, and without safe haven laws, legal mothers and fathers

child support, even when they are awarded no, or have never even attained, childrearing rights or interests. *See, e.g.*, Adrienne D. Gross, *A Man’s Right to Choose: Searching for Remedies in the Face of Unplanned Fatherhood*, 55 *DRAKE L. REV.* 1015, 1029 (2007) (reporting that in paternity proceedings the man is assigned responsibility for child support payments); Jessica L. Roberts, *Conclusions from the Body: Coerced Fatherhood and Caregiving as Child Support*, 17 *YALE J. L. & FEMINISM* 501, 508 (2005) (commenting that the traditional child support system requires unmarried fathers to pay child support); Amy L. Wax, *Traditionalism, Pluralism, and Same-Sex Marriage*, 59 *RUTGERS L. REV.* 377, 386 (2007) (“[L]aw and custom assign married men responsibility for their children’s support and well-being.”); Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, *ARIZ. ST. L. J.* 809, 814 (2006) (“Often the biological father will also be the social father, and all rights and responsibilities will rest with him.”).

⁴⁶ *Baum v. Nigro*, No. BER-L-010169-04, 2007 WL 1238360, at *8 (N.J. Super. Ct. Law. Div. Mar. 8, 2007) (“Under New Jersey Rule of Court 4:44, the parent or guardian of a minor suffering tortious injury cannot settle the minor’s claim without judicial or statutory approval . . .”).

⁴⁷ *Id.* at *9.

⁴⁸ *Id.* (quoting N.J. CT. R. 4:44-3).

⁴⁹ *See, e.g.*, 750 *ILL. COMP. STAT. ANN.* 5/502(b) (West 2007).

⁵⁰ *Id.*

⁵¹ *FML v. TW*, 157 P.3d 455, 456 (Wyo. 2007) (citing *WYO. STAT. ANN.* § 20-2-201(a) (2005)).

usually cannot simply walk away from parental responsibilities or agree privately for exclusive responsibilities in one of two parents.⁵² These and similar principles are undermined by safe haven laws. Lost fathers under safe haven laws are especially troubling as these laws have been shown to do very little to promote child protection.⁵³

II. LOST PATERNITY UNDER OTHER LAWS

While difficult to acknowledge, mothers sometimes do not know what is best for their children (even if we believe it is best to trust that potential mothers know best as to whether their children should be born). Aside from safe havens, there are other legal settings where mothers are solely entrusted with the well-being of their children, to the exclusion of fathers, but where mothers do not always know best.

In both adoption and birth record laws, unconditional maternal decision-making about newborns (and children) is often permitted. In such situations, too many unwed genetic fathers unfairly lose legal paternity or their chances for legal paternity.

A. Adoption Laws

Adoptions of children born in the United States to unwed parents typically prompt inquiries into legal maternity and paternity which, when established, usually necessitate participation and veto rights.⁵⁴ An underlying premise is that marriage should not be the sole route to parental rights.⁵⁵ Another premise is that the postbirth parental rights of genetic

⁵² *Dubay v. Wells*, 442 F. Supp. 2d 404, 412 (E.D. Mich. 2006) (noting there are no decisions recognizing a father's right to end his child support duties no matter how emotionally removed he is from his child); *State ex rel. Kayla T. v. Risinger*, 731 N.W.2d 892, 895–96 (Neb. 2007) (noting that in Nebraska, as elsewhere, agreements between parents depriving children of child support are void as against public policy).

⁵³ *See, e.g., Sanger, supra* note 20, at 758 (indicating that, at best, safe haven laws only “possibly” prevent harm to newborns, or, if truly preventative, prevent “only a little” harm).

⁵⁴ *See, e.g., ALASKA STAT. § 25.23.040* (2007) (“Persons required to consent”) and 750 ILL. COMP. STAT. ANN. 50/8 (West 2007) (“Consents to adoption and surrenders for purposes of adoption”).

⁵⁵ *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“[W]hatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.”); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (holding that failure to afford a non-married parent a hearing on parental fitness while extending it to married parents is contrary to the Equal Protection Clause).

mothers and genetic fathers should be comparable.⁵⁶ These premises promote the aforementioned equality principles. Yet another premise is that it is preferable for children to be raised by at least one genetic parent rather than by genetic strangers.⁵⁷ Thus, when children are born to the unwed, the genetic parents frequently are accorded in adoption proceedings participation rights similar to the rights accorded married and divorced parents.⁵⁸

Unwed parents themselves are not always treated similarly. Genetic mothers and genetic fathers typically have distinct avenues to securing parental status, triggering participation rights in adoptions. As Professor Katherine Bartlett has observed: “The fact that women by virtue of their biological and current social positioning often have an edge with respect to the parent-child relationship is unfortunate from the point of view of any androgynous goals we might have.”⁵⁹ Thus, in settings involving consensual sexual intercourse, only mothers automatically acquire legal parenthood, as only they bear children.⁶⁰ Parental rights for unwed fathers

⁵⁶ See, e.g., *Rosero v. Blake*, 581 S.E.2d 41, 50 (N.C. 2003) (“[W]e therefore hold that the father’s right to custody of his illegitimate child is legally equal to that of the child’s mother”); N.J. STAT. ANN. § 9:17-40 (West 2007) (“The parent and child relationship extends equally to . . . every parent, regardless of the marital status of the parents.”).

⁵⁷ See, e.g., Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 501 (1992) (parents should preferably be the biological father and mother of their children and support them during their minority).

⁵⁸ Participation rights are not always the same. For example, unwed fathers, under *Lehr v. Robertson* need to step up affirmatively to parenthood (e.g., initiate a lawsuit, register, or otherwise voluntarily acknowledge paternity). *Lehr v. Robertson*, 463 U.S. 248, 262 (1983). Married fathers, on the other hand, usually automatically receive legal parent status via presumptions about genetic ties. See *id.* at 263. As to unwed fathers, there are serious differences of opinion as to whether and to what extent this *Lehr* opportunity must be afforded genetic fathers who step up as soon as they learn of their paternity, though beyond the statutory limitation period. See, e.g., *Marquette S. v. Bobby G.*, 734 N.W.2d 81, 84, 104 (Wis. 2007) (interpreting statute on parental rights terminations in contemplation of adoption to allow step up, in part to avoid constitutional question).

⁵⁹ Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L. J. 293, 339 (1988) (footnote omitted).

⁶⁰ See, e.g., 750 ILL. COMP. STAT. ANN. 45/4(1) (West 2007) (“the natural mother may be established by proof of her having given birth to the child[.]”). By contrast, legal parenthood is automatically presumed for many married men when their wives bear children, see, e.g., *id.* at 45/5(a)(1); yet such paternity often is subject to rebuttable proof of lack of genetic ties, at times even when the married men have parented well and wish to

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often can only arise in adoption settings if there are both biological ties and either actual parent-child relationships or other parental conduct (as registering or acknowledging paternity).⁶¹ These inequalities, sanctioned by *Nguyen*,⁶² are quite sensible.

Yet while certain distinctions between mothers and fathers are warranted, the paternity interests of unwed fathers are, unfortunately too often, not fully respected in American state adoption laws. Frequently, unwed fathers have little or uncertain information about their offspring around the time of birth.⁶³ Even when aware, these fathers may have little practical opportunity to develop parent-child relationships, or to secure, or overcome obstacles to, legal paternity.⁶⁴

Mothers control both information and access. In the end, many schemes for recognizing legal paternity during adoptions are unfair to unwed genetic fathers. In too many instances, there are no serious inquiries made regarding male genetic ties.⁶⁵ Further, the methods

continue to rear children. *See, e.g., In re John M.*, 817 N.E.2d 500, 506 (Ill. 2004) (citing 750 ILL. COMP. STAT. ANN. 45/5(b) (West 2002)).

⁶¹ *See, e.g., Lehr*, 463 U.S. at 262; *Marquette S.*, 734 N.W.2d at 104.

⁶² *Nguyen v. INS*, 533 U.S. 53, 63 (2001) (such inequalities are “neither surprising nor troublesome from a constitutional perspective”).

⁶³ Even after relevant consensual sex, there is no duty on the part of an unwed pregnant woman to notify the potential father of the pregnancy which she decides to carry to term. *See, e.g., In re TMK*, 617 N.W.2d 925, 927 (Mich. Ct. App. 2000); *see also* Jeffrey A. Parness, *New Federal Paternity Laws: Securing More Fathers at Birth for the Children of Unwed Mothers*, 45 BRANDEIS L.J. 59, 62 (2006) [hereinafter Parness, *New Federal Paternity Laws*] (reporting that one in three children, totaling 500,000, who are born each year in the United States as a result of consensual sex between unwed parents, have no father designated on their birth certificates).

⁶⁴ For example, an unwed mother has no legal duty to facilitate a positive father-child relationship. And, unwed fathers can easily lose paternity opportunity interests by failing to register in putative father registries or by failing to sue in paternity within a very short time after birth. Their failures at times result from mothers moving to new states and the fathers acting to establish paternity in the states where sex occurred. *See, e.g., In re B.B.D.*, 984 P.2d 967 (Utah 1999); *Burns v. Crenshaw*, 733 P.2d 922 (Or. Ct. App. 1987); *Hylland v. Doe*, 867 P.2d 551 (Or. Ct. App. 1994).

⁶⁵ For example, in some states the only real inquiries involve searches of paternity registers or other government records since failures to register (or to indicate a desire for paternity)—regardless of reason—foreclose participation rights for unwed genetic fathers in any later adoptions of their offspring. *See, e.g., In re Baby Girl H.*, 635 N.W.2d 256 (Neb. 2001) (holding that genetic father need not consent to adoption as he failed to file a petition to adjudicate paternity within a month of birth, as required by statute, though he did file a

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available to unwed men in adoption cases for proving their genetic ties, parent-child relationships, or other relevant parental conduct (such as holding children out as their own in the community), prompting their rights to notice and participation, often are both cumbersome and unfair.⁶⁶ Practically speaking, much deference is paid to the choices of genetic mothers even when these mothers abandon their children by placing them for adoption. So, unwed mothers giving up their legal parenthood in children often decide as a practical matter what—if any—chances for parenthood should be afforded to the genetic fathers.

American state laws and cases also vary in their approach to unwed genetic fathers who step up late in adoption proceedings, although acting as soon as they know, or reasonably should know, of their genetic ties to children placed for adoption.⁶⁷ And state laws vary as to whether timely *de facto* compliance with adoption procedures by genetic fathers, although technically deficient, will preclude the fathers' parental participation.⁶⁸ As a result, there are nationwide variations in the opportunities afforded to unwed genetic fathers to participate in the proposed adoptions of their offspring. Participation opportunities are often denied to unwed genetic fathers when they fail to register, to provide child support, or to acknowledge paternity.⁶⁹ A few cases and statutes serve to illustrate both

notice of intent to claim paternity and seek custody within five days of his knowledge of birth, as required by statute; putative father who filed a timely petition, but in the wrong court, loses as "ignorance of the law" was no excuse and he had been given an adequate chance to protect his "opportunity interest" in fatherhood).

⁶⁶ See, e.g., Jeffrey A. Parness, *Participation of Unwed Biological Fathers in Newborn Adoptions: Achieving Substantive and Procedural Fairness*, 5 J.L. & FAM. STUD. 223 (2003) [hereinafter Parness, *Participation of Unwed Biological Fathers*] (paper presented at The Dave Thomas Center for Adoption Law at Capital University Law School).

⁶⁷ See, e.g., Mary Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y 1031, 1060–62 (2002).

⁶⁸ *Id.*

⁶⁹ Commentaries critical of contemporary adoption procedures because of their unfairness to unwed genetic fathers include Robbin Pott Gonzalez, *The Rights of Putative Fathers to Their Infant Children in Contested Adoptions: Strengthening State Laws That Currently Deny Adequate Protection*, 13 MICH. J. GENDER & L. 39 (2006) and Oren, *supra* note 20, at 154 (no U.S. Supreme Court guidance on how to protect the inchoate parental opportunity interests of unmarried biological fathers). For a broader critique of adoption procedures and their unfairness to all birth parents, see EVAN B. DONALDSON ADOPTION INSTITUTE, *SAFEGUARDING THE RIGHTS AND WELL-BEING OF BIRTHPARENTS IN THE ADOPTION PROCESS* (November 2006), http://www.adoptioninstitute.org/publications/2007_01_Birthparent_Study_All.pdf.

the harshness of many of these laws and the interstate differences that cause much confusion.⁷⁰

1. Failure to Register as Putative Father

Addressing the failure to register as the putative father, an illustrative case is the 2002 Minnesota Supreme Court decision in *Heidbreder v. Carton*.⁷¹ There, a genetic father was told by an Iowa attorney that an adoption of a child conceived to an unwed Iowa couple in Iowa needed the father's consent.⁷² But, the mother, while pregnant, had moved to Minnesota and did not tell the father.⁷³ A Minnesota adoption was sustained over the father's objection because the father had not filed with the Minnesota paternity registry within 30 days of birth, as was required by Minnesota law.⁷⁴ The father lost even though he filed in Minnesota 31 days after the child's birth, on the very day he learned of the child's birth in Minnesota.⁷⁵ The father lost even though the mother had never corrected her earlier statements to the father that she would not offer the child for adoption.⁷⁶ The court concluded there was no fraud because the mother had no "fiduciary duty" to tell the father about the birth.⁷⁷

2. Failure to Provide Support

For an illustration of the effects of a failure to support a child, there is the 1989 Florida Supreme Court case, *In re Adoption of Doe*.⁷⁸ The facts

⁷⁰ Beck, *supra* note 67, at 1037 (2002).

⁷¹ *Heidbreder v. Carton*, 645 N.W.2d 355 (Minn. 2002).

⁷² *Id.* at 361.

⁷³ *Id.*

⁷⁴ *Id.* at 367.

⁷⁵ *Id.* at 362.

⁷⁶ *Id.* at 367.

⁷⁷ *Id.* at 368 (no duty to genetic father "whom she knows is attempting to locate her," even where "she knows he wants to . . . establish a relationship with his child"). At least in some states the failure to register in a timely fashion will be excused if other steps toward parenthood are taken. *See, e.g.*, *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 205 (filing of a petition to determine paternity on day child was born prompts standing for genetic father in an adoption proceeding though no putative father registry action was taken by the father).

⁷⁸ *In re Doe*, 543 So. 2d 741 (Fla. 1989) (*Doe II*). The *Doe* facts were elaborately reviewed, and its rulings were significantly critiqued, in Jeffrey A. Parness, *Prospective Fathers and Their Unborn Children*, 13 U. ARK. LITTLE ROCK L. REV. 165, 166–71 (1991) [hereinafter Parness, *Prospective Fathers*]. *Doe* was preceded by an intermediate appeals court opinion. *In re Doe*, 524 So. 2d 1037 (Fla. Dist. Ct. App. 1988) (*Doe I*).

of the case are set out in detail; they demonstrate why paternity law reformers and case decision makers sometimes need to go beyond strict and unforgiving guidelines in order to reflect more compassion for the lives of those involved in legal paternity disputes.⁷⁹ Deadlines barely missed or requirements generally, though not technically, met should not always be dispositive. Greater awareness of the impacts that court rulings and statutes have on the lives of real people foster better law reform dialogues.

The Doe case was tragic for all concerned; its tragedies could have been avoided for the most part by better-written laws. The case began with Richard and Mary, an unwed mother, who met during the summer of 1985 in Tempe, Arizona.⁸⁰ Soon thereafter, Mary was pregnant.⁸¹ Early on Richard urged Mary to get an abortion.⁸² Mary resisted.⁸³ While Mary saw herself as neither financially nor emotionally able to raise two children alone, Richard thought he was not ready for marriage.⁸⁴

The following months were turbulent.⁸⁵ Richard lived comfortably, though he became unemployed and had to borrow money.⁸⁶ Mary lost her job and asked Richard for rent money.⁸⁷ Mary also began considering adoption.⁸⁸ In March of 1986, Mary wrote to Richard's mother, saying adoption was for her alone to decide.⁸⁹ Richard discussed the letter with his mother and then wrote to Mary:

I respect any decision you make but let's put the axe away. I hope you'll think about our whole situation. I really would like to see my child. I've never had a child before and it hurts me to think that he or she would grow up thinking their father was a monster. No matter what you take away from me, the child will still be a part of me. I'll still love the child no matter if I ever see it. Every time

⁷⁹ *Doe II*, 543 So. 2d at 742–43.

⁸⁰ *Id.* at 742.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 742–43.

⁸⁵ *Id.* at 743.

⁸⁶ *Id.* at 750 n.1 (McDonald, J., dissenting).

⁸⁷ *Id.*

⁸⁸ Parness, *Prospective Fathers*, *supra* note 78, at 166–67.

⁸⁹ *Id.* at 167.

you look at that child you'll see part of me there whether you like it or not. That's a decision you and only you can make. I do hope for the very best for you and my child.⁹⁰

By mid-April 1986, Mary was out of full-time work again.⁹¹ Although Richard was out of work until May, he provided meals for Mary and her son, gave her furniture and clothes, bought her milk and baby food, and paid insurance premiums for Mary's son.⁹²

In July, Mary talked by phone with her mother in Florida.⁹³ She spoke of adoption.⁹⁴ With Mary's permission, her mother contacted a local Tampa rabbi.⁹⁵ Before long, Bob and Jane Doe asked a Florida law office to pursue possible adoption.⁹⁶ On July 19, 1986, Mary called one of the Does' attorneys.⁹⁷ She told him the father of her child "wanted to have nothing to do with her, the pregnancy or the baby" and had not provided support.⁹⁸ She said she was financially destitute.⁹⁹ When the attorney asked for the father's location, Mary said he would not cooperate.¹⁰⁰ When the attorney asked Mary where she wanted to have the baby, she said Tampa.¹⁰¹ The attorney stressed the seriousness of adoption.¹⁰² When asked whether she still loved the father and would marry him, she responded, "No."¹⁰³

Mary left Phoenix for Florida on August 3.¹⁰⁴ The Does provided her with one-way airfare and agreed to support her financially from August 1 until shortly after birth.¹⁰⁵ Mary and her son left Phoenix quietly, telling

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

Richard by a letter channeled through her sister, who was told not to reveal her whereabouts.¹⁰⁶

On August 8, Mary phoned Richard, said she was in Florida, and told him why.¹⁰⁷ Afterwards, Mary and Richard frequently talked by phone. Mary gave Richard only her Florida phone number and refused Richard's offer to return to Arizona and to live with him outside of marriage.¹⁰⁸

On August 12, Mary was interviewed by an officer of the Florida Human Rehabilitative Services (HRS).¹⁰⁹ She was shown and she read a form regarding consent to adoption.¹¹⁰ She was told about its irrevocable nature and cautioned not to sign if she had doubts.¹¹¹ Mary told the agency officer that the father had never offered financial support, but that he did not deny paternity.¹¹² The agency never contacted Richard.¹¹³

By early September, Mary had brought to the office of the Does' attorneys a letter written by Richard.¹¹⁴ Dated August 18, it asked that Mary "at least think about" letting him raise his child, who he hoped would look like him.¹¹⁵ Attorneys for the Does thereafter concluded that Richard's consent to an adoption was unnecessary.¹¹⁶ They neither contacted Richard nor informed the Does of the letter.¹¹⁷

On September 4, Richard proposed marriage and Mary accepted.¹¹⁸ Mary bought a wedding dress and told her mother.¹¹⁹ She told Richard she would keep the child, though she did not tell the Does, HRS, or others.¹²⁰ Richard and Mary talked about reimbursing the Does.¹²¹ Richard later

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 167–68.

¹⁰⁸ *Id.* at 168.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

changed his mind.¹²² Mary then asked Richard to let her alone decide about the child, and he did not say no.¹²³

During a later phone conversation, Richard urged Mary not to sign any papers.¹²⁴ Mary then determined she would keep the baby.¹²⁵ When she told her mother, however, her mother became angry and told Mary she would have to fend for herself if there was no adoption.¹²⁶ Mary changed her mind again.¹²⁷

After John was born to Mary on September 12, 1986, Mary unsuccessfully tried to call Richard and her counselor, and asked the hospital to contact a rabbi.¹²⁸ Early on Sunday morning, September 14, Mary told a nurse she did not wish to see John anymore.¹²⁹ She took medicine to dry her breast milk.¹³⁰ Later that morning, two attorneys for the Does and a nurse watched Mary sign adoption papers.¹³¹ Mary left the hospital that day and John left the next day with the Does.¹³² Richard did not learn what happened until later, when he was called by an ex-girlfriend whom Mary had asked to give him the news.¹³³ He then called Mary, and proposed that they get John back and get married.¹³⁴ Richard also called his mom saying: “Mother, can you believe I have a son? I’m going to get it.”¹³⁵

On September 17, Richard called one of the Does’ attorneys and vowed to stop the adoption.¹³⁶ Soon after, Richard flew to Florida with baby clothes in hand.¹³⁷ On September 18, Mary cancelled her appointment with one of the Does’ attorneys.¹³⁸ On September 19, Richard

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 168–69.

¹³² *Id.* at 169.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

filed an acknowledgement of paternity in Florida and signed John's birth certificate.¹³⁹ Finally, on September 22, the Does were told by one of their attorneys (who had received a call from Richard and Mary's attorney) about Richard and Mary's plans.¹⁴⁰

Bob and Jane Doe declined to relinquish John.¹⁴¹ On October 22, they filed an adoption petition.¹⁴² Richard and Mary were married on November 15, in Arizona.¹⁴³

A three-day adoption hearing was held in May, 1987.¹⁴⁴ A month later the adoption was granted with the court determining that Mary's written consent was valid and that Richard had impliedly consented to adoption by failing to provide meaningful support to Mary.¹⁴⁵

Richard and Mary appealed.¹⁴⁶ The intermediate appeals court concurred that Mary's consent was freely given.¹⁴⁷ However, because it found abandonment covered only children born alive, it held that Richard's prebirth conduct was irrelevant and that the adoption was void for want of Richard's written consent.¹⁴⁸

In April, 1989, the Florida Supreme Court affirmed as to Mary¹⁴⁹ and ruled that Richard's pre-birth conduct was relevant to the issue of whether Richard "evinced a settled purpose to assume parental duties."¹⁵⁰ The high court found that Richard's efforts were "marginal" and insufficient to show "a settled purpose to assume parental duties."¹⁵¹ It thus determined Richard's consent was unnecessary,¹⁵² even though Richard seemed

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *In re Doe*, 524 So. 2d 1037, 1042 (Fla. Dist. Ct. App. 1988) (*Doe I*) (the statute only expressly addressed written consent after birth).

¹⁴⁶ *Id.* at 1038.

¹⁴⁷ *Id.* at 1041.

¹⁴⁸ *Id.* at 1044.

¹⁴⁹ *In re Doe*, 543 So. 2d 741, 744 (Fla. 1989) (*Doe II*).

¹⁵⁰ *Id.* at 746.

¹⁵¹ *Id.* at 747.

¹⁵² *Id.* A far stronger case of prebirth paternal abandonment in Florida is *In re Adoption of Baby E.A.W.*, 658 So. 2d 961 (Fla. 1995) (also ruling that the lack of emotional support and emotional abuse may be considered). Outside of Florida, statutes do not always permit consideration of prebirth acts, like abandonment, on right to notice in adoption cases. *See*,

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hampered in his attempt to assume parenthood by the unilateral acts of Mary.¹⁵³

In finding prebirth abandonment, the Florida Supreme Court failed to sufficiently describe the prebirth child support acts necessary to prompt a right to notice, failed to urge the legislature to do so, and failed to explain in much detail how Richard's conduct was deficient. Little has changed in Florida (and elsewhere), so that paternity opportunity losses due to failures of prebirth support remain subject to excessive judicial discretion. There are not only intrastate uncertainties, but also interstate variations.¹⁵⁴

3. *Failure to Acknowledge*

On the failure to acknowledge paternity, there are the self-described "strict" requirements in Utah on the participation rights of unwed fathers in newborn adoptions.¹⁵⁵ To protect their rights, men in Utah must secure a paternity adjudication or file a voluntary declaration of paternity before maternal relinquishment.¹⁵⁶ Where maternal relinquishment is permitted twenty four hours after birth, there would often be very little time for men to sue or file.¹⁵⁷ In the alternative, a man must manifest "a full commitment to his parental responsibilities" by commencing paternity proceedings and taking on financial responsibilities for pregnancy

e.g., Helen G. v. Mark J.H., 145 P.3d 98, 107–09 (N.M. Ct. App. 2006), *cert. granted*, 146 P.3d 810 (N.M. 2006) (examining N.M. STAT. §§ 32A-5-15(B) and 32A-5-15(C)).

¹⁵³ *See, e.g.*, Mary's providing false information to the Does' attorneys, *supra* notes 98, 100, 103; Mary's leaving Arizona for Florida without telling Richard her destination, *supra* note 106; Mary's keeping her exact location in Florida secret from Richard, *supra* note 108; Mary's telling the agency officer that Richard had never offered financial support, *supra* note 112; Mary's telling Richard she would keep the child while failing to tell the same to the Does, HRS, or others, *supra* note 120.

¹⁵⁴ *See* Parness, *Prospective Fathers*, *supra* note 78 (suggesting more precise articulation and better coordination of state social policies on prebirth paternal duties, though they would differ from the policies on the duties of pregnant women). A very different approach to a comparably situated unwed genetic father was taken, for example, in *In re Matthew D.*, 818 N.Y.S. 2d 399 (N.Y. App. Div. 2006) (father acted sufficiently though he did not pay any pregnancy expenses; as in *Doe*, father believed there would be no surrender for adoption and mother frustrated efforts to establish father-child relationship).

¹⁵⁵ *See* UTAH CODE ANN. § 78-30-4.14–4.15 (2002).

¹⁵⁶ UTAH CODE ANN. § 78-30-4.14(1)(d) (2002).

¹⁵⁷ *Thurnwald v. A.E.*, 163 P.3d 623 (Utah 2007) (under statutes in effect in 2004, a mother had to wait one day; court held (given *Lehr*) that if maternal relinquishment occurred one day later, on a holiday or weekend when government offices were closed, an unwed father had until the end of the first business day after such relinquishment to act).

expenses.¹⁵⁸ Utah legislators did declare that unwed fathers deceived by mothers can “pursue civil or criminal penalties in accordance with [unstated] existing law,” but also concluded that fraud is “no defense” to “strict compliance” and may not serve to undo an adoption.¹⁵⁹ Utah lawmakers reasoned that “an unmarried biological father is in the best position to prevent or ameliorate the effects of fraud.”¹⁶⁰ By contrast, in a South Carolina case where a genetic father’s consent to adoption was needed, his “strict” compliance with prebirth support duty was excused when it was caused by “the whim” of the mother, especially because the father acted sufficiently and promptly upon learning of birth.¹⁶¹

B. Birth Record Laws

American state birth record laws also effectively permit unconditional maternal decision-making about paternity. Before the 1996 federal mandates on voluntary paternity acknowledgments,¹⁶² state birth certificate laws for children born in the United States to unwed mothers typically permitted the certificates themselves to establish legal paternity.¹⁶³ In Illinois, from 1993–1996, these certificates could include a purported genetic father’s name with his consent, if accompanied by the written consent of the mother.¹⁶⁴ Before 1993, however, maternal consent to paternity recognition was not expressly required.¹⁶⁵ Additionally, and more importantly, hospital personnel in Illinois birth facilities, as of 1993, were required to attempt to secure paternity as well as maternity designations.¹⁶⁶ A statute declared that the “person responsible for preparing and filing the birth certificate . . . shall make a reasonable effort to obtain the signatures of both parents.”¹⁶⁷ Since 1996, with the advent of

¹⁵⁸ UTAH CODE ANN. § 78-30-4.14(2)(b) (2002).

¹⁵⁹ UTAH CODE ANN. § 78-30-4.15(2) (2002).

¹⁶⁰ UTAH CODE ANN. § 78-30-4.15(3) (2002).

¹⁶¹ *Doe v. Queen*, 552 S.E.2d 761 (S.C. 2001).

¹⁶² 42 U.S.C. § 666(a)(5)(C)–(E) (2000).

¹⁶³ *See e.g.*, 410 ILL. COMP. STAT. 535/12 (1993) (amended 2007), found in Illinois Public Act 88-159 (eff. July 28, 1993).

¹⁶⁴ 410 ILL. COMP. STAT. 535/12(4) (1996) (amended 2007), found in Illinois Public Act 89-6941 (eff. Aug. 9, 1996).

¹⁶⁵ 410 ILL. COMP. STAT. 535/12(4) (1993) (amended 2007), found in Illinois Public Act 88-159 (eff. July 28, 1993).

¹⁶⁶ 410 ILL. COMP. STAT. 535/12(2) (1993) (amended 2007), found in Illinois Public Act 88-159 (eff. July 28, 1993)

¹⁶⁷ 410 ILL. COMP. STAT. 535/12(4).

new federal Social Security Act mandates, alleged genetic fathers can be included on birth certificates of children born to unwed mothers only if they and the mothers sign witnessed acknowledgments of parentage.¹⁶⁸ Such acknowledgments, practically speaking, are generally only available in hospitals at the time of birth or in government offices sometime thereafter. Acknowledgments by a mother and a purported father usually are pursued simultaneously.¹⁶⁹

“Jodie Foster mothering,” wherein unwed mothers choose to parent their children alone, is thus facilitated by the new federal voluntary paternity acknowledgment laws. Without maternal consent, no man’s name may be entered as a father on a birth certificate.¹⁷⁰ There are no duties imposed on hospital personnel or on government officers at birth or shortly thereafter to locate unnamed male genetic parents of children born to unwed mothers.¹⁷¹ In fact, there has never been serious federal governmental interest in exploring, after birth, the legal paternity of all children born fatherless. Governments often only become interested in fatherless birth certificates where the mothers wish to receive governmental assistance on behalf of their children and where welfare officials wish reimbursements for past child support or the avoidance of future child support.¹⁷² To qualify for financial aid, mothers usually must cooperate in “good faith” in helping to establish legal paternity.¹⁷³

¹⁶⁸ 410 ILL. COMP. STAT. 535/12(5)(a) (2007).

¹⁶⁹ For a comparative review of American state voluntary paternity acknowledgment procedures, see Parness, *New Federal Paternity Laws*, *supra* note 63, at 70–93 (reviewing differing state laws on both executing and rescinding voluntary paternity acknowledgments). For a comprehensive review of Illinois paternity acknowledgment and other legal paternity establishment procedures, see Jeffrey A. Parness, *No Genetic Ties, No More Fathers: Voluntary Acknowledgment Rescissions and Other Paternity Disestablishments Under Illinois Law*, 39 J. MARSHALL L. REV. 1295 (2006) [hereinafter Parness, *No Genetic Ties*].

¹⁷⁰ See 42 U.S.C. § 666(a)(5)(C)–(E) (2000).

¹⁷¹ See *id.*

¹⁷² See, e.g., David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. LAW 125, 140–41 (2006), where Professor Meyer observes:

The child-support duties of non-custodial parents are now dictated by formulaic guidelines that take only limited account of individual circumstances. Enforcement of those obligations, long weak and ineffective, has grown increasingly stringent. Largely as a result of federal efforts to recoup welfare spending, a great deal of this

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And so, while men who engaged in unprotected heterosexual acts usually may register under state paternity registration schemes in order to safeguard certain paternity rights (as in adoptions), their partners have no obligation to inform them of pregnancies or births. American governments then do little to find the fathers omitted from birth records. Additionally, should women lie about genetic ties, there is little recourse for the many genetic fathers interested in parenting who come forward late, even if they acted as soon as they learned of the births of their offspring.¹⁷⁴

C. Consequences of Lost Paternity Arising From Adoption and Birth Record Laws

While unfettered maternal decisionmaking underlies birth certificate, adoption notice, and safe haven laws, its dangers to actual and would-be legal fathers are far more pronounced in the first two settings. There are relatively few maternal uses of safe haven laws.¹⁷⁵ As to birth certificates, however, there are, increasing numbers of children born in the United States to unwed mothers where there are no marital presumptions that automatically designate men as legal fathers.¹⁷⁶ And, there are growing numbers of out-of-wedlock children with no fathers named on their birth certificates.¹⁷⁷ A half-century ago, about one in every twenty children was

enforcement activity is focused on the working or non-working poor, with much of the money collected going directly to reimburse the government rather than to support dependent children. Moreover, the trend is to sever the legal obligation of support from the prerogatives of contact with supported children.

¹⁷³ See, e.g., 42 U.S.C. § 654(29)(A) (2000) (Title IV-D benefits); MONT. CODE ANN. § 53-6-113(6) (2007) (Title IV-D cooperation duties can be extended to Medicaid applicants); and N.J. STAT. ANN. § 2A:17-56.55 (West 2007) (applicants for Medicaid, public assistance and Title IV-D aid must cooperate “in good faith in establishing paternity”).

¹⁷⁴ See, e.g., *In re Baby Doe*, 734 N.E.2d 281, 285–87 (Ind. Ct. App. 2000) (reviewing adoption cases wherein genetic fathers acted as soon as they learned of birth, though none registered with a paternity father registry and some did not even know of the pregnancy); *In re Baby Boy K.*, 546 N.W.2d 86, 88–91, 101 (S.D. 1996) (same).

¹⁷⁵ See, e.g., Sanger, *supra* note 20, at 763, n.43 (105 cases in 1998), 789, nn. 223–224 (often in a state the numbers of illegal abandonments are more than the numbers of legal abandonments).

¹⁷⁶ See Parness, *New Federal Paternity Laws*, *supra* note 63, at 62.

¹⁷⁷ *Id.*

born out-of-wedlock in the United States.¹⁷⁸ Today, it is about one in three.¹⁷⁹ There are approximately one and a half million births of out-of-wedlock children each year in the United States.¹⁸⁰ While statistics are scarce, seemingly about one in three of these children, or about a half million children a year, are born without a legally designated father.¹⁸¹

With adoptions as well, there are large numbers of lost daddies. Newborns placed for adoption by unwed mothers often have no designated father under law.¹⁸² In such situations, during a parental rights recognition or termination hearing that precedes an adoption, if the birth certificate for the child to be adopted names no father, little is done to identify, locate and notify the genetic father unnoted on the birth records.¹⁸³ Little is done to find the genetic father even when there are no allegations, or even hints of, abandonment, unfitness, domestic abuse or ambivalence.¹⁸⁴ At times, as with Richard in the *Doe* case, findings of abandonment (or neglect or the like) might even be strongly prompted by concerns over removing a child from a home where the child has lived, loved, and been loved for some extended time, even though much time ran because of litigation delays. Recall that in the *Doe* case there was a September 1986 birth; a June 1987 initial adoption order; and, a final Supreme Court ruling in April 1989.¹⁸⁵ Delays are now being addressed here and there, though judicial frustration is often evident.¹⁸⁶

Failures to inquire into genetic fatherhood, however, do result at times in undoing adoptions when genetic fathers successfully show no personal fault and an adequate interest in parenthood, leading to children being torn by government from the only parents they have known in order to be handed over to strangers.¹⁸⁷ Interstate differences are exemplified by the

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Parness, *Participation of Unwed Biological Fathers*, *supra* note 66, at 224.

¹⁸³ Reforms are suggested in *id.* at 232–36.

¹⁸⁴ *Id.* at 224.

¹⁸⁵ *In re Doe*, 543 So. 2d 741 (Fla. 1989).

¹⁸⁶ *See, e.g.*, *DNW v. Dept. of Fam. Services*, 154 P.3d 990, 995 (Wyo. 2007) (J. Hill, dissenting) (“Exactly why this [paternity disestablishment] case took three years and four months to be resolved is not readily evident from the record.”).

¹⁸⁷ *See, e.g.*, *Petition of Doe*, 638 N.E.2d 181, 182 (Ill. 1994) (“Baby Richard” case, where an adoption undone when child was over three) and its follow-up, *Petition of Kirchner*, 649 N.E.2d 324, 327–28, 332, 339–40 (Ill. 1995) (habeas corpus action by unwed
(continued)

aforenoted Utah and South Carolina approaches to compliance with paternity identification requirements.

III. MATERNAL PRIVACY INTERESTS DO NOT ALWAYS JUSTIFY LOST PATERNITY

Maternal privacy interests certainly are implicated in laws promoting greater and more accurate designations of legal fathers at birth for children born to unwed mothers.¹⁸⁸ These interests are frequently urged to counter possible law reforms benefiting lost daddies.¹⁸⁹ These maternal interests primarily involve either “decisional privacy” or “information privacy.”¹⁹⁰ Decisional privacy “is usually defined as the right of individuals to make

genetic father to secure custody of Baby Richard pursuant to the earlier court order), *overruled by In re R.L.S.*, 844 N.E.2d 22 (Ill. 2006).

¹⁸⁸ While we recognize that some perceive a recent shift in the precedents from a focus on unenumerated substantive due process privacy rights to a focus on privacy interests as constituent values of the enumerated due process right to liberty, we do not see this shift as limiting in any ways our suggested reforms.

¹⁸⁹ See, e.g., the rather extreme position in E. Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother’s Consent to the Biological Father’s Co-Parenting of Her Child*, 48 ARIZ. L. REV. 97, 111 (2006) (the birth mother’s “constitutional right to direct the moral upbringing of her child should include . . . the power to prevent another from becoming a parent to her child”). See also Cecily L. Helms and Phyllis C. Spence, *Take Notice Unwed Fathers: An Unwed Mother’s Right to Privacy in Adoption Proceedings*, 20 WIS. WOMEN’S L.J. 1, 39–40 (2005) (“A father’s rights are not, and should not be, dependent on a birth mother’s disclosures[;]” as a mother has a right to privacy, less intrusive means are available in adoption cases to meet putative fathers’ rights, like putative father registries).

Maternal privacy interests also are urged by those concerned with certain childcare decisions made by women who are often uninformed. For example, some see these interests in informed decisionmaking undermined in current laws on maternal consents to adoption. See, e.g., Elizabeth J. Samuels, *Time to Decide? The Laws Governing Mothers’ Consents to the Adoption of Their Newborn Infants*, 72 TENN. L. REV. 509, 511 (2005) (states do not adequately promote mothers’ deliberate decision making). The 1989 Florida high court decision in *In re Doe*, 543 So. 2d 741 (Fla. 1989) provides a good fact pattern on which to chew (there, the mother’s plea of coercion was denied).

¹⁹⁰ Such privacy interests are often judicially recognized. See, e.g., *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 178–79 (3d Cir. 2005) (constitutional right to privacy protects “interest in avoiding disclosure of personal matters, and . . . in independence in making certain kinds of important decisions”). Another category of privacy interests, at times called locational or situational, or described as ties to physical space, have been recognized, but such interests seem largely irrelevant to legal paternity designations, so they are not further analyzed. As well, we do not consider any privacy interests arising in contract.

certain kinds of fundamental choices with respect to their personal and reproductive autonomy, and has its locus in the constitutional jurisprudence of *Roe v. Wade* and *Griswold v. Connecticut*.¹⁹¹ Information privacy is “usually defined as the right of individuals to control information about themselves,” drawing “primarily upon the tort law of privacy, state and federal legislation, and constitutional protections guaranteed by the First and Fourth Amendments.”¹⁹² Neither decisional privacy nor information privacy¹⁹³ foreclose, however, our suggested law reforms that would limit maternal conduct and expand governmental responsibilities regarding legal paternity.¹⁹⁴

A. Decisional Privacy

While the notion of a person’s right to decisional privacy perhaps first gained a foothold with the publication of “The Right to Privacy” in the

¹⁹¹ Neil M. Richards, *The Information Privacy Law Project Reviewing the Digital Person: Privacy and Technology in the Information Age*, 94 GEO. L.J. 1087, 1089 (2006) (book review). Perhaps the broadest statement by the U.S. Supreme Court on decisional privacy appears in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992), an abortion case wherein the Court said: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.” Criticisms of the passage (including failed arguments) are reviewed in Teresa Stanton Collett, *The Creation and Taking of Human Life: The Court’s Confused (and Confusing) Understanding of the Creation and Taking of Human Life*, 68 MONT. L. REV. 265 (2007).

¹⁹² Richards, *supra* note 191, at 1089.

¹⁹³ While we employ Professor Richards’ general descriptions of decisional and informational privacy, we recognize that not all cases nearly fit his scheme. *See id.* For example, neither the *Roe* nor *Griswold* rulings on decisional privacy is significantly understood as a First Amendment case (which to Richards prompts informational privacy). *Id.* *But see* *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (“If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.”), which seemingly involves one’s personal autonomy rather than control of information about oneself.

¹⁹⁴ We admit to some uncertainty on the nature of governmental interests sufficient to limit decisional or information privacy. *See, e.g.*, Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 235 (2006). Yet whatever the standard (strict scrutiny, undue burden, rational basis), we believe maternal privacy interests provide no significant barriers to our suggested paternity law reforms.

Harvard Law Review in 1890,¹⁹⁵ it took quite some time for the notion to gain serious attention from American lawmakers. Decisional privacy is a relatively new legal concept in the United States. Attention grew after the 1965 United States Supreme Court decision in *Griswold v. Connecticut*,¹⁹⁶ which held that a married couple had a right to privacy with respect to “what to do in the privacy of their marital bedrooms, without the intruding nose of the state of Connecticut.”¹⁹⁷ Governmental intrusion there involved decisions regarding contraceptive use.

In *Griswold*, the U.S. Supreme Court invalidated a Connecticut statute prohibiting the use of “any drug, medicinal article or instrument for the purpose of preventing conception”¹⁹⁸ The statute was challenged by the Executive Director and the Medical Director of the Planned Parenthood League of Connecticut after they were charged and fined under a related statute that allowed criminal sanctions against anyone who assists another to commit a crime.¹⁹⁹ Once recognizing that the challengers had standing to raise the constitutional rights of married people,²⁰⁰ the Court noted that marriage was a “relationship lying within the zone of privacy created by several fundamental constitutional guarantees.”²⁰¹ The Court then said that “a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.”²⁰² The Court concluded American governments could not generally deny married couples decisional authority on contraceptive use.

In *Eisenstadt v. Baird*, the U.S. Supreme Court decided in 1972 that a Massachusetts statute allowing the distribution of contraceptives to married persons, but not single persons, violated equal protection principles.²⁰³ The Court defined the right to privacy to include “the right of an individual . . . to be free from unwarranted governmental intrusion into matters so

¹⁹⁵ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195–96 (1890) (reviewing cases involving, inter alia, defamation, breach of confidence and invasion of property and designating them as “right to privacy” cases).

¹⁹⁶ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁹⁷ Ken Gromley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1392.

¹⁹⁸ *Griswold*, 381 U.S. at 480–85.

¹⁹⁹ *Id.* at 480.

²⁰⁰ *Id.* at 481.

²⁰¹ *Id.* at 485.

²⁰² *Id.*

²⁰³ *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972).

fundamentally affecting a person as the decision whether to bear or beget a child.”²⁰⁴

*Roe v. Wade*²⁰⁵ followed in 1973. There the U.S. Supreme Court found that for a pregnant woman, married or single, the “right of personal privacy includes the abortion decision but that this right is not unqualified and must be considered against important state interest in regulation.”²⁰⁶ Thus, the Court allowed American governments to promote in some ways their interests in “safeguarding health, maintaining medical standards and protecting potential life.”²⁰⁷ As to a “compelling” state interest that could limit the right, the Court said American states could normally deny abortion access where there was viable human life.²⁰⁸ By contrast, the Court found abortion decisions early in pregnancy generally could not be made by the state, but rather were for women, upon consultation with their physicians and other health professionals.²⁰⁹ The Court concluded that a “state criminal abortion statute of the current Texas type, that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved” violated the Due Process Clause of the Fourteenth Amendment.²¹⁰

While the *Roe* Court did not allow absolute state power over abortion decisions, it also did not allow a pregnant woman unfettered decision-making regarding childbirth. A woman’s right to choose early in pregnancy remains relatively strong thirty-five years after *Roe*.²¹¹ The government’s interest in potential viable human life remains a potential barrier to female decision making, especially where there is no health danger. The rationale in *Roe* suggests that what happens to a child once born cannot be subject to exclusive maternal control. While potential fathers cannot participate much in decisions on prenatal care, nor on pregnancy termination, a father can fully participate in childrearing once a child is born. In fact, under prevailing public policies, a father typically merits an equal opportunity to rear children, such that unilateral decision

²⁰⁴ *Id.* at 453.

²⁰⁵ *Roe v. Wade*, 410 U.S. 113 (1973).

²⁰⁶ *Id.* at 154.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 163–64.

²⁰⁹ *Id.* at 164.

²¹⁰ *Id.*

²¹¹ *See, e.g., Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846 (1992); *Gonzales v. Carhart*, 127 S. Ct. 1610, 1626–27 (2007).

making by a mother cannot be tolerated. A law strongly encouraging, if not usually requiring, a new mother, in good-faith, to identify or help to identify the potential father does not significantly undercut her decisional privacy on whether to bear a child. Perhaps a similar law can even operate postviability²¹² but prebirth, where abortion decision making rights are quite limited and future births are likely. A woman's right to make important decisions about pregnancy should not encompass absolute control over childcare decisions after (or about) birth.²¹³ Of course, childcare decisions by custodial mothers are less susceptible to government regulation when, for example, the religious views²¹⁴ or the health interests of the mothers²¹⁵ are in play. And childcare decisions by custodial mothers recognized by courts as having the final say are less susceptible to government interference though there are noncustodial fathers with some constitutionally-protected childrearing rights.²¹⁶

The decisional privacy interests accorded to married and unmarried people regarding contraception, and to pregnant women regarding abortion, significantly differ from maternal decisions about paternity of children born alive. Decisions on whether to have a baby differ from decisions on how to raise a baby once it is born. Legal paternity designations typically are made postbirth; they thus come only after, and

²¹² In fact, many pregnant women with pre-viable fetuses who learn about their postviability paternity identification duties will make more informed decisions about abortion.

²¹³ Cf. Kimberly Yuracko, *Illiberal Education: Constitutional Constraints on Homeschooling*, 95 CAL. L. REV. (forthcoming 2008), available at <http://ssrn.com/abstract=980100> (states can not only regulate homeschooling, but also must regulate in order "to ensure that homeschooled children received a basic minimum education and are not severely disadvantaged in their educational opportunities because of sex").

²¹⁴ *McGrath v. Mountain*, 784 So. 2d 607, 607–08 (Fla. Dist. Ct. App. 2001) (mothers immunization wishes on religious/medical ground upheld over father's). See also *In re Shmuel G.*, 2005 WL 2183648 (N.Y. Fam. Ct. Feb. 7, 2005); *Diana H. v. Rubin*, 171 P.3d 200 (Ariz. Ct. App., 2007). In both instances children were in state custody, but the mothers' religious convictions regarding immunization were followed. *In re Shmuel G.*, 2005 WL 2183648, at *2, *4; *Diana H.*, 171 P.3d at 201–02, 207–08.

²¹⁵ For example, mothers (or fathers) can object to child custody/visitation orders benefiting fathers (or mothers) where the objectors' health interests are placed at risk, as where children would be placed in environments that would necessarily expose the objectors to health risks such as exposure to second-hand smoke or other materials which could be dangerous to them. See *Badeaux v. Badeaux*, 541 So. 2d 301, 303 (La. Ct. App. 1989). The custody agreement was altered for various reasons—one being the existence of second-hand smoke in the father's home. *Id.* at 302–03.

²¹⁶ *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 16–17 (2004).

only pertain when, a woman has decided to bear a child.²¹⁷ It is well recognized that once a woman gives birth her childrearing authority (and that of any other legal parent) is far from absolute.²¹⁸ Limits can be grounded on governmental interests²¹⁹ as well as on paternity interests²²⁰ or children's interests.²²¹ Thus, mothers need not be accorded absolute decision-making powers over such matters as placing children for adoption or abandoning children at shelters. Unfortunately, absolute maternal authority is sometimes wrongly accorded even though there are strong countervailing state and individual interests.

B. Information Privacy

While decisional privacy seemingly blossomed in the mid-twentieth century,²²² information privacy seemingly developed earlier. Warren and

²¹⁷ On occasion paternity designations can occur prebirth, but typically only attain legal significance upon live birth. *Compare* HAW. REV. STAT. § 584-3.5 (2006) (voluntary paternity acknowledgment may be filed prior to birth) *with* UTAH CODE ANN. § 78-45g-304(a) (2007) (after birth).

²¹⁸ While all agree that the childrearing authority of legal parents is limited, there are spirited debates about the nature of such limits in certain settings, though not usually in settings involving decisions to raise children alone where there are existing legal parentage rights and interests of others. One area of debate involves grandparent visitation orders over the objection of one parent where the other parent (usually the child of the interested grandparent) has died. *Compare* *Von Eiff v. Azicri*, 720 So. 2d 510, 514 (Fla. 1998) (rejecting a grandparent's request for visitation rights to favor the parent's right of privacy) *with* *Hiller v. Fausey*, 904 A.2d 875, 901–02 (Pa. 2006) (more accommodating to a grandparent).

²¹⁹ *See, e.g.*, *Jacobson v. Massachusetts*, 197 U.S. 11, 38–39 (1905) (compulsory vaccination laws protect local communities against the spread of smallpox).

²²⁰ In part, paternity interests (as well as children's best interests) are usually promoted by legal presumptions about genetic ties (as with husbands whose wives bear children) that trigger childrearing rights (as well as child support duties), so that maternal consent is unnecessary.

²²¹ Consider, for example, laws allowing adoptees, who have reached the age of majority, to have access to their own adoption records without a showing of good cause and without the consent of the biological parents. *See, e.g.*, OR. REV. STAT. § 109.502 (2005) and TENN. CODE ANN. § 36-1-127 (2005). Consider, as well, Janet Leach Richards and Sheryl Wolf, *Medical Confidentiality and Disclosure of Paternity*, 48 S.D. L. REV. 409, 442 (2003) (concluding that when issues involving incorrect paternity designations arise for physicians, the "child's medical records should note the paternity conflict and be made available to the child upon attaining maturity").

²²² *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

Brandeis in their Harvard piece noted a right “to be let alone,” identified by Judge Cooley,²²³ and concluded it merited some protection, especially given emerging technology,²²⁴ though there should be some limitations.²²⁵

Information privacy rights and interests of mothers who seek to control information about themselves are recognized in constitutional law, tort law, and elsewhere.²²⁶ They encompass both wishes by mothers not to be compelled to reveal information about their children, and wishes by mothers not to have others compelled to reveal, or even approached for, information about their children. As unwanted information gathering (outside maternal controls) can be undertaken publicly or privately, there can be both constitutional (e.g., privacy) and nonconstitutional (e.g., tort) barriers to accessing information about childbirth that are founded on maternal privacy.²²⁷

One case with language on mothers who wished not to be compelled by government to reveal “information” about their children is *Lehr v. Robertson*.²²⁸ There, the United States Supreme Court found in 1983 that the biological father of a child born out of wedlock did not have an “absolute right to notice and the opportunity to be heard” before his child could be adopted.²²⁹ Though the biological father knew of the child, he did not early on develop a parent-child relationship, provide child support, or register with the state putative father registry.²³⁰ The biological father, in

²²³ Warren & Brandeis, *supra* note 195, at 195 (citing THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (2d ed. 1888)).

²²⁴ For example, Kodak had recently introduced the instant camera at a price allowing many access to picturing their neighbors instantly; and, newspapers were entering more fully into the gossip business. Warren & Brandeis, *supra* note 195, at 195. For the view that information privacy “has received very little attention from the Supreme Court” but merits “much more protection,” see Erwin Chemerinsky, *Rediscovering Brandeis’s Right to Privacy*, 45 BRANDEIS L.J. 643, 644 (2007).

²²⁵ Warren & Brandeis, *supra* note 195, at 214–19.

²²⁶ For a comparison of American and English experiences with information privacy, see Neil M. Richards and Daniel J. Solove, *Privacy’s Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 124–25 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=969495.

²²⁷ For a mother’s privacy, there can be limits on information giving by others as well as on information gathering by others. Consider, e.g., D. Utah Loc. R. 7–3 (“Constraints on Disclosing Personal Data in Civil Filings;” suggested limits cover “medical records”).

²²⁸ *Lehr v. Robertson*, 463 U.S. 248 (1983).

²²⁹ *Id.* at 250.

²³⁰ *Id.* at 251–52.

fact, did not assert paternity rights until the child was over two, at a time when an adoption proceeding initiated by the mother and her husband was pending.²³¹ The biological father alleged that the biological mother concealed her whereabouts after birth and obstructed his attempts at child contact and child support.²³² In the pertinent language, Justice White stated in dissent:

Absent special circumstances, there is no bar to requiring the mother of an illegitimate child to divulge the name of the father when the proceedings at issue involve the permanent termination of the father's rights. Likewise, there is no reason not to require such identification when it is the spouse of the custodial parent who seeks to adopt the child. Indeed, the State now requires the mother to provide the identity of the father if she applies for financial benefits under the Aid to Families with Dependent Children Program The state's obligation to provide notice to persons before their interests are permanently terminated cannot be a lesser concern than its obligation to assure that state funds are not expended when there exists a person upon whom the financial responsibility should fall.²³³

We believe there remains no bar and that Justice White's sentiments are today reflected in state public policies, including equal treatment for mothers and fathers and a desire that there be two parents for every child conceived by consensual sex.

A federal constitutional privacy right relating to maternal control of personal information on childbirth obtained by government from others can be grounded in the 1977 United States Supreme Court decision *Whalen v. Roe*.²³⁴ There the Court examined the constitutionality of New York statutes requiring information be provided to the state by physicians and others about individuals who were prescribed controlled substances.²³⁵ Specifically, physicians lawfully prescribing schedule II controlled substances were required to provide the names and addresses of the prescription recipients to New York for collection in a Department of

²³¹ *Id.* at 252.

²³² *Id.* at 269 (White, J., dissenting).

²³³ *Id.* at 273 n.5.

²³⁴ *Whalen v. Roe*, 429 U.S. 589 (1977).

²³⁵ *Id.* at 593.

Health database. The governmental purpose was to help the state identify individuals who were improperly accessing regulated substances.²³⁶ Access to the database was significantly restricted and paper prescription forms were securely kept.²³⁷ In *Whalen*, the prescription recipients argued the statute invaded “a constitutionally protected ‘zone of privacy.’”²³⁸ The high Court identified two interests often associated with privacy, an “individual interest in avoiding disclosure of personal matters” and “independence in making certain kinds of important decisions.”²³⁹ The disclosure of names was said by the Court to implicate the first interest. In *Whalen*, the Court determined that the New York scheme did not unlawfully infringe upon any privacy interests.²⁴⁰ The Court noted the legitimate governmental interests included the minimizing of “the misuse of dangerous drugs.”²⁴¹ The Court also found the protections against erroneous disclosures were adequate, demonstrating a “proper concern with, and protection of, the individual’s interest in privacy.”²⁴² Because there were adequate security measures, the Court did not discuss any scenario with a significant chance of unwarranted information disclosure.²⁴³ As with drugs, the identification of a potential father by physicians and other health care professionals serving a mother could involve a recordkeeping system carefully crafted to protect against improper disclosures while simultaneously promoting important state goals.²⁴⁴

²³⁶ *Id.* at 591–92.

²³⁷ *Id.* at 593 (paper prescription forms were also to be destroyed after five years).

²³⁸ *Id.* at 598.

²³⁹ *Id.* at 599–600.

²⁴⁰ *Id.* at 600.

²⁴¹ *Id.* at 597–98 (noting there was “nothing unreasonable in the assumption that the patient-identification requirement might aid in the enforcement of laws designed to minimize the misuse of dangerous drugs,” in that it would deter potential violators and “aid in the detection or investigation” of drug abuse).

²⁴² *Id.* at 605.

²⁴³ *Id.* at 605–06.

²⁴⁴ Compare, e.g., *Bradley v. Children’s Bureau of South Carolina*, 274 S.E.2d 418 (S.C. 1981) (upon showing of “good cause,” adopted child can secure identity of natural parents though they had a general, constitutionally-protected expectation of privacy arising from adoption statutes) with *Doe v. Ward Law Firm, P.A.*, 579 S.E.2d 303 (S.C. 2003) (“good cause” shown for release of adoption file as adopted child had both physical and mental health issues). For an excellent review of medical information privacy and compulsory disclosure laws after *Whalen v. Roe*, see Wendy K. Mariner, *Mission Creep: Public Health Surveillance and Medical Privacy*, 87 B.U. L. REV. 347 (2007).

When information on paternity is sought by private actors where the mothers object on privacy grounds, the constitutional restraints imposed by *Whalen* and comparable federal constitutional precedents limiting governmental actions may still come into play. They are relevant when private actors so significantly employ governmental mechanisms in seeking the information, such as depositions in civil cases or freedom of information requests, that the so-called constitutional “state action” requirement is met.²⁴⁵ They are not relevant, however, where private information gathering about paternity does not significantly employ governmental mechanisms, such as on-the-street conversations with the mothers or with her friends or family members.

A paternity or marriage dissolution case illustrates the boundaries on nongovernmental actors securing information from mothers about paternity when governmental mechanisms are employed. In such cases, mothers usually can be compelled to reveal information relevant to paternity designations.²⁴⁶ For example, in a paternity case involving an unwed mother and an alleged genetic father, questions about the mother’s sexual acts will be forbidden when they are not relevant, as when the alleged father is estopped from denying genetic ties²⁴⁷ or when the questions

²⁴⁵ See, e.g., Privacy Act of 1974, 5 U.S.C. § 552(a) (2000).

²⁴⁶ See, e.g., CAL. FAM. CODE § 7551 (West 2004) (paternity tests may be ordered for a mother, child and alleged genetic father in a suit involving paternity of the child). Compare *People v. Hernandez*, 2007 WL 2123760 (Cal. Ct. App. 2007) (applying state statute requiring a criminal defendant involved in certain sexual offenses to submit to HIV testing if there is “probable cause to believe” a bodily fluid capable of transmitting HIV was transferred to the victim) with *John B. v. Superior Court*, 137 P.3d 153, 167–68 (Cal. 2006) (wife needs good cause to access via discovery her husband’s sexual “history” in her tort claims on her HIV infection; even with access, appropriate confidentiality—via “in camera review, orders to seal documents, protective orders and other measures”—must also be insured).

²⁴⁷ See also ME. REV. STAT. ANN. tit. 19-A, § 1506 (2007), which says:

When the department seeks to establish paternity of a dependent child, any inquiry about prior or current sexual activity of a recipient of public assistance must be limited to that necessary to resolve a genuine dispute about the parentage of a child. When a custodial mother has informed the department that a particular man is the father of her child, the department may make no further inquiry into her personal life unless the man so identified has denied that he is the father of that child or he refuses to cooperate.

involve sexual conduct outside the time of conception.²⁴⁸ Similarly, in a marriage dissolution case inquiries about sex can be precluded, as when a marital paternity presumption is not subject to rebuttal.²⁴⁹

The limits on nongovernmental actors who, during governmental proceedings, seek information on the paternity of certain children from non-mothers are similarly illustrated in both paternity and divorce cases. In only some circumstances (i.e., relevance) might a mother's friends or family members be questioned about the mother's sexual liaisons. So, questions about a mother's sex acts are unauthorized when an alleged genetic father (unwed man, or husband as presumed father) is estopped from denying paternity due to lack of genetic ties (as when the time to rescind a voluntary paternity acknowledgement has run, or when the marital paternity presumption is irrebuttable or not then subject to rebuttal because of estoppel).

In the wholly private realm, there are also limits on information gathering relating to paternity when information is sought from the mothers directly. For example, certain tort law principles foreclose private actors from asking women about the paternity of their children at least in some settings. There is the possible tort of "unreasonable intrusion upon the seclusion of another" which encompasses "highly offensive prying into the . . . affairs of another person" that involve "private" matters.²⁵⁰ This

²⁴⁸ See, e.g., *Fults v. Superior Court*, 88 Cal. App. 3d 899 (Cal. Ct. App. 1979) (not even incremental encroachment on privacy right to learn information which may lead to relevant information is allowed without legitimate and overriding compelling state interest).

²⁴⁹ See, e.g., CAL. FAM. CODE § 7540-41(b) (West 2004) (husbands, children, and some genetic fathers may not rebut presumption more than two years from the child's date of birth). Of course, not all marital paternity presumptions may be irrebuttable, as when denials of rebuttal opportunities infringe upon the constitutional rights of unwed genetic fathers (who, for example, have stepped up to parenthood under *Lehr*, via actual parenting or designations on birth certificates). See, e.g., *Callender v. Skiles*, 591 N.W.2d 182, 192 (Iowa 1999) (state constitutional due process liberty interest for unwed natural father in his child, even when child is born into an intact marriage, as long as the natural father demonstrates "a serious and timely expression of a meaningful desire to establish parenting responsibility").

Of course, though information on paternity (and thus on very personal matters) is subject to court-authorized investigation procedures (as depositions and interrogatories), that same information may not be available to all outsiders to the litigation who wish to see the results. See, e.g., *Burkle v. Burkle*, 37 Cal. Rptr. 3d 805 (Cal. Ct. App. 2006) (court records in dissolution cases are presumptively open).

²⁵⁰ *Lovgren v. Citizens First Nat. Bank*, 534 N.E.2d 987, 988-89 (Ill. 1989) (declining to determine the status of this tort though there were conflicting lower court decisions). The

(continued)

(and any comparable) tort do not foreclose implementation of our suggested paternity law reforms.

As well, in the wholly private realm there are limits on private information gathering from non-mothers as to paternity.²⁵¹ Data may be sought by phone calls, emails or in-person conversations. Again, tort law principles can bar inquiries. For example, there is the tort of intentional infliction of emotional distress, typically involving extreme and outrageous conduct (intentional or reckless).²⁵² Here too, our suggested reforms are not implicated.

It should also be noted that in the private realm, certain information seekers may have greater inquiry opportunities. For example, the First Amendment protections afforded the press seemingly allow newspaper reporters to gather and employ data in ways unavailable to others. As an illustration of this principle, the media has a well-recognized right to disclose truthful information,²⁵³ even when the means used to obtain that information are questionable. Dissemination by the press of private information obtained illegally has been deemed protected by the First Amendment when the information is a matter of public interest. In *Bartnicki v. Vopper*²⁵⁴ in 2001, the U.S. Supreme Court effectively allowed the publication by the press of an illegally recorded cell phone conversation between two union officials involved in a school district negotiation. A tape of the conversation was provided to a member of the media who then played the conversation on a radio program.²⁵⁵ School

tort was recognized and applied in *Mlynek v. Household Finance Corp.*, No. 00 C 2998, 2000 WL 1310666 (N.D. Ill. 2000) (no tort for creditors phone calls to alleged debtor regarding nonpayment) and *Schiller v. Mitchell*, 828 N.E.2d 323, 328–29 (Ill. App. Ct. 2005) (no tort for neighbor’s video surveillance of claimant’s property).

²⁵¹ See *supra* note 250.

²⁵² *Alvarado v. KOB-TV*, 493 F.3d 1210 (10th Cir. 2007) (New Mexico tort does not include publication of truthful, albeit embarrassing or humiliating information; court also reviews New Mexico invasion of privacy torts involving intrusion into seclusion and public disclosure of private facts—which can embody “true but intimate . . . facts . . . such as matters concerning . . . sexual life”, but which is not implicated when there is “a legitimate public interest in the information”). Of course, quite different are possible tort claims when in soliciting information from non-mothers, the mothers are placed in a false light (i.e., publicized matter is false). See, e.g., *Welling v. Weinfeld*, 866 N.E.2d 1051 (Ohio 2007) (invasion of privacy claim recognized after differing state approaches are reviewed).

²⁵³ See, e.g., *New York Times Co. v. United States*, 403 U.S. 713 (1971).

²⁵⁴ *Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001).

²⁵⁵ *Id.* at 519.

district contract negotiations garnered enough public interest so that concerns about illegality were overcome.²⁵⁶

There is at least one case, however, where media publication of truthful paternity information did violate the opportunities for mothers to “control information about themselves.” In that case, the media acted not only under statutory mandates, but also in conjunction with court proceedings so that state action was very clear. At the time of *G.P. v. Florida*,²⁵⁷ Florida statutes²⁵⁸ required publication in newspapers of information on the sexual acts of women who were placing their children for adoption. These laws, intended to notify fathers of their potential loss of paternity rights and interests, were held unconstitutional.²⁵⁹ A Florida appellate court, employing strict scrutiny, held in *G.P.* in 2003 that the state was required to show the statutes “serve a compelling state interest and that they accomplish the intended result, i.e., notice to fathers, through the use of the least intrusive means.”²⁶⁰ The court ruled that the manner in which the information was disseminated (i.e., newspaper publication) violated the mothers’ privacy right under the Florida constitution,²⁶¹ as there was no compelling state interest and as the statutes were not narrowly drawn to meet the legitimate state interest in notification.²⁶²

Not surprisingly, given *Bartnicki* and *G.P.*, a government which gathers information on paternity must secure that information by means that limit, as best possible, its potential misuse. In *Planned Parenthood of*

²⁵⁶ *Id.* at 535 (at least where the illegal recording was not undertaken by the media). See also *Jean v. Mass. State Police*, 492 F.3d 24 (1st Cir. 2007) (applying *Bartnicki* to a woman who posted on her website a tape of a police search illegally recorded by another, as the search was a matter of public concern).

²⁵⁷ *G.P. v. Florida*, 842 So. 2d 1059 (Fla. Dist. Ct. App. 2003). The case and its problematic aftermath are reviewed in Jeffrey A. Parness, *Adoption Notices to Genetic Fathers: No to Scarlet Letters, Yes to Good-Faith Cooperation*, 36 CUMB. L. REV. 63 (2005) [hereinafter Parness, *Scarlet Letters*] (although finding *G.P.* correctly decided, arguing that the General Assembly should not thereafter have relied on putative father registries and paternity lawsuits to protect the paternity opportunity interests of unwed fathers whose children are placed for adoption by unwed mothers).

²⁵⁸ *G.P.*, 842 So. 2d at 1061–62; FLA. STAT. § 63.087(6)(f) and § 63.088(5) (repealed).

²⁵⁹ *G.P.*, 842 So. 2d at 1063.

²⁶⁰ *Id.* at 1062.

²⁶¹ *Id.* (FLA. CONST. ART. I, § 23 recognizes a natural person “has the right to be let alone and free from governmental intrusion into the person’s private life”).

²⁶² *Id.* at 1063 (insufficient governmental interest to override “privacy rights of the mother and child in not being identified in such a personal, intimate, and intrusive manner”; alternative and “more narrowly tailored” intrusions are not addressed).

Southern Arizona v. Lawall,²⁶³ a federal appellate court considered an Arizona parental notification statute covering minors seeking abortions.²⁶⁴ It was argued that the information conveyed under the statute violated a minor's "privacy interest in avoiding disclosure of sensitive personal information."²⁶⁵ The court stated: "Like the right to decide whether to terminate a pregnancy, the right to informational privacy is not absolute; rather, it is a conditional right which may be infringed upon a showing of proper governmental interest."²⁶⁶ The court concluded that there existed legitimate interests and that the confidentiality provisions in place were sufficient in their protection of information privacy rights.²⁶⁷ A few years later the same appellate court, in *Tucson Woman's Clinic v. Eden*,²⁶⁸ examined Arizona laws requiring both that abortion providers give unredacted information on abortion services to a medical licensing board and that there be complete access to that information by employees of the Department of Health Services.²⁶⁹ The court ruled that the scheme violated the information privacy rights of patients.²⁷⁰ The court was concerned with the excessive opportunities for access to the records, saying that even "if a law adequately protects against public disclosure of a patient's private information, it may still violate informational privacy rights if an unbounded, large number of government employees have access to the information."²⁷¹ The problem was unfettered access. However, a scheme evidently would be proper where a mother discloses information about the possible or actual genetic father of her child only when it is relevant (and perhaps critical) to a public or private inquiry, is narrowly tailored to achieve the need for identification, and contains stringent safeguards on

²⁶³ *Planned Parenthood of S. Ariz. v. Lawall*, 307 F.3d 783 (9th Cir. 2002).

²⁶⁴ ARIZ. REV. STAT. ANN. § 36-2152(D), (F) (2007).

²⁶⁵ *Lawall*, 307 F.3d at 789.

²⁶⁶ *Id.* at 790.

²⁶⁷ *Id.*

²⁶⁸ *Tucson Woman's Clinic v. Eden*, 379 F.3d 531 (9th Cir. 2004).

²⁶⁹ ARIZ. REV. STAT. ANN. § 36-2301.02(B) and (C) (2007); ARIZ. ADMIN. CODE § 9-10-1511(A)(4)(b) and (c) (2007) (placed no restriction on employee access to unredacted information); ARIZ. ADMIN. CODE § 9-10-1504(B) (2007) (no nondisclosure requirements for a board receiving the information.).

²⁷⁰ *Eden*, 379 F.3d at 553-54.

²⁷¹ *Id.* at 551-52.

access, including penalties for any breach.²⁷² Illustrative is a provision in the New Jersey Parentage Act which says:

Notwithstanding any other law concerning public hearings and records, any action or proceeding held under this act shall be held in closed court without admittance of any person other than those necessary to the action or proceeding. All papers and records and any information pertaining to an action or proceeding held under this act which may reveal the identity of any party in an action, other than the final judgment or the birth certificate, whether part of the permanent record of the court or of a file with the State registrar of vital statistics or elsewhere, are confidential and are subject to inspection only upon consent of the court and all parties to the action who are still living, or in exceptional cases only upon an order of the court for compelling reason clearly and convincingly shown.²⁷³

So, an American state's interest in identifying both genetic parents of a newborn conceived as a result of consensual sex is usually deemed substantial. These interests include preserving or providing for each parent the opportunity to develop a parent-child relationship, identifying potential health issues for the child, and establishing financial and emotional support for the child. Precedents before and after *Lehr* and *Whalen* have regularly recognized the legitimacy of these goals.

Constitutional information privacy cases involving inquiries into paternity by, or supported by, government go beyond *Lehr* and *Whalen*. At times, precedents employ the Fourth Amendment ban on unreasonable

²⁷² Pre- and post-*Bartnicki* information privacy cases in the federal circuit courts of appeal are reviewed in Jessica Ansley Bodger, Note, *Taking the Sting Out of Reporting Requirements: Reproductive Health Clinics and the Constitutional Right to Informational Privacy*, 56 DUKE L.J. 583, 593–601 (2006).

²⁷³ N.J. STAT. ANN. § 9:17-42 (West 2007). This is similar to the restrictions placed by courts on the dissemination and use of medical information relevant in a tort case where informational privacy protection is deemed only partially waived. See, e.g., *Brende v. Hara*, 153 P.3d 1109, 1115–16 (Haw. 2007) (medical information privacy order in an auto accident case guided by state constitutional information privacy interests).

searches and seizures.²⁷⁴ The Fourth Amendment, however, does not undermine our suggestions. The information on paternity sought from or about new mothers is typically used solely for paternity identification and parental notification purposes in reasonable ways. Access to the gathered information is restricted to those persons directly involved in implementing governmental policies on parenthood. Of course, Fourth Amendment privacy protections do not encompass instances where information is voluntarily revealed.²⁷⁵

State constitutional rights can also serve as independent, and additional, sources of information privacy rights. For example, in 1998 in *Kunkel v. Walton*, the Illinois Supreme Court held that the express state constitutional protections involving “people” being “secure in their persons” against “invasions of privacy” went “beyond federal constitutional guarantees” so as to protect against unreasonable disclosures of patients’ “personal medical information.”²⁷⁶ Yet here, as with federal constitutional precedents, there is little to restrain American governments with legitimate interests in accessing information about children.²⁷⁷

Contemporary state and federal legislation demonstrate the significant governmental interests in limiting or denying maternal control over information about children. These laws, however, also protect against unnecessary public and private disclosure of the personal information on

²⁷⁴ See generally *Boyd v. United States*, 116 U.S. 616, 633–35 (1886); *Olmstead v. United States*, 277 U.S. 438, 464–66 (1928); *Katz v. United States*, 389 U.S. 347, 353 (1967) (areas where persons have a reasonable expectation of privacy.)

²⁷⁵ See *United States v. Miller*, 425 U.S. 435, 441–43 (1976) (bank records); *Smith v. Maryland*, 442 U.S. 735, 743–45 (1979) (phone records).

²⁷⁶ *Kunkel v. Walton*, 689 N.E.2d 1047, 1055–56 (Ill. 1997).

²⁷⁷ See, e.g., *id.* at 1056 (it is reasonable to require a patient to disclose medical information otherwise subject to state constitutional privacy protections where the information is relevant to the issues in a lawsuit commenced by the patient). See also *Jacob B. v. County of Shasta*, 154 P.3d 1003, 1012 (Cal. 2007) (state constitutional privacy right can be infringed where there is a justified, competing interest; balancing shows “litigation privilege” can bar otherwise appropriate state constitutional privacy law claim). Consider as well that even when patients do not commence suits, they may still on occasion be questioned (e.g., deposition or trial testimony) when their medical histories are relevant and necessary (e.g., issues raised by other patients or by state licensing boards regarding doctor competency) for more accurate fact-finding in suits involving others. See, e.g., *United States v. Westinghouse*, 638 F.2d 570, 580–81 (3d Cir. 1980) (investigation into workplace safety would allow government to obtain from an employer the medical records of many employees; but, employees need prior notice and a chance to raise personal privacy claims [which may lead to bars against certain disclosures to third persons]).

children that is secured from mothers. For example, the federal Social Security Act, which requires mothers seeking financial aid to cooperate in good faith to establish paternity, mandates that expedited state paternity procedures contain safeguards “on privacy and information security” that apply to access opportunities to certain public records (including records on marriage, birth and divorce).²⁷⁸

Similarly, state birth certificate laws limit maternal control, but also limit the dissemination of collected information. For example, in Missouri there is a duty for those in attendance at a birth, including medical personnel, to record on a certificate of live birth such information as the date, place and time of birth; the sex of the newborn; the mother’s maiden name, birthdate and birthplace; the father’s name and date of birth; and, the mother’s weight before and during pregnancy.²⁷⁹ But there is often also an express confidentiality duty on those gathering information in order to complete birth certificates.²⁸⁰ Furthermore, information relevant to birth certificates often may not be collected in the presence of anyone other than personnel directly involved in providing care to mothers (usually hospital personnel).²⁸¹

IV. SUGGESTED LIMITS ON MATERNAL DECISIONMAKING

In what ways might current laws be altered so as to better protect paternal interests and rights, as well as to provide legal fathers for all newborns and to promote other social policies on paternity (as parental equality) while not unduly undermining maternal privacy?

In the safe haven setting, laws allowing at-will maternal (or any parental or custodial) abandonments should be eliminated. There would be very little cost, as the laws are largely unused. These laws send the wrong message about fathers. In the alternative, newborn abandonments should be allowed only where both legal parents (actual or potential) desire an end to parenthood, as is done with adoption placements of older children.

In the adoption setting, placements should usually require truer (or at least more informed) consent (actual or presumed) from both legal parents (actual or potential) where the placed children are born to unwed parents as

²⁷⁸ 42 U.S.C. § 666(c)(1)(D) (2000).

²⁷⁹ MO. CODE REGS. ANN. tit. 19, § 10-10.040 (2007) (interestingly, the mother’s and the father’s names are requirements distinct from the “signature of parent”).

²⁸⁰ *See, e.g.*, ILL. ADMIN. CODE tit. 77, § 500.20(c) (2000); 12 VA. ADMIN. CODE § 5-550-470 (2003) (registrar holding birth certificate may only disclose it to someone having “direct and tangible interest in the content”).

²⁸¹ *See, e.g.*, ILL. ADMIN. CODE tit. 77, § 500.20(d) (2000).

a result of consensual sex. Enhanced consent would be facilitated by better prebirth education on the legal parentage consequences upon birth for both women and men. After birth, adoptions should usually only go forward after more significant, or new, paternity inquiries are made when the child is fatherless. As well, the consequences of inaccurate paternity designations should be better understood, and, on occasion, prompt increased employment of anti-perjury and other similar sanctions. And often genetic ties should be investigated where serious questions are raised about who has been designated a father under law. Howard K. Stern was not the ultimate legal father of Anna Nicole Smith's daughter even though he was named on the birth certificate. There was significant evidence that he was not genetically tied even before the certificate was completed. The state has strong interests (especially in child welfare, finality, and accurate paternity records) that disallow suspicious designations of legal paternity or legal fatherhood in other settings (e.g., adoption) that are solely based on certifications by moms and alleged dads. "Good faith" cooperation in naming fathers during government inquiries is now already required for many unwed mothers seeking government aid for their children.²⁸²

In the birth record setting, public policies should better insure that both married and unmarried mothers more accurately name legal fathers at birth. Where mothers are married, in states where there are marital paternity presumptions that are easily rebutted by a showing of no genetic ties, married women should be better informed of the potential consequences of designating (or allowing designations of) their husbands as fathers when there is no biological connection and no actual or likely parental relationship between husband and child. Where marital presumptions are difficult to rebut, husbands should better understand that later proof of no genetic ties (and thus often of adultery by wives) may not be enough to undo paternity obligations since DNA testing is not always available or admissible.²⁸³ If the (sometimes stringent) state timing requirements for rebuttal, as well as the differing state norms for differing rebutters, were required to be communicated to all newly-designated

²⁸² See, e.g., 42 U.S.C. § 654(29)(A) (2000); N.J. STAT. ANN. § 2A:17-56.55 (West 2000) (applicants for Medicaid and public assistance, as well as Title IV-D benefits).

²⁸³ See, e.g., *Cravens v. Cravens*, 936 So. 2d 538, 542 (Ala. Civ. App. 2005) (wife could not rebut with DNA the marital presumption earlier recognized in a dissolution order); *Michael H.*, 491 U.S. at 124 (genetic father cannot rebut marital presumption; only husband and wife may rebut, under limited circumstances per the state statute); and 750 ILL. COMP. STAT. 45/8 (1993) (husband has 2 years to seek to rebut a marital presumption once he has "knowledge of relevant facts").

married parents,²⁸⁴ there should be little personal offense and a likely deterrence of some nasty paternity battles long after the children and others have developed family and other attachments (and detachments).

Where new mothers are married and where there are automatic paternity presumptions for their husbands, the wedded couples should also be better informed of the potential consequences if they are contemplating additional methods of paternity designation. For example, where a husband, who is already a presumed father, executes a paternity acknowledgment, the standards for later paternity disestablishment can become much more stringent. Thus, for a significant period of time in Wyoming, a husband was able to disestablish his presumed paternity (usually done during marriage dissolution) by showing no genetic ties, but could not disestablish his paternity by acknowledgment after sixty days if it was not “a result of fraud, duress or material mistake of fact.”²⁸⁵

When mothers are unwed, both signatories on birth certificates should better understand the consequences. It is not generally recognized that states vary significantly in their guidelines on overcoming non-marital paternity arising from such birth records. All of these birth records are seemingly guided by the single federal statutory directive that after sixty days, rescissions can occur only upon proof of “fraud, duress, or material mistake of fact, with the burden of proof on the challenger” to establish the paternity designation.²⁸⁶ Yet depending on the state and on the reason for challenge, there may be five years to act, ten years to act, or no written time limit.

There are other potential misunderstandings by birth certificate signatories. At times, but not always, laches or estoppel or a child’s best interest may preclude paternity disestablishment proceedings. And there

²⁸⁴ Further proposals on conveying better information to those considering voluntary paternity acknowledgments (or other paternity designation acts) were recently made by the Common Ground Project, reviewed in Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 376 (2005).

²⁸⁵ *DNW v. Dept. of Fam. Services*, 154 P.3d 990, 994 (Wyo. 2007) (under the since-amended WYO. STAT. ANN. § 14-2-102). As the information we would like to see conveyed is factual (i.e., legal requirements in the relevant state or states), is not a state’s “viewpoints” (i.e., does not contain “the state’s moral and philosophical objections” to contemplated acts), and does “promote independent decision making,” we see no First Amendment barrier.

²⁸⁶ 42 U.S.C. § 666(a)(5)(D)(iii) (2000).

are even important interstate variations on the meanings of the federal statutory terms of fraud, duress, and material mistake of fact.²⁸⁷

Where the legal consequences of parentage designations of both wed and unwed fathers are known, but where mothers nevertheless prompt erroneous paternity designations by affirmative deceit (and perhaps even where there is only silence in the face of the recognized ignorance of others), there should be consequences. Clearly, public policy does not now allow unwed mothers to select amongst their male friends the best potential fathers and then prompt paternity for the chosen men by lying about male genetic ties. Similarly, in the adoption setting, unwed mothers cannot alone designate the legal fathers or choose to proceed fatherless. Trial judges who preside in paternity and adoption proceedings always seek to promote traditional principles recognizing the importance of genetic ties and to protect the best interests of children. Unfortunately, both within and outside of the federal Social Security Act, there are insufficient deterrents to prevent fraud or other misconduct by mothers who fail to name, or who falsely name, the fathers of their children born in and outside of marriage.²⁸⁸ Little is done when married or unmarried women lie about the men who are and who are not the genetic fathers. Paternity rights and interests are undermined, as are societal norms regarding the import of genetic ties, the desire for two parents for every child born alive, and children's interests in knowing about or having the chance to know about, if not bond with, both genetic parents.

CONCLUSION

There should be differences in the laws governing abortion decisions and the laws governing maternal decisions about children in safe haven abandonment, adoption, and birth record settings. There are definitely differences in societal concerns about protecting potential human life and protecting born alive human life. For children as well (both actual and potential), there are important differences in laws governing pre-birth and

²⁸⁷ On the differing state laws on rescinding voluntary paternity acknowledgments under the federal law standards, see Parness, *New Federal Paternity Laws*, *supra* note 63, at 76–93.

²⁸⁸ On reforming the federal Social Security Act standards governing unwed mothers and voluntary paternity acknowledgments, see Parness, *New Federal Paternity Laws*, *supra* note 63, at 93–97. On reforming state adoption laws when unwed mothers place their children for adoption, see Parness, *Scarlet Letters*, *supra* note 257, at 76–80 (focusing on the infamous Florida “Scarlet Letter” laws, invalidated in *G.P. v. Florida*, 842 So. 2d 1059, 1063 (Fla. Dist. Ct. App. 2003), and the subsequent Florida “Putative Father Registry” law).

postbirth parenthood. There are differences between legal paternity rights affecting interests in potential human life and legal paternity rights affecting interests in children born alive. Accordingly, there should be differences between the laws allowing for the termination of potential or actual legal paternity before birth, and the termination of potential or actual legal paternity after birth.

Unfortunately, many American safe haven, adoption, and birth record laws reflect the abortion law policies that recognize relatively unconditional respect for exclusive maternal decisionmaking. We do not question *Roe v. Wade* here. Yet, when there are children born alive as a result of consensual sex, maternal decisionmaking affecting legal paternity should not always be promoted without regard for a child's best interests, the legal paternity interests or rights, or the strong social policies, including the favoring of two parents for each child born alive.