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THE RIGHTS OF PUTATIVE FATHERS TO THEIR INFANT CHILDREN IN CONTESTED ADOPTIONS: STRENGTHENING STATE LAWS THAT CURRENTLY DENY ADEQUATE PROTECTION

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INTRODUCTION

"The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not endangered."[1] For unwed fathers of infants[2] in the United States, this principle is not readily accepted. Putative father registries and safe haven laws make it too easy for a state to discard a father's interest in the adoption of his infant child. Further, when a father has established his interest to contest the adoption of his infant child, the courts disadvantage the natural father-child relationship by granting *pendente lite*[3] custody to preadoptive parents during the legal proceedings. These statutes and procedures often do not adequately protect a father's interest in gaining custody of his infant child. In extreme cases, the statutes violate fathers' constitutional parental rights by relying on the presumption that unwed fathers are unfit parents. This assumption attempts to improve expediency in securing adoptive placements for illegitimate children, which ultimately denies fathers due process. The Supreme Court has said that "[p]rocedure by presumption is always cheaper and easier than individualized determination"[4] and "[i]t may be . . . that most unmarried fathers are unsuitable and neglectful parents."[5] But when procedure denies a determination of the relevant issues of competence and care, "it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand."[6]

This paper argues that states need to strengthen protection of putative fathers'[7] rights to their infant children when the mother wishes for the child to be adopted. Part I frames the discussion around established parental rights through constitutional case law. To do this, the paper addresses both the Supreme Court's parental rights doctrine and its bi-

1. JANE FORTIN, CHILDREN'S RIGHTS AND THE DEVELOPING LAW 423 (2003) (quoting Lord Templeman of the House of Lords).
2. For the purpose of this paper, the term "infant" refers to children six months old or younger.
3. BLACK'S LAW DICTIONARY 1154 (7th ed. 1999), defines *pendente lite* as "[d]uring the proceedings or litigation; contingent on the outcome of litigation."
4. Stanley v. Ill., 405 U.S. 645, 656 (1972).
5. *Id.* at 654.
6. *Id.* at 656–57.
7. The terms "putative father" and "unwed father" are not interchangeable. "Putative father" is the "alleged biological father of a child born out of wedlock." BLACK'S LAW DICTIONARY 623 (7th ed. 1999). "Unwed father" might also be the legal father if he legitimizes his relationship to his child. *Id.*

ology-plus doctrine, which requires unwed fathers to show that in addition to being the biological father they also have taken responsibility for their children. Part II describes common state statutes that affect putative fathers, including putative father registries, safe haven laws, and laws granting custody of an infant child to preadoptive parents instead of the father when he contests an adoption petition. Part II also discusses these statutes' inherent flaws, which violate an unwed father's parental and due process rights, and suggests ways states can strengthen these statutes to provide greater protection for fathers. Part III addresses how state practices implicate poor policy decisions. Specifically, states promote adoption for illegitimate children even when unnecessary and psychologically harmful, and when federal child welfare policy promotes family preservation. Part IV adds two more recommendations for how states can strengthen their protection for unwed fathers: greater compulsion of mothers' cooperation in identifying the father of their child and better recognition of the child's interest in being raised by a biological parent.

I. BACKGROUND: ESTABLISHED PUTATIVE FATHERS' RIGHTS FROM CONSTITUTIONAL CASE LAW

The Supreme Court has said, "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[8] The Court gives definition to the term "liberty" found in the Due Process Clause of the Fourteenth Amendment when it declares "[w]ithout doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to . . . bring up children."[9] However, the Supreme Court has infrequently addressed the complex issue of unwed fathers' parental rights and the principles that emerge are not as well established or as clearly defined as the rights of traditional parents.

A. General Parental Rights Doctrine

In *Meyer v. Nebraska*, the Court first recognized parents' fundamental liberty interest in raising their children as they see fit.[10] Specifically,

8. Prince v. Mass., 321 U.S. 158, 166 (1944).
9. Meyer v. Neb., 262 U.S. 390, 399 (1923).
10. *Id.*

the Court recognized parents' right to control the education of their children. In an effort to promote American ideals and identity in all children reared in the state, Nebraska prohibited the teaching of foreign languages to children who had not completed the eighth grade.[11] The Court said that although it is clear the state has the authority to legislate programs aimed at improving the physical, mental, and moral quality of its citizens, "the individual has certain fundamental rights which must be respected."[12] Those fundamental rights include the liberty to raise children without arbitrary state interference.[13] In *Pierce v. Society of Sisters*, the Court reaffirmed parents' liberty interest in directing the upbringing of their children by holding that parents have the right to send their children to any school they wish.[14]

In *Prince v. Massachusetts*, however, the Court acknowledged that parental rights are not beyond limitation.[15] The Court upheld Massachusetts's child labor law, holding that the state has a legitimate power to limit parental freedom in certain circumstances.[16] In other words, society's interest in protecting the welfare of children is sometimes a valid reason to interfere with parents' rights. The Court found that the legislative goals to prevent the harms associated with child employment and to keep children safe trumped the parents' right to control their children's behaviors.[17] The court explained, "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people," and it "may secure this against impeding restraints and dangers within a broad range of selection."[18]

Meyers, *Pierce*, and *Prince* established the basic framework from which the Court later analyzed the parental rights of putative fathers. The Court did not address the rights of these men until 1972. In the course of the following decade, the Court delineated the circumstances in which unwed fathers may assert parental rights over their children. Unfortunately, not all the lines were drawn clearly and some issues are unresolved.

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11. *Id.* at 397, 401.
12. *Id.* at 401.
13. *Id.* at 402–03.
14. 268 U.S. 510 (1925).
15. 321 U.S. 158 (1944).
16. *Id.* at 166–67.
17. *Id.* at 168–69.
18. *Id.* at 168.

B. Parental Rights of Unwed Fathers: The Biology-Plus Doctrine

In *Stanley v. Illinois*, the Court first addressed unwed fathers' rights.[19] Peter Stanley and Joan Stanley cohabitated intermittently for eighteen years, although they were not married, and had three children together. When Mrs. Stanley died, Illinois law mandated that the children become wards of the state. Without a hearing as to his fitness as a parent, Mr. Stanley's children were removed from his custody and placed with court-appointed guardians.[20] In Illinois, married (divorced, widowed or separated) fathers and all mothers enjoyed a statutory presumption of fitness to raise their children and the state was required to provide a hearing to prove otherwise.[21] Conversely, the Illinois statute presumed unwed fathers were unfit to raise their children and therefore had no right to a hearing before their children were removed.[22] The Supreme Court found that this practice violated Mr. Stanley's right to equal protection,[23] explaining "[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."[24] The Court did not question the state's legitimate interest in protecting children; rather, it reviewed the means by which it pursued that interest.[25] This case ushered in the doctrine of "biology-plus," which requires more than a mere biological connection to a child for an unwed father to assert his parental rights.[26]

As later cases highlighted, the Court's demonstrated willingness to protect putative fathers' rights is limited to those men who already have a relationship with their children and who have provided support for them.

In *Quilloin v. Walcott*, the Court underscored this limitation.[27] This case involved an unwed father objecting to his son's adoption by his stepfather.[28] Mr. Quilloin challenged a Georgia law that gave all mothers

19. 405 U.S. 645 (1972).
20. *Id.* at 646.
21. *Id.* at 647.
22. *Id.*
23. *Id.* at 658.
24. *Id.* at 651.
25. *Id.* at 649–50.
26. Laura Weinrib, *Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in Nguyen v. INS*, 12 COLUM. J. GENDER & L. 222, 229 (2003).
27. 434 U.S. 246 (1978).
28. *Id.* at 247.

and married fathers the authority to consent to an adoption, but denied such power to unwed fathers unless they legitimized their relationship to their children.[29] The Court focused on how differently situated Mr. Quilloin was from Mr. Stanley by highlighting the fact that Mr. Quilloin never had custody of his son, did not want custody, that he provided only sporadic financial support throughout his son's eleven years, and that he had not attempted to legitimize his relationship to his son prior to the adoption petition.[30] The Court found, under these circumstances, that this statute did not violate the Equal Protection Clause of the Fourteenth Amendment because an unwed father who had not legitimized his relationship to his child nor provided consistent financial and emotional support for his child is distinguishable from a once married, but now divorced or separated father, and therefore the state may treat them differently.[31] Consequently, the Court granted the adoption.[32] A year later, the Court granted certiorari to a very similar, but distinguishable case. In *Caban v. Mohammed*, the Court reviewed a New York statute that again gave unwed mothers, but not unwed fathers, veto power over adoption petitions.[33] In this case the children's stepfather petitioned for adoption. The biological father objected and the stepmother cross-petitioned for adoption.[34] The mother successfully vetoed the stepmother's petition, but the father did not have similar power to veto the stepfather's petition.[35] Mr. Caban differed from Mr. Quilloin because he lived with the unwed mother for some years, held himself out to be the father, and provided consistent support for his children,[36] which are the factors the Supreme Court says establish an unwed father's parental rights to his children.[37] These facts put the unwed mother and father on equal footing, which required the state to treat them equally.[38] The Court then proceeded to look at the state's use of gender in distin-

29. *Id.* at 248–49.
30. *Id.* at 250–51, 254–56.
31. *Id.* at 256. Before reaching the equal protection issue, the Court found that the statute did not violate due process principles. Even though there was no finding that Mr. Quilloin was an unfit father, the State may legitimately use a "best interest of the child" standard to make adoption decisions when the countervailing interests are more substantial, such as the maintenance of an intact family unit, as in this case. *Id.* at 255.
32. *Id.* at 256.
33. 441 U.S. 380 (1979).
34. *Id.*
35. *Id.*
36. *Id.* at 389.
37. *See* Quilloin v. Wolcott, 434 U.S. 246 (1978).
38. *Caban*, 441 U.S. at 389.

guishing between unwed mothers and fathers, an issue the *Quilloin* Court had reserved. The Court held that the statute violated the Equal Protection Clause of the Fourteenth Amendment because the distinction the statute made between unwed mothers and fathers did not bear a substantial relationship to the state's legitimate interest in finding adoptive homes for illegitimate children.[39] Further, the Court rejected the state's claim that there are fundamental differences between mothers' and fathers' relationships to their children at every phase of development, allowing mothers and fathers to be treated differently.[40] The Court said that the stereotypical differences between mothers' and fathers' relationships with a child at the time the child is born diminish as the child grows older and that these generalizations "would become less acceptable as a basis for legislative distinctions as the age of the child increased."[41]

In an attempt to protect the newly recognized rights of unwed fathers, some states instituted a putative father registry where men can report their biological connection to a child and in return receive notice of legal proceedings involving that child.[42] *Lehr v. Robertson* is the only case in which the Supreme Court has reviewed these statutes.[43] In *Lehr*, an unwed father did not receive notice of the adoption proceeding of his two-year-old daughter and was denied standing.[44] The father was involved with the mother during the pregnancy and birth but his name did not appear on the birth certificate, he did not provide financial support, and he never registered on New York's putative father registry. The father discovered the adoption petition when he filed a paternity action and sought custody. Although evidence was admitted that suggested the mother defrauded the father,[45] the Court upheld the New York statute explaining that the putative father registry provided the father ample opportunity to protect his interest in receiving notice of the adoption petition and to subsequently have standing in the proceeding.[46] Because

39. *Id.* at 388, 391. The Court used intermediate scrutiny to review the statute, noting that gender-based distinctions "must serve important governmental objectives and must be substantially related to achievement of those objectives" to withstand judicial scrutiny. Craig v. Boren, 429 U.S. 190, 197 (1976); *see also* Reed v. Reed, 404 U.S. 71 (1971).

40. *Caban*, 441 U.S. at 389.

41. *Id.*

42. See part II *infra*, for discussion of the weaknesses and strengths of putative father registries.

43. 463 U.S. 248 (1983).

44. *Id.* at 250.

45. *Id.* at 251–53, 268–69.

46. *Id.* at 265.

the state had a mechanism for putative fathers to protect their interest in their children, the Court found that the New York statute did not violate Mr. Lehr's due process or equal protection rights when he failed to register, and the state subsequently granted the adoption of his child without his consent.[47] The Court said that a natural father who grasps the opportunity to develop a relationship with his child and take responsibility for her shall enjoy protection of that parent-child relationship. But, if he fails to grasp that opportunity, the state owes him no duty to protect his parental rights.[48]

The foregoing cases provide only partial parameters of putative fathers' parental rights. It is clear that a father who has a substantial relationship with and provides for his child has established his parental rights.[49] However, the Court has yet to consider whether a father has had an opportunity to form that relationship with his child; the protection only begins once he establishes the substantial and supportive relationship. The Supreme Court has never addressed an unwed father's parental rights to his infant,[50] a situation in which it is difficult for him to establish a substantial relationship with his child.

II. Examples of State Laws that Illustrate the De Facto Presumption that Unwed Fathers Are Unfit Parents

To date, the Supreme Court has provided little guidance to states on how to properly protect the parental interests of putative fathers. For that reason, states have enjoyed vast discretion in developing a variety of strategies ranging from satisfactory protection to failing to provide even minimum protection for such rights. Unfortunately, too many states inadequately address the need to protect putative fathers' rights.

The Supreme Court recognizes a state's duty to protect a father's parental rights to children with whom he has established a substantial relationship, which means a father must provide regular emotional and

47. *Id.* at 265–67.

48. *Id.* at 262.

49. *But see*, Michael H. v. Gerald D, 491 U.S. 110 (1989) (holding that an adulterous father of a child born to a married woman does not have standing to challenge paternity because tradition dictates that states may protect a unitary family from invasion of privacy).

50. *See In re* Raquel Marie X, 559 N.E.2d. 418, 419 (N.Y. 1990) (accepting that a father's consent to adoption is needed for children under six months old in certain situations).

financial support to the child.[51] But, the Supreme Court has never assessed what a father must do to assert his parental rights to his infant. It is nearly impossible to establish a substantial relationship with an infant before the child is surrendered for adoption. Several states look at how the father treated the mother during pregnancy and childbirth; a father who has contributed to the financial cost of prenatal care and childbirth, and supported the mother emotionally during this time may avoid abandonment charges.[52] Although evidence that the father treated the mother well during pregnancy may be the state's only available measure to gauge whether a father has grasped the opportunity to parent his infant child, there are too many ways this method may deny a father the opportunity to develop a relationship with his infant because it relies in part on the mother's acceptance of his assistance. A mother may refuse help from the father and bar him from her life during this time. She may hide the pregnancy from him or tell him that the child is not his. In these cases, when the mother surrenders her infant for adoption, the father is not able to provide the court evidence that he has taken responsibility for his child.

Some states already recognize a putative father's liberty interest in his opportunity to establish a relationship, regardless of whether he is successful. In *Smith v. Malouf*, Mississippi's Supreme Court held that a father who attempts to establish a relationship with his child, but is thwarted by the mother, should nonetheless have his constitutional parental rights protected.[53] In *In re Clausen*, a Michigan court concluded that it is "now clearly established that an unwed father who has not had a custodial relationship with a child nevertheless has a constitutionally protected interest in establishing that relationship."[54] The New York Court of Appeals asserted in *In re Raquel Marie X*,

> In the case of a child placed for adoption at birth, the father can have no more than a biological connection to the child, there having been no chance for a custodial relationship. Protection of his parental interest would depend, then, upon

51. See part I.B. *supra*, discussing the Supreme Court's jurisprudence on putative fathers' rights.

52. *See, e.g.*, FLA. STAT. § 63.032(19) (2005); IOWA CODE § 600A.8 (2001 & Supp. 2006); W. VA. CODE § 48-22-306 (2004 & Supp. 2005).

53. 722 So. 2d 490, 497 (Miss. 1998).

54. 502 N.W.2d 649, 664 (Mich. 1993) (affirming the Iowa trial court).

> recognition of a constitutional right to the opportunity to develop a qualifying relationship with the infant.[55]

The court went on to conclude that "such an interest must be recognized in appropriate circumstances," such as when a mother has effectively prevented the father from establishing a relationship with his child.[56] The Supreme Court has not affirmed that a putative father has a right to the opportunity to establish substantial relationships with his children, as well as rights to children with whom he has already established such a relationship. As a consequence, common state practices involving putative father registries, safe haven laws, and grants of *pendente lite* custody to court-appointed guardians violate putative fathers' rights to due process and equal protection by not providing adequate protection for men who wish to parent their infant children.

A. Putative Father Registries

Enforcing putative fathers' rights to participate in the rearing of their children can be difficult because mothers inherently have superior knowledge and control. Mothers may choose not to tell the father he has a child or may lie to him by telling him the child is not his. Mothers may refuse to name the father on the birth certificate or refuse any support he may offer. Putative father registries ("PFR") are popular legal devices that states implement to counter this dilemma. Upheld by the Supreme Court in *Lehr v. Robertson*, PFRs provide a putative father with a means to protect his rights to his child, independently of the mother's actions.[57] PFRs allow fathers to register with the state and claim that they are, or even that they suspect they are, the father of a child. Registration guarantees a father that his child will not be adopted without the state providing him notice of the proceedings. Specifically, registration grants a father standing in an adoption proceeding involving his child,

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55. Raquel Marie X, 559 N.E.2d at 424.

56. *Id.* at 419–20 (concluding that the New York statute requiring that the father live with the mother in the six months preceding adoption placement, which requires a mother's cooperation, neither furthers a legitimate state interest nor adequately protects the father's interest); *see also* MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 70 n.19 (2005) (stating that other jurisdictions that recognize a father's interest in the opportunity to form a relationship with his child are Illinois, District of Columbia, South Dakota, Tennessee, and West Virginia).

57. 463 U.S. 248 (1983).

allowing him to argue for what he thinks is in the child's best interest.[58] The state considers a father who takes the time to register to have taken positive action to protect his relationship with his child and for that reason his parental rights are worthy of certain protections.

In contrast, failure to register under the requirements of a state's statute often means the state owes no duty to the father to protect his parental interests. Thirty-two states have adopted PFR statutes.[59] Although there is great variation in each state's statute, the most common legal consequence for a father who does not register in compliance with statutory requirements is that he will not be notified of an adoption proceeding or his parental rights will be terminated without a hearing.[60] Twenty-two of the state statutes assert that a father's failure to register repudiates his right to notice of adoption proceedings and denies him standing. Such consequences effectively empower the court to approve an adoption petition without the father's knowledge or consent. Further, the statutes regard a father's failure to register as prima facie evidence of unfitness, which a court may use to terminate a father's rights.[61] Essentially, in the majority of states with PFRs, an unregistered father is considered uninterested in his child and thus, unfit as a parent. More significantly, because PFRs enjoy judicial backing,[62] states use PFRs to efficiently secure the adoption of illegitimate children by expeditiously discarding the father's rights in the matter.[63]

These statutes rely on two faulty assumptions. First, states assume that putative fathers know the registry exists and understand the requirements of proper registration. Most statutes have a deadline by which the father must register[64] and courts tend to strictly enforce

58. Rebeca Aizpuru, Note, *Protecting the Unwed Father's Opportunity to Parent: A Survey of Paternity Registry Statutes*, 18 REV. LITIG. 703, 705 (1999).

59. Mary Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y 1031, 1080–92 (2002) (providing a chart of state statutes describing paternity registries).

60. *Id.*

61. *Id.*

62. *See Lehr*, 463 U.S. 248 (holding that putative father registries are a constitutional means for a state to protect a father's interest in his child). State courts also echo *Lehr*'s decision by upholding their state's PFR statutes. *See, e.g., In re* TMK, 617 N.W.2d 925, 926–27 (Mich. Ct. App. 2000); Friehe v. Schaad, 545 N.W.2d 740, 747 (Neb. 1996).

63. Aizpuru, *supra* note 58, at 705–06.

64. The deadline for registering varies among states. The most common approach is to specify an amount of time after the baby is born, which is often set at thirty days. However, the deadline may be as soon as five days after the baby is born or may be any time up until an adoption petition is filed. Aizpuru, *supra* note 58, at 716 (surveying state putative father registries); Beck, *supra* note 59, at 1040.

them.[65] Ignorance of the law is commonly rejected as a reason to reverse legal consequences.[66] However, in this instance a man may be denied his fundamental right to parent his child based on his failure to meet a legal technicality.

Although these statutes intend to provide an unwed father a means to protect his parental rights, they have the potential to fail. A putative father who has established a substantial relationship with his child and provides support for her—conditions the Supreme Court says establishes an unwed father's parental rights to his child—may nonetheless lose those rights without a hearing if he is simply unaware of the state's requirement to register on its PFR. For example, in *In re Adoption of Reeves*, the Arkansas Supreme Court upheld the trial court's ruling that despite the fact that the putative father had established a substantial relationship with his son, the father was not entitled to notice of, or to standing in, the adoption proceedings since he failed to register on the PFR.[67] The father was previously married to the mother, but the couple was divorced at the time of conception and the birth of their second son.[68] Although his name was not on the birth certificate, the man held himself out to be the boy's father and regularly visited him during the times he had visitation with his older son from the relationship.[69] When the boy was about three years old, the mother remarried and consented to his adoption by her new husband. The putative father did not receive notice of the adoption because he did not register on the PFR and because the mother lied on the petition and said the natural father was unknown.[70] In its decision, the Court quoted *Lehr*'s conclusion that:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the

65. *See* Aizpuru, *supra* note 58, at 716–20 (detailing the different time constraints states impose on fathers and how courts have interpreted them).

66. *See* Lehr v. Robertson, 463 U.S. 248, 264 (1983) (stating that the fact that a man may fail to register due to ignorance of the law cannot be a valid criticism of the statute and that there are countervailing interests that support this policy: avoiding more complicated adoptions, avoiding injuring the privacy interests of the mother, and impairing the finality of adoptions); *In re* S.J.B., 745 S.W.2d 606 (Ark. 1988); *In re* Appeal in Maricopa County, 876 P.2d 1137 (Ariz. 1994); Robert O. v. Russell K., 604 N.E.2d 99 (N.Y. 1992).

67. 831 S.W.2d 607, 608 (Ark. 1992).

68. *Id.* at 607.

69. *Id.*

70. *Id.* at 609.

> child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.[71]

The trial court in *Lehr* found that the father had not established a substantial relationship with his child, therefore the Supreme Court held that the New York PFR statute was an adequate mechanism to protect a father's rights.[72] In *Reeves*, however, the court acknowledged that *Lehr* did not assess the New York PFR system for its constitutional adequacy in terminating the rights of a father who had developed a relationship with his child.[73] Nonetheless, the Arkansas Supreme Court declined to address that issue and upheld the PFR statute and the adoption decision, which consequently left a father who had grasped his opportunity to develop a relationship with his son without any legal parental rights to him.[74]

Legal reality is that a mother may consent to the adoption of her child without the court notifying the biological father if he did not register, despite the fact the he has established himself in the child's life, and therefore has a right to due process before his parental rights are terminated. Some argue that better publicity of and accessibility to the registry requirements would mitigate these problems.[75] A public awareness campaign and simplification of forms will not change the fact that legally unsavvy men who still fail to register may have their parental rights terminated without due process even if they have established a relationship with their child.

The second assumption states make is that men know when they have a child. Almost universally, states place the onus on the father to determine if sexual intercourse results in pregnancy even though a mother can easily mislead a man into thinking the child is not his.[76] This requirement fits with the underlying policy of PFRs to place the burden upon the father to protect his own rights. However, men are

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71. *Id.* at 608 (quoting Lehr v. Robertson, 463 U.S. 248, 262 (1983)).
72. *Id.* at 609.
73. *Id.* Because the father challenged the trial court's interpretation of *Lehr* and did not directly challenge the constitutionality of Arkansas's statute, the court did not address that specific issue.
74. *Id.*
75. *See* Aizpuru, *supra* note 58, at 727–28; Beck, *supra* note 59, at 1038.
76. Beck, *supra* note 59, at 1062–63; Aizpuru, *supra* note 58, at 725–26. *See, e.g., In re* RFF, 617 N.W.2d 745 (Mich. Ct. App. 2000).

disadvantaged in their access to truthful information and women have the unique capability of denying a man his rights to his child. Proponents of PFRs argue that the man does not need to know whether or not a sexual encounter produced a child; he may register on the mere possibility that he has a child.[77] This premise faultily relies on the first assumption being true—that men know a PFR exists. And, even if a father does register, there is no interstate-connected or national registry; a mother can easily avoid a father's involvement in her adoption decision by simply going to another state.[78] There is a growing consensus that a mother who consents to an adoption should be compelled to disclose who the father or potential fathers are, except in cases of rape, domestic violence, or incest.[79] I discuss the arguments for this proposal in part V *infra*.

Some PFRs adequately protect a putative father's interest in his child when states use them in conjunction with other notice requirements, such as publication of adoption proceedings, and when failure to register does not automatically terminate a man's parental rights.[80] But, PFRs inadequately protect a father's interests when they are a state's sole means of doing so. States should forgive a putative father for not registering if he can show that he was unaware of his infant child through no fault of his own and that once he became aware he took immediate action to assert paternity.[81] For example, Illinois softens its PFR requirements by exempting a putative father from registry deadlines if he can show, by clear and convincing evidence, that it was not his fault that he did not register and that he took immediate steps to file once he could.[82] If a father never intended to relinquish his parental rights and cannot be faulted for failing to register, then he should not summarily be penalized.[83]

When a state employs a PFR as one of several ways it provides protection to the interests of putative fathers, PFRs become an important tool in balancing the interests of all the parties involved in adoptions. They allow a father to gain equality in enforcing his parental rights by

77. *See id.* at 1051 (quoting M.V.S. v. V.M.D., 776 So. 2d 142, 151 (Ala. Civ. App. 1999)).

78. *See* Beck, *supra* note 59 (arguing the need for a national PFR system).

79. *See* Aizpuru, *supra* note 58, at 728–30; Stacy Lynn Hill, Note, *Putative Fathers and Parental Interests: A Search for Protection*, 65 IND. L.J. 939, 958–59 (1990).

80. *See* Aizpuru, *supra* note 58, at 716–720.

81. GUGGENHEIM, *supra* note 56, at 72.

82. 750 ILL. COMP. STAT. 50/12.1(g) (2004). However, Illinois makes no exception for lack of knowledge of pregnancy or that child was his. *Id.*

83. *See* GUGGENHEIM, *supra* note 56, at 73.

affording him an opportunity to assert those rights regardless of the mother's actions. They also serve to secure adoptions efficiently. When a father fails to register and respond to notice, the state may proceed without his involvement. He is much less likely to challenge that decision successfully because the state has protected his constitutional right to due process. Consequently, adoption decisions are more likely to be permanent.

B. Safe Haven Laws

Safe haven laws allow one parent (read: mother) to anonymously and unilaterally abandon her infant child at a designated safe location such as a hospital or clinic, without the fear of being criminally prosecuted for abandonment. The purpose of these statutes is to reduce the risk of babies being abandoned in a way that would lead to injury or death and to give mothers a safe alternative when they feel they have no other option. As an incentive to abandon her child safely, a mother receives either immunity from prosecution or an affirmative defense against abandonment charges.

Typically, safe haven statutes detail where a baby may be left, who may leave the child, in what timeframe a baby may be abandoned with immunity, and what procedures must be taken after a baby is abandoned.[84] All of the statutes provide for the anonymity of the person dropping off the baby, either explicitly or through omission of a requirement to disclose identification.[85]

Today, forty-six states have safe haven laws.[86] Many of these laws were adopted hastily after a few high-profile national cases of "dumpster babies" in the late 1990s and are not well thought out.[87] The universal acceptance of anonymity prevents states from effectively protecting the parental interest of the nonabandoning parent. In reality, that parent is the father. PFR searches and notice attempts are futile if there is no

84. See Dayna R. Cooper, Note, *Fathers are Parents Too: Challenging Safe Haven Laws with Procedural Due Process*, 31 HOFSTRA L. REV. 877 (2003), for specifics and criticisms of each of these conditions.

85. *Id.* at 882–83.

86. Carole Heath & Anita Catlin, *American Alternative to Unwanted Infants*, PEDIATRIC NURSING, May/June 2005, at 229. Texas, in 1999, was the first state to pass a safe haven law. Cooper, *supra* note 84, at 879.

87. Cooper, *supra* note 84, at 877; Tanya Amber Gee, Comment, *South Carolina's Safe Haven for Abandoned Infants Act: A "Band-Aid" Remedy for the Baby-Dumping "Epidemic"*, 53 S.C. L. REV. 151, 161–62 (2001).

information about the mother or the baby. With no mechanism left for the state to attempt to contact the father, the father's right to due process, before the state terminates his fundamental right to parent his child, will be violated. To date, no court has addressed this problem with safe haven laws.

This collective oversight of failing to protect fathers' rights in these politically popular statutes indicates a societal apathy to fathers' interests and an acceptance of the presumption that they are unfit parents and uninterested in their children. Safe haven laws not only deprive fathers who do not know they have a child an opportunity to find out, but also deny men who know they are fathers and have taken affirmative steps to parent (such as providing prenatal financial and emotional support to the mother) their right to due process.

The irony of these statutes is that they are very unlikely to prevent the types of abandonment that triggered their enactment. For instance, one high-profile news story involved an eighteen-year-old New Jersey high school student named Melissa Drexler.[88] Melissa gave birth in the bathroom during her prom, strangled the baby, left him in the trash, and went back to the dance.[89] It is hard to imagine that, had a safe haven law existed in New Jersey at the time, Melissa would have swaddled her son, left the prom, and safely abandoned him at a hospital or fire station. All of the newsworthy baby abandonment stories have similar elements;[90] all were equally unlikely to be avoided if there were safe haven laws in place.[91] Instead, safe haven laws provide an avenue for mothers who would safely abandon their children anyway, a means to do so anonymously and without the father's consent.

Just as troubling, there is little evidence these laws affect the decisions made by the women they were meant for. There is little information on the true number of abandoned babies because counting the number of babies unsafely abandoned each year is nearly impossible, since so many are probably never found.[92] In 1998, the last year for which statistics are available, it was estimated that 105 babies were un-

88. Debbe Magnusen, *From Dumpster to Delivery Room: Does Legalizing Baby Abandonment Really Solve the Problem?* 22 J. JUV. L. 1, 2 (2002).

89. *Id.*

90. *See id.*; Gee, *supra* note 87, at 161.

91. *See* Shannon Farley, *Neonaticide: When the Bough Breaks and the Cradle Falls*, 52 BUFF. L. REV. 597 (2004) (arguing that Neonaticide Syndrome, a collection of common characteristics of women who kill their babies shortly after birth, should be recognized by the courts as an affirmative defense and that safe haven laws inadequately mitigate this phenomenon).

92. *Id.*

safely abandoned in the United States and thirty-three were found dead.[93] In New Jersey, even after $500,000 was spent on a public awareness campaign, only seven babies were abandoned the year after the safe haven statute became law.[94] There have been only three safely abandoned babies in Mobile, Alabama since the enactment of its safe haven law.[95] These early statistics suggest that these statutes do not significantly impact the problem of baby abandonment.

Although proponents argue that these statutes are worthwhile if only one child is saved,[96] there is no evidence that the few women who have abandoned a child under the safe haven laws would have unsafely abandoned the child without it. Worse, the anonymity components of these statutes severely impair the statutes' worth because they violate a parent's fundamental right. Moreover, there are viable alternatives that would be more effective toward alleviating the problem and would not plainly trample the rights of the fathers. More widely available confidential and free prenatal counseling and medical care for women who feel the need to hide their pregnancy and want to relinquish their rights to their babies when born, could mitigate not only the problem of abandoned babies, but also the unhealthy conditions in which they are born.[97] Public financing and educational awareness campaigns of such services, targeted to high risk groups (teenagers, low-income women, and those already involved in protective services), could have a greater impact on the problem of baby abandonment while not systematically violating the fathers' due process rights. Even if these services are provided confidentially, if they are conducted in a supportive and safe environment, women may be more willing to give identifying information, allowing the state both to conduct both a PFR search and to provide constructive notice to potential fathers. If Melissa Drexler was aware of free and confidential assistance during her pregnancy, it is possible her son would not have died; rather, he may have been safely

93. Heath & Catlin, *supra* note 86; Carol A. Docan, *She Could Have Safely and Anonymously Surrendered Her Newborn Infant Under California Law—Did She Know That?*, 4 J. LEGAL ADVOC. & PRAC. 15 (2002).

94. Docan, *supra* note 93, at 24–25. That same year, five babies were abandoned in public places. *Id.* at 24.

95. Farley, *supra* note 91, at 624.

96. Docan, *supra* note 93, at 24.

97. *See* Gee, *supra* note 87, at 162 (arguing why these women need attention long before the baby arrives). *See generally* Docan, *supra* note 93 (discussing Project Cuddle, a model of such services); Farley, *supra* note 91, at 625 (advocating for better prevention strategies). Gee also argues that promoting contraception and improving social services for single mothers would help alleviate this problem. Gee, *supra* note 87, at 163–64.

abandoned, the father's rights could have been constitutionally protected, and adoption would be more secure if it were the ultimate result.

Since there are several viable alternatives to addressing the problem of baby abandonment that do not tread on fundamental rights, courts must find safe haven laws unconstitutional. The Supreme Court has consistently stated that the state may only intrude on an individual's fundamental right when there is a compelling state interest and when the state employs narrowly tailored means to address that interest.[98] Decriminalizing baby abandonment is a good idea to allow desperate women to safely abandon their infants, but in doing so states should not systematically violate fathers' rights.

C. Granting Pendente Lite *Custody of Infants to Preadoptive Parents*

Imagine a father who properly registers for his state's PFR and gains legal standing to assert his parental rights to his infant child in an adoption proceeding where the mother gave consent. That father has only so far acquired the right to argue what he thinks is in the best interest of his child. If the father wants custody of his child, he must prove he is fit to parent her. This is especially true if the father was denied the opportunity to support the mother during pregnancy and birth.

It is clear that states may treat mothers and fathers of newborn infants differently in terms of proving that they are the biological parent.[99] Courts recognize that at the time of birth the mother has substantially contributed to the child's life simply by carrying out the pregnancy, where a father has had significantly less opportunity to prove his commitment. By the time the child is born the mother has necessarily

98. *Compare, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003) (holding that a state has a compelling interest in providing educational benefits that flow from a diversified student body and that affirmative action, narrowly tailored, does not violate the right to equal protection); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (holding that a state may impose a minimum wage that interferes with an individual's liberty interest to contract for her labor), *with* Skinner v. Oklahoma, 316 U.S. 535 (1942) (denying the state the ability to sterilize women against their wishes and holding that the right to have offspring is fundamental).

99. *See* Nguyen v. INS, 533 U.S. 53, 63 (2000) ("Fathers and mothers are not similarly situated with regard to the proof of biological parenthood."); Lehr v. Robertson, 463 U.S. 248, 260 n.16 (1983) ("'The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures.'" (quoting Caban v. Mohammed, 441 U.S. 308, 397 (1979))).

invested much more into her parental role; a father, on the other hand, may have at most contributed to the financial burden and supported the mother emotionally during pregnancy and birth. Because the mother and father are, by definition, differently situated, the state may have different requirements for each before it recognizes parental rights.[100]

Because the father is differently situated than the mother at the time a mother wants to surrender her infant for adoption, it is reasonable for states to require more from him than a mere showing of a biological connection. What is not reasonable, however, is for the court to grant *pendente lite* custody to preadoptive parents during the time in which he is litigating his challenge to an adoption.

Although the father who contests the adoption of his infant likely did not have the opportunity to meet the conditions under which the Supreme Court holds that he has parental rights to his child,[101] a father's biological connection paired with his expressed and acted-upon desire to raise his child should establish his primary right to custody.[102] Indeed, he is the only party with a constitutional right at stake.[103]

The practice of granting *pendente lite* custody of a child to preadoptive parents puts the father at a distinct disadvantage to claim his parental rights and increases the possibility that he is not given custody of his child despite a court's determination of his parental fitness. The first months and years of a child's life are critical to her wellbeing. The caretaker forms a strong attachment with the infant through caring for his physical and emotional needs on a daily basis.[104] Legal proceedings can take a substantial amount of time; the more prolonged the proceedings, the stronger the infant attaches to her caretaker. Notwithstanding a determination that the father is fit to parent his child, if a long time elapses during the proceedings and the preadoptive parents have had custody, conventional wisdom of what is in the best interest of the child

100. *Cf.* Cleburne v. Cleburne Living Ctr. Inc., 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment . . . is essentially a direction that all persons similarly situated should be treated alike.").

101. *See supra* part I.

102. *See* Daniel C. Zinman, *Father Knows Best: The Unwed Father's Right to Raise His Infant Surrendered for Adoption*, 60 FORDHAM L. REV. 971 (1992) (highlighting the problems with granting *pendente lite* custody during proceedings involving the adoption of a newborn and a father who wants to veto it, and arguing that courts should grant putative fathers custody of their children to give meaning to fathers' constitutional right to raise their children).

103. *Id.* at 996.

104. JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 11 (1996).

could influence the court to nonetheless grant a petition for adoption.[105] It has long been understood that removing a child from the only home and caretaker she has known is extremely traumatic and should only happen to keep the child safe.[106] The potential trauma is so grave that to avoid it, courts may decide the child shall remain with her nonparental custodian rather than transfer her to her biological father in order to uphold his constitutional rights.

In essence, by granting *pendente lite* custody to a preadoptive family, the state may predetermine which party will prevail.[107] This practice unfairly reduces the state's burden in determining a father's rights. How is a father supposed to show the court he is a fit parent when he is not given the opportunity to care for his child? If a father had *pendente lite* custody, he would be able to provide the court with direct evidence of his fitness.[108] Without it, the court might depend on speculation and conjecture to make its determination, making it less likely that the father will overcome his burden in a court that uses a best interest of the child standard. If a father appeals a decision against him, the proceeding drags out even longer, further decreasing his chances of success.

A more alarming concern is having the infant child bond with preadoptive parents throughout lengthy legal proceedings only to be removed from the only home she knows when the court finalizes a decision to return her to her biological father. This precise scenario played out in front of a national audience twice in the 1990s. The first case involved Baby Jessica, a girl born February 8, 1991, whose unwed mother placed her for adoption two days after her birth.[109] The mother lied about the identity of the father on the adoption form and a false father signed consent to release the baby for adoption. About a month later, the mother told the biological father, Daniel Schmidt, about his daughter and he immediately filed an affidavit of paternity on March 12, 1991. This is the moment where the court could have avoided the trauma Baby Jessica endured. Instead of quickly establishing Schmidt's paternity and granting him *pendente lite* custody during his challenge to

105. *See, e.g.*, Quilloin v. Wolcott, 434 U.S. 246 (1978) (holding that a state may legitimately use a best interest of the child standard to make adoption decisions); *In re* P.G., 452 A.2d 1183, 1184 (D.C. 1982) (holding that ordering adoption over the objection of the natural parent, and without a determination that the natural parent was unfit, was constitutionally permissible if it was the "least detrimental available alternative").

106. GOLDSTEIN ET AL., *supra* note 104, at 19.

107. Zinman, *supra* note 102, at 996.

108. *See id.* at 998.

109. *In re* Clausen, 501 N.W.2d 193, 194 (Mich. Ct. App. 1993).

the adoption petition, the trial court did not hear the issue of paternity and wrongful termination of parental rights until November 4, 1991, a full seven months later.[110] In all, two and one-half years passed during the litigation. Meanwhile, Baby Jessica was living with preadoptive parents and developing psychological bonds with her daily caretakers. The trial court, using a purely legal analysis of the statutory language, found that Schmidt had not abandoned his daughter and therefore his parental rights remained intact.[111] After failed appeals in Iowa,[112] Michigan,[113] and the U.S. Supreme Court, the preadoptive parents were forced to surrender two-and-one-half-year-old Baby Jessica to her biological father—a man she had never met.[114]

Simultaneously, a very similar story was unfolding in Illinois. Baby Richard was born March 16, 1991.[115] Four days later, his mother consented to his adoption and falsely claimed that the father was unknown.[116] The mother told the father that the baby had died; he discovered the truth fifty-seven days after the mother consented to the adoption and immediately began proceedings to challenge the adoption.[117] The Illinois Supreme Court stated, "[w]hen the father entered his appearance in the adoption proceedings 57 days after the baby's birth and demanded his rights as a father, the petitioners should have relinquished the baby at that time."[118] Instead, Baby Richard remained with preadoptive parents during the four-year long litigation.[119] As with Baby Jessica, Baby Richard, who was no longer a baby, was removed from the only home he knew and placed with his biological father.[120]

In both the Baby Jessica and Baby Richard cases, the preadoptive parents argued that the courts should use a best interest of the child standard to decide the custody battle.[121] This conflict of interest between

110. *Id.*
111. *See In re* Clausen, 502 N.W.2d 649, 657 (Mich. 1993) for a detailed procedural history of this case.
112. *In re* B.G.C., 496 N.W.2d 239, 241 (Iowa 1992).
113. *In re* Clausen, *supra* note 111, at 691.
114. DeBoer v. Schmidt, 509 U.S. 1301 (1993).
115. Scott A. Resnik, *Seeking the Wisdom of Solomon: Defining the Rights of Unwed Fathers in Newborn Adoptions*, 20 SETON HALL LEGIS. J. 363, 371 (1996) (citing *In re* Doe, 627 N.E.2d 648 (Ill. App. Ct. 1993)).
116. *Id.*
117. *In re* Doe, 638 N.E.2d 181 (Ill. 1994).
118. *Id.* at 182.
119. *Id.*
120. Resnik, *supra* note 115, at 375.
121. *In re* Clausen, 501 N.W.2d 193, 194 (Mich. Ct. App. 1993); *In re* Doe, 638 N.E.2d at 182.

the father's parental rights and the child's best interest is not intrinsic to the father-child relationship; rather, it was created by the practice of granting *pendente lite* custody to the preadoptive parents. The Iowa Supreme Court ruling in the Baby Jessica case stated that deciding cases solely on the best interest of the child without regard to parental rights in adoption cases leads the court to engage "in uncontrolled social engineering."[122] The court went on to say, "this is not permitted under our law; 'courts are not free to take children from parents simply by deciding another home appears more advantageous.' "[123]

The unwed father's parental rights only conflict with his infant's best interests after the state has granted *pendente lite* custody to the preadoptive parents.[124] The Supreme Court has not "embraced the general proposition that a wrong may be done if it can be undone."[125] Granting *pendente lite* custody to preadoptive parents is a no-win situation for fit putative fathers and their children. If courts use a best interest of the child standard, and decide to grant adoption petitions despite a showing that the biological father is a fit parent, the father is injured by being denied the opportunity to enjoy his child, and the child loses a connection to her biological ties. If courts enforce a father's parental rights using a purely legal analysis, the child suffers the trauma of being removed from her attachment figure. Either way, these conflicts can be avoided by granting *pendente lite* custody of an infant child to the interested unwed father.

What if a father is given custody of his infant child during his challenge to an adoption petition and the court later determines that he is unfit? The reverse scenario of the Baby Jessica and Baby Richard stories would result, and a child who has formed a psychological bond to her caretaker would be removed from the only home she knew. Nevertheless, this is what the child welfare system does everyday. The benefit comes from protecting the party with a constitutional right at stake and from assuming that an unwed father is a fit parent. Like in other child protection cases, the state should have to substantiate claims of unfitness and provide clear and convincing evidence to the court before his rights are terminated.[126] As one scholar noted, "[u]ntil state legislatures grant an unwed father custody of his infant while his parental rights are being

122. *In re* B.G.C., 496 N.W.2d 239, 241 (Iowa 1992).
123. *Id.* (quoting *In re* Burney, 259 N.W. 2d 322,324 (Iowa 1977)).
124. Zinman, *supra* note 102, at 996.
125. Stanley v. Ill., 405 U.S. 645, 647 (1972) (citing Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969)).
126. *See* Santosky v. Kramer, 455 U.S. 745, 748 (1982).

determined, the judicial system will provide little more than lip service to protecting his constitutional rights."[127]

III. Implications of Bad Policy Decisions

Unquestionably, the state has an interest in efficiently securing permanent placements for infants.[128] In *Stanley*, the Court acknowledged, "[t]he establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication."[129] The Court then qualified that statement by saying, "[b]ut the Constitution recognizes higher values than speed and efficiency."[130] Indeed, the "rights to conceive and raise one's children have been deemed 'essential,' 'basic civil rights of man,' and 'rights far more precious . . . than property rights.'"[131] In addition, it is widely accepted, through statutes[132] and case law,[133] that it is in the best interest of the child to be raised with his biological parent or parents unless there are grounds for the state to terminate parental rights for gross misconduct.

Many states, in employing strict PFRs, adopting safe haven laws with anonymity provisions, and giving custody of infants to preadoptive families during custody disputes, are violating these principles espoused by the Supreme Court and federal government. States need to strike a better balance between their interests in finding safe and secure placements for infants while simultaneously protecting the interests of putative fathers.

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127. Zinman, *supra* note 102, at 1001.

128. *See* Lehr v. Robertson, 463 U.S. 248, 275 (1983) (White, J., dissenting) ("The State no doubt has an interest in expediting adoption proceedings to prevent a child from remaining unduly long in the custody of the State or foster parents."); Caban v. Mohammed, 441 U.S. 380, 391 (1979) ("The State's interest in providing for the well-being of illegitimate children is an important one."); *Stanley*, 405 U.S. at 647 ("Surely, . . . if there is delay between the doing and the undoing petitioner suffers from the deprivations of his children, and the children suffer from uncertainty and dislocation.").

129. *Stanley*, 405 U.S. at 656.

130. *Id.*

131. *Id.* at 651 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923); May v. Anderson, 345 U.S. 528, 533 (1953); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

132. *See infra* part II.B.

133. *See, e.g.*, Dickson v. Lascaris, 423 N.E.2d 361, 363 (1981) (stating that the child's best interest is to be raised by her natural parent).

A. States Might Unnecessarily Inflict Psychological Harm on Fathers and Children

Adoption is a vital tool for securing the future of many children. Unfortunately, it is also statutorily promoted as a solution for illegitimate infants who may have fathers interested in and capable of raising them. This preferential promotion implies that it is better for a child born out of wedlock to be adopted into a stranger's family than be raised by her biological single parent. States prefer adoption for children whose unwed mothers wish to relinquish parental rights. This is illustrated through states' use of PFRs as the sole means to discard a father's interest in the adoption of his child, safe haven laws that allow anonymity to the surrendering parent, and grants of *pendente lite* custody to preadoptive families.

States not only potentially violate putative fathers' constitutional right to due process when they employ these practices, but also they may unnecessarily exact psychological harm to both fathers and children. These practices underscore the fact that states' overemphasized interest in efficiency overshadows their duty to do what is in the best interest of children and to not injure the psychological wellbeing of both parents and children.[134]

Decades of research show that adoption is psychologically traumatizing to both parent and child. The wound inflicted is sometimes described as "primal."[135] Shirley Darby Howell concludes from her comprehensive review of available research:

> Many adoptees forever feel a hole in their identities that needs to be filled, but cannot be. A need to identify the adoptee's 'true identity' and history often haunts even the most well-adjusted adoptees. It is likely that few legislators or jurists realize that psychological research indicates that the loss experienced by an adoptee is more pervasive, less socially recognized, and more profound than that of death or divorce.[136]

134. Shirley Darby Howell, *Adoption: When Psychology and Law Collide*, 28 HAMLINE L. REV. 29 (2005).

135. *Id.* at 38 (citing NANCY N. VERRIER, THE PRIMAL WOUND 21 (1993)).

136. *Id.* at 43 (quoting in part Kathleen Caswell, *Opening the Door to the Past: Recognizing the Privacy Rights of Adult Adoptees and Birthparents in California's Sealed Adoption Records While Facilitating the Quest for Personal Origin and Belonging*, 32 GOLDEN GATE U. L. REV. 271, 278 (2002)).

Research indicates that adoption decisions have a lifelong and profound negative impact on the birth mother as well, and although there is very little empirical evidence involving fathers, the fact that some fathers bring legal battles to assert parental rights is evidence that some do experience a deep emotional loss.[137] One study investigating the impact of adoption on fathers who surrender their children reveals that ninety-six percent of these men consider searching for their children.[138] The same study reveals that sixty-seven percent of men who consent to the adoption of their children do eventually search for them.[139] Fathers who search for their children have an "almost obsessional quality" about their need to find them.[140] These are men who voluntarily released their children for adoption; it can be assumed that the pain is equally penetrating for men who discover they lost their parental rights unknowingly or involuntarily and who desire to raise their children.

The second half of the twentieth century saw the number of adoptions jump dramatically.[141] Prior to 1950, legislatures and social workers held the principle that preserving the biological family was a fundamental social goal. That attitude waned as infant adoption became systematically expedited by state statutes and by courts' interpretations that ignored decades of psychological research indicating that "adoption is profoundly traumatizing not only to the child, but to the parents as well."[142]

This dramatic rise in adoptions is a result of society's recognition of child maltreatment in the 1960s, the federal government passing the Child Abuse Prevention and Treatment Act in 1974,[143] and subsequent legislation addressing the issue of child abuse and neglect. During this time, states became increasingly involved in protecting children, and subsequently in terminating parental rights and finding adoptive homes for children. There is a demonstrated need for adoption; nonetheless, because of the potential for serious psychological damage, adoption should be resorted to only after all reasonable alternatives have failed.[144] When a biological father is interested in his infant child, some states

137. *Id.* at 44–47.

138. Eva Y. Deykin et al., *Fathers of Adopted Children: A Study of the Impact of Child Surrender on Birth Fathers*, 58 AM. J. ORTHOPSYCHIATRY 240, 244 (1988).

139. *Id.*

140. *Id.*

141. *Id.* at 30 (stating that in 1988, one million children lived in adoptive homes).

142. See *id.* at 32–36 for a comprehensive review of the history of adoption.

143. MARVIN VENTRELL & DONALD DUQUETTE, CHILD WELFARE LAW AND PRACTICE 113 (2005).

144. Howell, *supra* note 134, at 31.

violate this principle through their inadequate means of protecting his rights; consequently, children with no need for adoptive families are nevertheless being placed in them.

Statutes that promote adoption as the best result for illegitimate infants potentially deny that child the opportunity to be raised by a biological parent and access to her extended biological family. When the custody of an infant is in dispute, the law "must make a decision based on a prediction about who, among available alternatives, holds the most promise for meeting the child's psychological needs."[145] That determination should consider the psychological importance of knowing one's biological identity.

B. Looking to Federal Child Welfare Policy for Preference for Keeping Children with Biological Parents

Federal child welfare policy explicitly prefers that children remain with their biological families unless there are substantial concerns about their safety. In 1974, the federal government passed the Child Abuse Prevention and Treatment Act,[146] its first incentive-based funding statute aimed at encouraging states to reform their child welfare systems.[147] In the past three decades, the federal government's influence over state child welfare practice has steadily grown.[148] In the Adoption Assistance and Child Welfare Act of 1980,[149] Congress first codified its policy that reasonable efforts must be made to provide services aimed at keeping children with their families and to prevent states from unnecessarily removing children from their parents.[150] Congress reasserted this policy in 1997 when it passed the Adoption and Safe Families Act ("ASFA"),[151] which clearly promotes family preservation efforts to avoid removing a child from her parents.[152]

Congress made clear that in determining if reasonable efforts were made, "the child's health and safety shall be the paramount concern."[153] Many states' inadequate attempts at protecting putative fathers' rights to

145. GOLDSTEIN, ET AL., *supra* note 104, at 6.
146. 42 U.S.C. §§ 5101–5119(c) (1974).
147. VENTRELL & DUQUETTE, *supra* note 143, at 143–44.
148. *Id.* at 144.
149. Pub. L. No. 96-272 (codified as amended in scattered sections of 42 U.S.C.).
150. 42 U.S.C. §§ 620–629(i) (2000).
151. Pub. L. No. 105-89 (codified as amended in scattered sections of 42 U.S.C.).
152. 42 U.S.C. § 671(a)(15) (2000).
153. *Id.*

their infant children suggest that states presume unwed fathers are unfit parents and children are not safe in their care. It may be true that many unwed fathers are not interested or not capable of properly caring for their children. But this is an overbroad assumption that the states use to circumvent establishing that an individual father is unfit. When the state is dealing with an infant whose father wants custody, the father is the only one with a constitutional interest at stake and federal policy explicitly prefers that children stay within their biological family if there is no potential of harm to the child. If the state has no evidence of a father's unfitness at the time a father contests the adoption of his infant child, the state should not be allowed to rely on the stereotypical assumption that all unwed fathers of infants are unfit.

States that employ stringent PFRs or have safe haven laws know little about an infant's father at the time a mother surrenders her infant for adoption. Abandonment is one "aggravated circumstance" which may relieve a state from its requirement to make reasonable efforts to preserve a family.[154] Some states use failure to register on a PFR as prima facie evidence that a father abandoned his child,[155] and it is nearly impossible to determine if a father abandoned his child if the baby was surrendered under safe haven laws. The Supreme Court holds that a state needs "clear and convincing evidence" to terminate parental rights.[156] Although abandonment may be a sufficient basis on which to terminate parental rights, neither PFRs nor safe haven laws provide the state with clear evidence that a father abandoned his child.

IV. Further Recommendations for Greater Protection of Unwed Fathers' Rights

There are many ways in which protection for unwed fathers' parental rights need to be improved. Several have already been suggested. States should recognize that unwed fathers have an interest in the opportunity to establish a relationship with their infant children, which should be protected, especially if fathers are unsuccessful in establishing a relationship with their children through no fault of their own. PFRs should be used not as a sole means to protect or terminate a father's rights, but should be used in conjunction with other notice requirements. States

154. *Id.* at § 671(a)(15)(D)(ii).

155. This is the case in Illinois, Minnesota, Nebraska, and Utah. Beck, *supra* note 59, at 1080.

156. 455 U.S. at 748.

should decriminalize abandonment of infants without allowing for anonymity of the surrendering parent. Courts should grant *pendente lite* custody of infants to fathers contesting adoption petitions. And to strengthen their policies that protect putative fathers' rights, states should look to social science research indicating that adoption may be psychologically traumatizing, as well as to federal policy that promotes preservation of biological connections. In addition, states should require mothers to cooperate in identifying the fathers of their infants. Finally, states should recognize that children have an interest in being raised by a biological parent.

A. Require Mothers to Disclose Identity of Potential Fathers

The Supreme Court has said that, "[a]bsent 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."[157] A mother has superior knowledge about her pregnancy and therefore has the capacity to prevent the father from establishing his right to due process before his parental rights are terminated, either by not telling him she is pregnant or misleading him into thinking the child is not his.[158] It is not logical for states to put the complete onus on a father to discover whether or not a sexual encounter resulted in a pregnancy when the mother can easily obstruct a father's intent to care for his child. As of today, no court or statute requires a mother to disclose a pregnancy or the existence of a child to the father.[159]

If states enacted statutes that required a mother to identify the adoptee child's father, such a statute should receive strict scrutiny in a court challenge.[160] In *Riley v. National Federation of the Blind*, the Supreme Court specifically addressed the constitutional issues involved

157. Lehr v. Robertson, 463 U.S. 248, 273 n.5 (1983) (White, J., dissenting).

158. *See, e.g., In re* Reeves, 831 S.W.2d 607 (Ark. 1992).

159. Howell, *supra* note 134, at 57.

160. The Court applies "strict scrutiny" to legislation that interferes with an individual's fundamental right. When the Court applies strict scrutiny, it will evaluate whether there is a compelling state interest behind the statute at issue to justify the interference, and whether the state's means to address that interest is tailored so narrowly as to only interfere with that fundamental right if absolutely necessary. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved . . . regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and [] legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.").

when a state compels the disclosure of facts from a private party.[161] The relevant issue in *Riley* was a North Carolina statute requiring charities to reveal to potential donors the percentage of donations that go directly to the charitable work.[162] The Court said, "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech."[163] Therefore, the statute was a content-based regulation of speech.[164] The Court also stated that for the purpose of applying a First Amendment analysis, there is no difference between compelled speech and compelled silence; both necessarily comprise the fundamental right of "freedom of speech."[165] Since freedom of speech is a fundamental right, the Court gave the "directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored."[166]

Applying the analysis in *Riley* to a possible adoption statute requiring a mother to identify the father of her infant, that statute must serve a compelling state interest that is narrowly tailored. The compelling state interests include: (1) protecting the putative father's fundamental rights to the custody and care of his child (including a right to due process before his parental rights are terminated), (2) protecting the child's right to have a relationship with his father, (3) adequately protecting these rights in the first instance to ensure the legal stability of finalized adoptions, (4) establishing parent-child relationships as quickly as possible, and (5) avoiding unnecessary adoptions by diligently investigating possible familial placements.

Opponents of compelling a mother to disclose the identity of the father argue that the state has a compelling interest to protect a woman's right to privacy.[167] Some argue that a woman should not have to expose the personal and embarrassing aspects of her life, especially since having a child out of wedlock is socially stigmatizing.[168] This argument has been greatly eroded over the past several decades. Today, nearly one in three children are born out of wedlock,[169] indicating more social acceptance

161. 487 U.S. 781 (1988).
162. *Id.* at 795.
163. *Id.*
164. *Id.*
165. *Id.* at 797–98.
166. *Id.* at 800.
167. *See* Stacy Lynn Hill, Note, *Putative Fathers and Parental Interests: A Search for Protection*, 65 IND. L.J. 939, 958–59 (1990).
168. *Id.*; Aizpuru, *supra* note 58, at 729–30.
169. Irwin Garfinkel & Sara McLanahan, Note, *Unwed Parents: Myths, Realities, and Policymaking*, SOC. POL'Y & SOC'Y 143–50 (2003).

and little need to protect a woman from social disdain.[170] Regardless of this societal change, mothers have a pure privacy interest in keeping their personal lives private. The privacy of women's sexual behavior should be considered a fundamental right. This is why states need to narrowly tailor statutes that compel a woman to disclose the potential father(s) of the child she wishes to surrender.

Statutes that would require a mother to disclose the identity of the father would necessarily be narrowly tailored; the mother is the only source of accurate information. Florida's 2001 Adoption Act included a requirement that mothers who wish to have their child adopted must provide detailed information about the putative father(s). Then, this information was extensively published. A mother challenged the statute, contending that it violated her Fourteenth Amendment right to privacy. The trial court agreed, but found that the state had a compelling interest in infringing on that right and that no less intrusive means would achieve the same result.[171] Most state courts uphold a woman's right to privacy and putative father registries as adequate alternative means to protect putative fathers' rights to their infant children,[172] but the Supreme Court has never addressed the issue.

PFRs, some argue, are a less intrusive means of addressing a state's compelling interest in identifying infants' fathers.[173] But, as discussed in part I *supra*, most PFRs fall short of adequately protecting a putative father's rights or of providing him due process before those rights are terminated. And because most states only provide weak and superficial protection through these registries, the states are not adequately establishing secure parent-child relationships, either with a biological parent or adoptive parent. Plus, by employing PFRs in place of requiring mothers to identify the father, the state establishes a double standard: a state will not fully protect a father's parental rights by compelling a mother to disclose his identity, but it will protect a mother's right to privacy. It appears that infringing on a woman's right to privacy by not

170. Aizpuru, *supra* note 58, at 729–30.

171. G.P. v. State, 842 So.2d 1059, 1062–63 (Fla. Dist. Ct. App. 2003). The Florida Court of Appeals disagreed with the trial court's conclusion, but mainly because the state failed to defend itself in the proceedings, as the legislature was about to repeal the provision. Claire L. McKenna, Note, *To Unknown Male: Notice of Plan for Adoption in the Florida 2001 Adoption Act*, 79 NOTRE DAME L. REV. 789, 794, 810 (2004).

172. *See, In re* S.J.B., 745 S.W.2d 606, 609 (Ark. 1988); *In re* Baby Doe, 734 N.E.2d 281, 287 (Ind. Ct. App. 2000); *In re* T.M.K., 617 N.W.2d 925, 927 (Mich. Ct. App. 2000).

173. McKenna, *supra* note 171, at 811 n.158.

compelling her to disclose the identity of the father outweighs the state's multiple other compelling interests.

Lastly, it is suggested that statutes requiring a mother to reveal the father's identity would result in more abortions and fewer adoptions.[174] Florida's statute requiring mothers' cooperation in identifying the father was in effect for one year. During that year, there were more abortions and fewer adoptions than average.[175] But such data is neither conclusive nor adequate for drawing causal relationships between the statute's effect and changes in frequencies of abortion and adoption. The idea that obliging a woman to cooperate in identifying the father will negatively impact abortion and adoption rates is a theoretical problem and should not prevent a state from enacting such statutes without empirical evidence.[176]

Moreover, compelling the mother to disclose the father's identity is something states already do when a mother applies for welfare assistance. "Cooperative federalism," codified in the Social Security Act of 1974,[177] encourages mothers applying for entitlement payments under Temporary Assistance for Needy Families ("TANF")[178] to cooperate in identifying the fathers of their children.[179] States must deduct twenty-five percent of eligible benefits if the mother refuses to identify the father and may deduct more if the state chooses.[180] Other federal statutes that attempt to persuade mothers to identify the fathers of their children include Medicaid and food stamps programs.[181] Congress adopted the cooperative model for approving entitlement benefits so that states may protect themselves against unnecessarily spending money on families when there is a father who is responsible. Comparing the legitimacy of these statutes to one that would require a mother to cooperate in identifying the father of the child she is surrendering for adoption, Justice White opined, "[t]he State's obligation to provide notice to persons before their interests are permanently terminated cannot be a lesser

174. *See* McKenna, *supra* note 171, at 812 n.163; Aizpuru, *supra* note 58, at 730.

175. McKenna, *supra* note 171, at 812 n.163.

176. Aizpuru, *supra* note 58, at 730.

177. Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology 'Plus' Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 WM. & MARY J. WOMEN & L. 47, 72 (2004) (citing Pub. L. No. 93-647, 88 Stat. 2337 (1975)).

178. 42 U.S.C. § 601. The program was originally called Aid to Families with Dependent Children. *Id.*

179. Pub. L. No. 93-647, 88 Stat. 2337 (1975).

180. *Id.* at 2337–38.

181. 42 U.S.C. 608(a)(2) (2003) (requiring cooperation for Medicaid benefits); 42 U.S.C. 1396(k) (requiring cooperation for food stamps benefits).

concern than its obligation to assure that state funds are not expended when there exists a person upon whom the financial responsibility should fall."[182]

Of course, there are situations where it is not in the best interest of the child or woman to compel cooperation. The federal statutes make clear exceptions to the cooperation requirement if the custodial parent can show good cause,[183] which includes cases of rape, incest, and domestic violence. State statutes requiring mothers to identify the fathers of their surrendered children should include similar provisions.

While it is imperative that the woman and child's safety are paramount concerns, the state should provide a countermeasure to dissuade women from deceiving courts. States should provide for civil damages to fathers who were wrongly thwarted by the mothers of their children, but this is an imperfect solution for several reasons. Civil damages often rely on the opinions of a jury. But, juries may not be sympathetic to the unwed father or may easily find the mother's deceptive actions reasonable.[184] A father may not have the financial means to bring suit or the woman he wishes to sue may be insolvent.[185] But the threat of this mechanism would create an incentive for women to seriously consider the father's rights in the matter and to cooperate with the state to ensure his rights are protected. Plus, in cases where the child has been in an adoptive placement for a substantial amount of time when the father discovers her existence and it is not in the best interest of the child to remove her, the father is not left entirely without remedy.

Placing the onus on the father to discover whether or not he is the father is "totally unrealistic."[186] In some cases, it would require a man "to become involved in the pregnancy on the mere speculation that he might be the father because he was one of the men having sexual relations with her at the time in question."[187] In other cases, the mother can hide the pregnancy from him even if he inquires about the possibility of her being pregnant. Women have control over the situation; men do not. Greater cooperation from mothers is necessary for states to provide greater protection for fathers' parental interests.

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182. Lehr v. Robertson, 463 U.S. 248, 273 n.5 (1983) (White, J., dissenting).

183. 7 U.S.C. § 2015(l)(2) (2003) (waiving cooperation requirement for food stamps if good cause can be shown); 42 U.S.C. § 602(a)(7)(A)(iii) (2003) (waiving cooperation requirement for TANF benefits in domestic violence situations if good cause can be shown).

184. GUGGENHEIM, *supra* note 56, at 76.

185. *Id.*

186. *In re* B.G.C., 496 N.W.2d 239, 241 n.1 (Iowa 1992).

187. *Id.*

B. Apply a Child-Focused Analysis to this Controversy

Statutes and courts focus on the legal status of a putative father to his child: has he met the constitutionally established criteria of biology-plus that would trigger the state's requirement to protect his interest in his relationship with his child? Children's interests in their relationship with their biological fathers is not a factor in the calculus, yet these decisions have a profound impact on their lives and development. Balancing the father's and child's interests to have a relationship with one another would be less dismissive of fathers' legal rights.

Recognizing that children have a liberty interest in familial relationships is an idea that has been gaining support in recent years,[188] but the Supreme Court has yet to formally accept such a proposition. The last time the Supreme Court had the opportunity to do so was in *Michael H. v. Gerald D.*[189] There, the Court stated, "[w]e have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship . . . [and] [w]e need not do so here."[190] However, a few years earlier, in *Pickett v. Brown*, the Court suggested that "an illegitimate child has an interest . . . in establishing a relationship to his father."[191]

However, the Court has laid the foundation to recognize a child's right to maintain a relationship with her family. The Court has recognized that a child is a person for the purposes of the Constitution[192] and has specifically recognized that minors have a constitutional right to abortions, contraceptives, and freedom of speech.[193] Courts have also recognized that children have a substantive right of companionship with their parents in the context of wrongful death or separation.[194] In *Santosky v. Kramer*, the Court asserts, "[a]t the factfinding, the State cannot

188. *See* Gilbert A. Holmes, *The Tie that Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358 (1994); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993).

189. 491 U.S. 110 (1989).

190. *Id.* at 130.

191. 462 U.S. 1, 15 n.13 (1982).

192. *In re* Gault, 387 U.S. 1 (1967) (holding that juveniles have a right to due process in criminal proceedings).

193. Holmes, *supra* note 188, at 385.

194. *Id.* at 399–404; Smith v. City of Fontana, 818 F.2d 1411, 1419 (9th Cir. 1987) (citing Strandberg v. City of Helena, 791 F.2d 744, 748 (9th Cir. 1986), *cert. denied*, 484 U.S. 935 (1987)) (extending parents' constitutional interest in their familial companionship to their children in the context of 42 U.S.C. § 1983).

presume that a child and his parents are adversaries, . . . [b]ut until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."[195]

Further, the United Nations' Convention on the Rights of the Child ("CRC") explicitly identifies a child's right to be with his parents.[196] Specifically, Article 7 declares, "[t]he child . . . shall have . . . the right to know and be cared for by his or her parents" and Article 8 declares, "[s]tates . . . [shall] respect the right of the child to preserve his or her identity, including . . . family relations."[197] Though the CRC is not binding on the United States, which has failed to ratify it, 191 other countries have ratified this convention, which strongly demonstrates an international consensus around the importance of these rights.

States have reason to condemn out-of-wedlock births, since these children are often a financial burden on the state. But, as the *Pickett* Court stated, "visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrong doing."[198] Although states may want to discourage men from fathering children outside of marriage by making it difficult to assert paternity if they do, the child's interest in her relationship with her father countervails that state interest: "Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual as well as an unjust way of deterring the parent."[199]

The Due Process Clause affords only those protections "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[200] But, "[w]hat the deeply rooted traditions of the country are

195. 455 U.S. 745, 760 (1982).

196. United Nations Convention on the Rights of the Child, G.A. Res. 44/25, Annex, 44 U.N. GAOR Supp. (No. 49), at 166, U.N. Doc. A/44/49 (1989). ("[T]he most expansive international treaty that protects children's rights in 191 participating countries [yet] awaits ratification by the United States. Its consideration by the Senate Foreign Relations Committee has been delayed for more than ten years due to procedural and political barriers.").

197. *Id.* arts. 7, 8.

198. Pickett v. Brown, 462 U.S. 1, 7 (1982) (discussing a state's interest in not disadvantaging illegitimate children by denying them rights to financial support from their fathers that children whose parents are married enjoy).

199. Trimble v. Gordon, 430 U.S. 762, 769–70 (1977) (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)).

200. Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (quoting Snyder v. Mass., 291 U.S. 97, 105 (1934) (Cardozo, J.)).

is arguable."[201] Tradition is too limited a methodology for the court to fully realize the rights protected by the Constitution. "Liberty [is a] broad and majestic term[] . . . among the great constitutional concepts . . . purposely left to gather meaning from experience."[202] Before 1972, neither tradition nor law recognized putative fathers' parental rights to the children with whom they established a substantial relationship.[203] It is time for legal recognition that children have a liberty interest in being raised by their biological parent and to give that interest its rightful constitutional protection. By doing so, states would have a greater incentive to protect putative fathers' parental interests when their children are infants.

Conclusion

States have an interest in protecting putative fathers' rights. By doing so, they will avoid violating fathers' rights and prevent them from asserting them later.[204] Contrary to current belief and practice, strengthening the protection of putative fathers' rights to their infant children would increase efficient administration and expediency because it would protect the state from legal challenges from fathers who wish to undo adoption decisions in which their rights were not originally protected. It is in the best interest of the child to quickly find permanency. For this reason, the state should provide stronger statutory protection for unwed fathers' rights—either to promote the bonds of family or to ensure the stability of adoption decisions.

201. *Id.* at 137 (Brennan, J., dissenting) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 549 (1977)).

202. *Id.* at 138 (White, J., dissenting).

203. *See Michael H.*, 491 U.S. at 139 (providing a list of cases in which the Court first recognized fundamental rights, such as the right to use contraceptives, freedom from corporal punishment in school, and freedom from an arbitrary transfer from prison to a psychiatric institution); *see also* Lehr v. Robertson, 463 U.S. 248 (1983).

204. *See* Stanley v. Ill., 405 U.S. 645, 657 (1972); *Lehr*, 463 U.S. at 275–76 (White, J. dissenting).