SYSTEMATICALLY SCREWING DADS: OUT OF CONTROL PATERNITY SCHEMES

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I. INTRODUCTION

Most children are born in the United States as a result of consensual adult sex.[1] In this country, genetic ties between a man and a child often do not determine legal paternity.[2] Conversely, many states presume that a man has both legal paternity and genetic ties to a child if he is married to the child's biological mother.[3] However, if a child's biological mother is unmarried, the child's genetic father is more likely to successfully claim paternity interests. For instance, in *Lehr v. Robertson*, the U.S. Supreme Court recognized that such interests implicate federal constitutional protection of "life, liberty, or property" and thus warrant guarantees of fair procedure during adoption proceedings.[4] Moreover, the

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1. *See* Jeffrey A. Parness, *Deserting Mothers, Abandoned Babies, Lost Fathers: Dangers in Safe Havens*, 24 QUINNIPIAC L. REV. 335, 340 (2006).

2. *See, e.g.*, CAL. FAM. CODE § 7611 (West 2008); 750 ILL. COMP. STAT. ANN. § 45/5(a)(1) (West 2008).

3. *See, e.g.*, CAL. FAM. CODE § 7611 (West 2008) (stating a "man is presumed to be the natural father of a child" born to his wife); 750 ILL. COMP. STAT. ANN. § 45/5(a)(1) (West 2008) (presuming fatherhood when "child is born or conceived" during a marriage). Incidentally, there are no presumed maternity interests for wives whose husbands father children outside the marriage. *See, e.g.*, Amy G. v. M.W., 142 Cal. App. 4th 1, 15 (Cal. Ct. App. 2d 2006).

4. Lehr v. Robertson, 463 U.S. 248, 262 (1983) (declaring federal constitution may compel State to consider biological father's opinion "of where the child's best interests

U.S. Supreme Court, in *Michael H. v. Gerald D.*, concluded that a genetic father has the "unique opportunity" to develop a relationship with his offspring if the child's biological mother is unmarried under federal constitutional law,[5] although similar paternity opportunities may not be available to genetic fathers of children born to mothers who are married to other men.[6] Under *Lehr* and *Michael H.*,[7] when paternity schemes systematically and unfairly interfere with men who wish, or might wish, to pursue their paternity opportunities, these schemes should fail.[8] The *Lehr* court specifically recognized that governmental systems that likely omit "many responsible fathers" for reasons beyond their "control" may be "procedurally inadequate."[9]

Unfortunately, contemporary American paternity schemes now frequently omit "many responsible fathers" who have little or no "control" over the "unique opportunity" to develop a parent-child relationship. Often these omissions undercut rather than promote general policies underlying paternity laws. The omissions can be easily reduced, if not ended. Relevant public policies involve dual parenthood and equality. In particular, current state birth certificate, safe haven and adoption schemes are flawed. Suggested reforms will be presented after a brief review of genetic father "control" and the "unique" paternity opportunity interest under *Lehr*, the general requirements for procedurally adequate paternity regimes, the policies guiding

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lie," provided that biological father develops "a relationship with his offspring" and accepts "some measure of responsibility for the child's future").

5. Michael H. v. Gerald D., 491 U.S. 110, 128 (1989).

6. *Id.* at 128-30 (finding that conclusive paternity presumption favoring husband under state law is permitted under federal constitution). *But see* State ex. rel. Cihlar v. Crawford, 39 S.W.3d 172 (Tenn. App. 2000) (holding that one-time conclusive presumption favoring husband is rebuttable).

7. Some state law precedents expand paternity opportunity interests beyond those required by *Lehr*, *Michael H.*, and subsequent federal constitutional cases. *See* Callender v. Skiles, 591 N.W.2d 182, 192 (Iowa 1999) (holding genetic father of child born into marriage of genetic mother and husband could nevertheless seek to overcome the husband's paternity, although he was an "established father"), *aff'd* Callender v. Skiles, 623 N.W.2d 852 (Iowa 2001) (terminating husband's rights).

8. *See Lehr*, 463 U.S. at 262-64; *Michael H.*, 491 U.S. at 128-30. The traditional test for procedurally unfair governmental schemes infringing upon federal constitutional "life, liberty or property" interests involves the three-pronged strict scrutiny approach. Mathews v. Eldridge, 424 U.S. 319 (1976). Where such interests arise initially only from state law, the breadth of procedural safeguards is narrower than where such interests arise under an independent federal substantive due process analysis. *See* Pena v. Mattox, 84 F.3d 894, 897-98 (7th Cir. 1996) (stating that predeprivation governmental hearings "dealing with parental rights" warrant "a higher order of procedural protection" when independent federal substantive due process liberty interests are implicated).

9. *Lehr*, 463 U.S. at 264.

contemporary American paternity laws, and the unfairness of current birth certificate, safe haven and adoption schemes.

II. PATERNITY OPPORTUNITY INTERESTS

Under the U.S. Supreme Court decision in *Lehr v. Robertson*, many genetic fathers have constitutionally protected opportunities for paternity under law when the genetic mothers of their children are unmarried at all times from conception to birth.[10] Fathers secure legal paternity when they establish in a timely fashion "significant custodial, personal, or financial" relationships with their offspring.[11] Unfortunately, neither *Lehr* nor its progeny fully describe how such relationships are successfully established. They seemingly do require, however, that the chance for legal paternity for at least a very young child usually not be lost when the genetic father had no control over establishing the requisite relationship.[12] Paternity opportunity interests now differ significantly from state to state, with many uncertainties and technical pitfalls. Unfortunately, some states find that *Lehr* allows the denial of paternity opportunities to genetic fathers who fail to establish significant parent-child relationships because of simple "ignorance," "grudging and crabbed" legal doctrines, or genetic mothers or others who conceal children.[13] These approaches do not necessarily follow from *Lehr* and run contrary to the prevailing public policies underlying paternity laws. *Lehr* requires that the control over paternity establishments by genetic fathers be real, not fictitious, even when alternative parentage plans, such as adoptions by strangers, seemingly offer the children better chances for good lives.[14] Legal parents have never been denied custody or visitation rights simply because genetic strangers would likely make better parents.

In *Lehr*, the story of the birth of Jessica to an unmarried couple, Lorraine and Jonathan, yielded vastly different opinions in the Supreme Court.[15] Six justices emphasized Lorraine's story,[16] while three focused on Jonathan's.[17] Lorraine had "married Richard Robertson eight months

10. *Id.* at 252. Genetic fathers whose paternity arose from illegal sexual conduct typically are excluded from these protections. *See, e.g.*, Pena v. Mattox, 84 F.3d 894, 900 (7th Cir. 1996) (excluding genetic father from protections when child was conceived in case of statutory rape).

11. *Lehr*, 463 U.S. at 262.

12. *Id.*

13. *Id.* at 275 (White, J., dissenting).

14. *Id.*

15. *Id.* at 270.

16. *Id.* at 250-52.

17. *Lehr*, 463 U.S. at 268-69.

after Jessica's birth."[18] Robertson then sought to adopt Jessica shortly after Jessica's second birthday in December 1978.[19] Jonathan, the biological father, contested the adoption, arguing that he was entitled to advance notice of the adoption proceeding and opportunity to be heard.[20] Jonathan filed a separate paternity petition in January 1979.[21] In March 1979, the Family Court of Ulster County, New York granted Richard's adoption request.[22]

Under New York statutory law, a genetic father of a child born to an unmarried woman was entitled to notice only if: (1) he had filed his name in "the putative father registry;" (2) he had been adjudicated to be the father, "identified as the father on the child's birth certificate," or "identified as the father by the mother in a sworn written statement;" (3) he had married the mother before the child was six months old; or, (4) he had lived "openly" with the child and the child's mother while holding himself out as the child's father.[23] Conceding that he did not meet any of the statutory requirements,[24] Jonathan urged that "special circumstances gave him a constitutional right to notice and a hearing before Jessica was adopted."[25] Those circumstances included the filing by Jonathan of "a visitation and paternity petition" in a New York court about a month after the adoption proceeding began, before any adoption order was signed.[26]

A month after filing his paternity petition, Jonathan learned of Robertson's adoption petition.[27] Four days later, Jonathan sought to halt Richardson's adoption proceeding so that only his paternity case would proceed.[28] The adoption court judge responded to Jonathan's request for

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18. *Id.* at 250.

19. *In re* Adoption of Martz, 423 N.Y.S.2d 378, 380 (N.Y. Fam. Ct. 1979).

20. *Lehr*, 463 U.S. at 250.

21. *Id.*

22. *Id.*

23. *Id.* at 251-52 (discussing N.Y. DOM. REL. LAW § 111-a) (McKinney 2008)).

24. The concession was made though Jonathan alleged that he and Lorraine cohabitated for about two years, until Jessica's birth, that Lorraine disappeared with Jessica right after birth, and that Lorraine acknowledged Jonathan's paternity to friends and relatives during her pregnancy. *Id.* at 268-69. In other situations, this may satisfy the "living openly" and "holding out" requirements of adoption laws on when participation rights arise for unwed genetic fathers.

25. *Lehr*, 463 U.S. at 252.

26. *Id.* at 252. Jonathan filed the paternity petition on January 30, 1979. *Martz*, 423 N.Y.S.2d at 380. Process was served on Lorraine on February 22, 1979. *Id.*

27. *Lehr*, 463 U.S. at 253. On March 3, 1979, Jonathan was served a copy of Lorraine's motion in the adoption case for consolidation with the paternity case. *In re* Adoption of Jessica XX, 430 N.E.2d 896, 897 (N.Y. 1981).

28. *Lehr*, 463 U.S. at 253.

a stay by indicating the adoption order was signed earlier that day.[29] By then, the judge was aware of Jonathan's pending paternity case.[30] The adoption court judge concluded that notice to Jonathan was not required.[31]

Two New York appellate courts sustained Jessica's adoption.[32] The New York Court of Appeals affirmed in part on the basis that Jonathan "made no tender indicating any ability to provide any particular or special information relevant to Jessica's best interest."[33] Accordingly, any notice afforded to Jonathan would not have furthered the purpose of such notice.[34] The purpose of such notice was to enable a genetic father "to provide the [adoption] court with evidence concerning the best interest of the child."[35] Furthermore, the appellate court made several observations. First, it noted that Jonathan knew where Lorraine was even before he petitioned for visitation and paternity.[36] Second, it observed that Jonathan never filed a statutory notice of intention to claim paternity, which would have assured him participation rights in any adoption proceeding under New York law.[37] Lastly, it remarked that Jonathan did not make a "prompt" application to intervene in the adoption case once he learned of it.[38]

On appeal to the United States Supreme Court, the only legal issues were: (1) "whether the New York statutes are unconstitutional because they inadequately protect the natural relationship between parent and child," and (2) whether these statutes "draw an impermissible distinction between the rights of the mother and the rights of the father."[39]

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29. *Martz*, 423 N.Y.S.2d at 384.

30. *Lehr*, 463 U.S. at 252-53. *See also Martz*, 423 N.Y.S.2d at 384 (acknowledging that trial judge learned of paternity action when Lorraine sought change of venue of paternity case to court where the adoption case was pending). It was unclear whether Richard "had any actual or imputed knowledge" of Jonathan's claim to the fatherhood. *Id.*

31. *Lehr*, 463 U.S. at 253.

32. *Id.* at 253-54.

33. *Id.* at 255.

34. *Id.*

35. *Id.*

36. *Jessica XX*, 430 N.E.2d at 901.

37. *Id.*

38. *Id.* In his dissent, the Chief Judge noted that Jonathan would have reasonably thought that a filing of statutory notice by him was "a meaningless act," since Jonathan knew that the adoption judge was aware of the paternity case before the adoption was finalized. *Id.* at 904 (Cooke, C.J., dissenting). Additionally, the Chief Judge noted that a "prompt" intervention between Saturday, March 3, and Tuesday, March 6, reasonably may have seemed unnecessary to Jonathan as Lorraine's venue request before the adoption court was "returnable" on March 12. *Id.* at 904-05.

39. *Lehr*, 463 U.S. at 255.

Regarding the rights that flow from "the natural relationship between parent and child,"[40] six Supreme Court justices distinguished between an unwed genetic father who had formed a "significant custodial, personal, or financial relationship"[41] with his child, thereby acquiring "substantial" federal constitutional childrearing interests, and an unwed genetic father who had not yet formed such a relationship.[42] In *Lehr*, the majority found that Jonathan had not formed a significant relationship with Jessica and that he had not sought "to establish a legal tie until after she was two years old."[43] Consequently, the issue was not the "adequacy of New York's procedure for terminating a developed relationship," but whether New York had sufficiently protected Jonathan's "opportunity to form" a parent-child relationship with Jessica.[44] The majority found there was adequate protection.[45]

The Supreme Court thus deemed "procedurally adequate" the New York statutory conditions regarding advance notice of adoption proceedings to unwed genetic fathers.[46] The Court observed that "the right to receive notice" was completely within Jonathan's "control" and that he simply needed to mail a postcard to the putative father registry.[47] Jonathan's ignorance of the putative father registry requirement was no defense.[48] The Court rejected Jonathan's plea that his case was "special" because both the adoption court and the mother were aware of his pending paternity petition before the adoption order was entered.[49] Thus, the Court refused to make an exception for special circumstances, reasoning that strict compliance with the statutes served the public interest of facilitating expeditious adoptions of young children.[50] Furthermore, the Court noted that the New York scheme was fair

40. *Id.*
41. *Id.* at 262.
42. *Id.* at 261-62. Specifically the court said: "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' his interest . . . acquires substantial protection. . . . But the mere existence of a biological link does not merit equivalent constitutional protection." *Id.* at 261.
43. *Id.* at 262-63.
44. *Id.* at 263-65.
45. *Id.* at 265.
46. *Id.* at 264.
47. *Id.*
48. *Id.*
49. *Id.* at 264-65.
50. *Id.* at 264-65.

because Jonathan was "presumptively capable of asserting and protecting" his own rights.[51]

Regarding the distinction between maternal and paternal rights, the court recognized the need for "a substantial relation between the disparity and an important state purpose."[52] The state adoption procedure distinguished between women and men who were genetic parents in that it allowed all mothers, but not all fathers, "the right to veto an adoption and the right to prior notice of any adoption proceeding."[53] According to the Court, the distinction served three objectives: (1) promoting "the best interests of the child;" (2) protecting "the rights of interested third parties;" and (3) securing prompt and final adoptions of nonmarital kids.[54] To achieve these objectives, the New York laws afforded veto and participation rights only to genetic parents who had established, and not later abandoned, "custodial, personal, or financial" relationships with their children.[55]

By giving birth, genetic mothers have always established parent-child relationships.[56] However, the Court observed that only certain putative fathers could claim such a relationship, usually through the process of legitimization or active participation in childrearing.[57] The high court found the New York statutes sufficiently recognized unwed genetic fathers who came forward to participate in childrearing, noting that the statutory scheme did not likely "omit many responsible fathers."[58] The Court seemingly concluded the New York statutes adequately protected genetic fathers because the right to receive notice was entirely within these fathers' "control."[59]

The dissenters in *Lehr* focused more on Jonathan's story, which resulted in a very different conclusion about the adequacy of protection afforded Jonathan's natural relationship with Jessica.[60] According to Jonathan, whose factual account was never subject to an evidentiary

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51. *Id.* (stating further that Jonathan's argument "amounts to nothing more than an indirect attack on the notice provisions of the New York statute").

52. *Id.* at 265 (citing Craig v. Boren, 429 U.S. 190, 197-99 (1976)).

53. *Id.* at 266. The state endowed mothers with this right, assuming no earlier parental rights termination. *Id.*

54. *Id.* at 266-67.

55. *Id.*

56. *See* Nguyen v. INS, 533 U.S. 53, 62-63 (2001) ("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.").

57. *Lehr*, 463 U.S. at 266-67.

58. *Id.* at 264.

59. *Id.*

60. *Id.* at 268-71 (White, J., dissenting).

hearing, Jonathan and Lorraine "cohabited for approximately two years, until Jessica's birth."[61] During this time Lorraine acknowledged to friends and relatives that Jonathan was Jessica's father.[62] Later, when Lorraine sought public aid, she reported to the Department of Social Services that Jonathan was the father.[63] Jonathan "visited Lorraine and Jessica in the hospital every day during Lorraine's confinement."[64] However, upon discharge from the hospital, Lorraine largely concealed her whereabouts from Jonathan for nearly a year, though he sporadically located her and visited with Lorraine, Jessica, and Lorraine's other child "to the extent" Lorraine was willing.[65] From August 1977 to August 1978, Jonathan was unable to locate Lorraine and Jessica, though he never ceased looking for them.[66] Jonathan located them again in August 1978 "with the aid of a detective agency."[67] By that time, Lorraine was married to Richard Robertson.[68] Jonathan maintained that he offered to furnish financial assistance and to establish a trust fund for Jessica, but Lorraine refused.[69] Lorraine also rejected Jonathan's request to visit Jessica and "threatened" him "with arrest unless he stayed away."[70] Jonathan subsequently retained counsel who wrote to Lorraine in early December 1978, requesting visitation for Jonathan and threatening legal action.[71] The Robertsons' adoption petition, which they filed on December 21, 1978, closely followed Jonathan's retention of counsel.[72] The adoption was granted on March 7, 1979, though Jonathan had filed a paternity petition in January, 1979 and though he claimed he only learned of the adoption proceeding on March 3, 1979.[73]

With this "far different picture," the dissenters concluded "that but for the actions" of Lorraine, Jonathan would have developed a relationship with Jessica that warranted full veto and participation rights in the adoption case.[74] The dissent also looked to a 1980 statutory amendment in New York that guaranteed a genetic father's right to consent to adoption when he was "prevented" from establishing a

61. *Id.* at 268-69.
62. *Id.* at 269.
63. *Lehr*, 463 U.S. at 269.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Lehr*, 463 U.S. at 269.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 253.
74. *Id.* at 270-72.

significant parent-child relationship by the genetic mother or another "having lawful custody of the child."[75] The dissent seemingly concluded that blood ties, together with interference and an inquiring genetic father who parented for some time and wished to parent, were sufficient circumstances to prompt adoption notice and participation rights.[76]

The dissenters viewed the filing of the paternity petition as comparable to the statutory factors affording to genetic fathers affirmative rights during adoptions.[77] Noting that Jonathan's "identity and interest" was as clearly and easily ascertainable as those of fathers falling under the statutory categories,[78] the dissent observed that failure to provide him with the same rights constituted the "sheerest formalism."[79] Such formalism failed to serve the government's goals of the child's best interest and of expeditious and conclusive adoptions.[68]

Finally, the dissenters implied that states could better ensure a genetic father's participation in adoption proceedings by requiring an unwed genetic mother "to divulge" the name of the child's biological father.[81] The dissent observed that states could even do so when it is the spouse of the genetic mother, like Richard Robertson, who seeks an adoption.[82] The dissent further remarked that governments already require such identifications in other settings, including situations where mothers seek public assistance on behalf of their children.[83]

Both the majority and the dissent in *Lehr* recognized that unwed genetic fathers possess constitutionally-protected paternity opportunity interests in their offspring born to unwed mothers. Even the majority, with its more limited view, expressed concerns about the validity of state adoption schemes that deny paternity opportunities to men who had no "control" over establishing paternity or that likely omit many "responsible fathers."[84] Jonathan arguably had "control" as he knew of the pregnancy and birth and as he could have filed his name in the registry sometime before Jessica turned two.[85] However, it would be

75. *Id.* at 271 (quoting N.Y. DOM. REL. Law § 111(1)(d)).
76. *Lehr*, 463 U.S. at 272-74.
77. *Id.* at 272.
78. *Id.* at 274.
79. *Id.* at 275.
80. *Id.*
81. *Id.* at 273.
82. *Lehr*, 463 U.S. at 273.
83. *Id.*
84. *Id.* at 264.
85. Like the New York Court of Appeals, the U.S. Supreme Court indicated that Jonathan did not exert "control" because he could have made a "prompt" application to intervene in the adoption case. *Id.* at 253. Jonathan did show up at the adoption proceeding, but it was four days after he first learned of it, which was not "prompt"

considerably harder to determine whether Jonathan had "control" if he only knew about his sexual encounter with Lorraine and was therefore in the dark about Lorraine's pregnancy and Jessica's birth. On these facts, would the U.S. Supreme Court rule that Jonathan would still be required to register his sexual encounter with Lorraine before birth or very shortly thereafter in order to secure participation rights in a proposed adoption of Jessica very shortly after her birth?

III. PROCEDURALLY ADEQUATE PATERNITY SCHEMES

The guarantees of fair governmental systems are extended under several U.S. Supreme Court decisions, including *Lehr*, to many non-paternity settings. Generally, individuals with "life, liberty, or property" interests cannot be subjected to unfair deprivations. For example, in *Parratt v. Taylor*, a prisoner complained that his hobby kit package, though delivered to the prison, never arrived at his cell, thereby depriving him of "life, liberty or property" protected by federal procedural due process.[86] The U.S. Supreme Court recognized that the prisoner had a viable constitutional claim if the postal delivery system was "inadequate" in protecting the mail, as long as it was "practicable for the State" to provide greater protection.[87] No matter what post-deprivation remedy was available to the prisoner to recover the cost of the hobby kit, the governmental system was inadequate where "pre-deprivation safeguards would be of use in preventing the kind of" loss alleged.[88]

The 1978 U.S. Supreme Court decision in *Monell v. Department of Social Services* spoke to the need for fair governmental procedures in a different setting.[89] In *Monell*, the Court held that unfair schemes infringing upon a person's constitutional interests can prompt institutional and individual liability[90] under a provision of the Civil Rights Act of 1871.[91] Thus, a municipal social services department and a municipal school board, even without vicarious liability, could be held accountable to pregnant employees who were subjected to unfair leave of

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enough for the majority. *Id.* at 252-54. Further, the majority did not address whether Jonathan could have been found to have lived "openly" with Lorraine and their unborn child under the New York statute. *Id.* at 251-52.

86. Parratt v. Taylor, 451 U.S. 527, 537 (1981).

87. *Id.* at 543.

88. Zinermon v. Burch, 494 U.S. 113, 138-39 (stating that loss could not be caused by government officers' "random, unauthorized" acts).

89. 436 U.S. 658 (1978).

90. *Id.* at 690-91.

91. 42 U.S.C. § 1983 (2006) (defining "person" under Civil Rights Act of 1871).

absence schemes that originated from the "execution of a government's policy or custom, whether made by lawmakers or by those whose edicts or acts may fairly be said to represent official policy."[92]

Borrowing from *Monell*, the 1998 U.S. Supreme Court decision in *Gebser v. Lago Vista Independent School* spoke to public school liability under Title IX of the Education Amendments of 1972.[93] In *Gebser*, the Court held that institutional, as compared to individual, liability arose only if a governmental unit engages in intentional discrimination directly through "official policy" or if the unit knew of discrimination by a teacher or student and deliberately decided not to take remedial action.[94]

A few recent federal circuit court rulings further demonstrate how flawed government schemes can prompt institutional responsibility for deprivations of "life, liberty or property." For instance, the Fifth Circuit found in *Stotter v. Univ. of Texas at San Antonio* that *Monell*-type federal procedural due process liability was possible in a case where a state university "discarded" a professor's personal property left in his office without affording the professor "sufficient opportunity to retrieve" his property.[95] While notice was sent, notice was actually received by the professor three days after his property was discarded.[96] The Fifth Circuit held that the availability of a post-loss remedy in some state tribunal was insufficient process where the deprivation was reasonably "predictable or foreseeable," where a reasonable pre-loss process was available, but not used, and where the official who discarded the property was acting within "authorized" (express or implied) authority.[97]

Gebser-type liability was found possible in *Simpson v. University of Colorado*. In this case, players and recruits of a state university's football team sexually assaulted multiple women.[98] Because the head football coach "maintained an unsupervised player-host program," even though he had "general knowledge of the serious risk of sexual harassment and assault during college football recruiting efforts" via knowledge of

92. *Monell*, 436 U.S. at 694 (observing that the schemes were allegedly unfair because they mandated pregnant employees to take unpaid leaves of absence before they were medically required).

93. 524 U.S. 274 (1998); *see also* 20 U.S.C. §§ 1681-1688 (2006) (stating sex discrimination claims are available against educational institutions receiving federal financial assistance).

94. Simpson v. University of Colorado, 500 F. 3d 1170 (10th Cir. 2007) (analyzing cases involving Title IX, *Gebser* and Davis *ex rel.* LaShonda D. v. Monroe County Bd. Of Ed., 526 U.S. 629 (1999), and recognizing their reliance on *Monell*).

95. Stotter v. Univ. of Texas at San Antonio, 508 F.3d 812 (5th Cir. 2007).

96. *Id.* at 819.

97. *Id.* at 822.

98. *Simpson*, 500 F.3d at 1184.

similar prior assaults, the Tenth Circuit found that a due process violation existed.[99] The *Simpson* court held that a jury "reasonably" could find that "the need for more or different training" of player-hosts was obvious because the likelihood of future Title IX violations was great and the coach was "deliberately indifferent to the need [to prevent sexual harassment and assaults during the university's football recruiting efforts]."[100]

For paternity schemes, these cases suggest that governmental protection of paternity opportunities is inadequate if greater protection is "practicable" and comports with general public policies. These cases also suggest that if past instances of paternity opportunity deprivations have occurred where genetic fathers had no "control," then "remedial action" is required in order to prevent future deprivations. Further, they suggest that governments cannot be "deliberately indifferent" to the need for more or different training of paternity law personnel who oversee paternity schemes where some "responsible fathers" have earlier been omitted from their children's lives without good reason.

IV. PUBLIC POLICIES UNDERLYING AMERICAN PATERNITY LAWS

Like flawed property disposal and college football recruiting schemes, paternity designation systems can be deficient. Paternity schemes should fail when they do not afford "practicable" opportunities for biological dads to establish fatherhood under law for children born to unwed mothers.[101] Today, about a million and a half children are born in the United States each year to unwed mothers.[102] About a million of these children have fathers recognized under law around the time of

99. *Id.* at 1184.

100. *Id.* at 1184-85.

101. Unwed mothers include, in many states, both women who were unmarried at all times during their pregnancies and for some time after birth. Marriage during pregnancy, but not at birth, can prompt a marital paternity presumption under law, as in ARIZ. REV. STAT. ANN. § 36-334(C)(1) (2008) (stating that wed mother is a mother married "at any time in the ten months before the birth"). Marriage after birth sometimes can also prompt a marital paternity presumption under law. *See* 750 ILL. COMP. STAT. ANN. § 45/5(a)(2) (West 2008) (presuming natural fatherhood with post-birth marriage and man's name on birth certificate); N.Y. DOM. REL. LAW § 111-a (presuming fatherhood when marriage to mother occurs before child is six months old).

102. *See* 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).

birth.[103] Virtually all of these children have legal mothers, but these children do not necessarily have legal fathers. [104]

This disparity in parentage designation occurs even though state governments repeatedly pronounce they usually want both a father and a mother under law for all children born of consensual adult sex. Dual parenthood for non-marital kids means healthier lives for the kids[105] and two sources of child support.[106] As well, the paternity statutes in Wisconsin are founded, in part, on a state policy "to promote the interest of children in knowing the identity of both parents."[107] Knowledge of parental identity means better healthcare for the kids.[108]

Further, lost paternity is rampant even though state governments generally proclaim that, at least upon birth, biological mothers and fathers of non-marital kids should be treated equally. A Delaware statute states:

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103. *See id.*

104. *See Nguyen*, 533 U.S. at 62-63. In *Nguyen*, Justice Kennedy approved different procedures for eligible women and men seeking parental rights through proof of genetic ties. He stated:

> 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 mothers' status is documented in most instances by the birth certificate or hospital records and the witnesses who attest to her having given birth.
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> 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.

Id. Thus, even where genetic ties alone can prompt similar childrearing rights for men and women, methods of proof usually vary.

105. *See, e.g.*, Margaret F. Brinig & Steven L. Lock, *Legal Status and Effects on Children*, NOTRE DAME LEGAL STUD. PAPER NO. 07-21 (2007), *available at* http://ssrn.com/abstract=973826 (last visited June 16, 2008).

106. *See, e.g.*, MICH. COMP. LAWS ANN. § 722.712(1) (West 2008) ("The parents of a child born out of wedlock are liable for the necessary support and education of the child.").

107. WIS. STAT. ANN. §§ 767.87, 767.89 (West 2008). *See also* Samantha Besson, *Enforcing the Child's Right to Know Her Origins: Contrasting Approaches Under Convention of the Right of the Child and the European Convention on Human Rights*, 21 INT'L J. L., POL'Y & FAM. 137, 138-39 (2007) (observing child's right to know origins "is now broadly recognized and respected" by European countries and international human rights law).

108. *See, e.g.*, OKLA. STAT. ANN. § 7501-1.2 (B) (West 2008) ("[Legislature] seeks to . . . collect and maintain social and medical information . . . in the recognition that all children should have access to knowledge about their heritage.").

> The father and mother are 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 concerning such child's custody or any other matter affecting the child.[109]

Notwithstanding these widely-prevalent two parent and sex equality policies, about one-half million non-marital children have a mother, but no father, under law at the time of birth.[110] Of course, legal paternity can later be secured via judicial actions, like Jonathan Lehr's paternity suit[111] or other proceedings.[112] But by then, healthy father-child relationships are far more difficult to establish. Further, post-birth paternity inquiries are often driven by child support needs or child support reimbursements rather than by the desire for healthy parent-child relations or for sexual equality.[113]

Unfortunately, while the policies of dual parenthood and equal treatment of mothers and fathers should be promoted by American paternity laws, often they are not.

V. THE UNFAIRNESS OF STATE BIRTH CERTIFICATE, SAFE HAVEN AND ADOPTION SCHEMES

A quick glance at American paternity laws in several contexts demonstrates the systematic screwing of dads of non-marital children, including the failure to promote dual parenthood and equality. In the birth certificate context, federally-driven mandates[114] require that

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109. 13 DEL. CODE ANN. tit. 13, § 701(a) (2008).

110. *See* Parness, *supra* note 102, at 62.

111. These proceedings may be initiated by the birth mothers, their children, the state, or the alleged genetic fathers. The purposes of these proceedings can include: child support, child visitation, child custody, or termination of parental rights. *See, e.g.*, 750 ILL. COMP. STAT. ANN. § 45/7(a) (West 2008).

112. Post-birth paternity proceedings, at times, do not require initial judicial involvement. For example, there are administrative determinations of paternity in Illinois in cases involving "applicants for or recipients of financial aid." 305 ILL. COMP. STAT. ANN. § 5/10-17.7 (West 2008); ILL. ADMIN. CODE tit. 89 § 160.61 (2008).

113. *See, e.g.*, 750 ILL. COMP. STAT. ANN. § 45/7(a) (West 2008).

114. These federally driven mandates arise from federal welfare subsidies within the Temporary Assistance for Needy Families program (TANF). 42 U.S.C. § 666(a)(5) (2006). Scholars have reviewed the federal mandates on establishing and rescinding voluntary paternity acknowledgments. *See, e.g.*, Jeffrey A. Parness, *No Genetic Ties, No*

voluntary paternity acknowledgment opportunities be made available to genetic fathers of non-marital children at hospitals shortly after birth or at government offices thereafter.[115] Yet, federal and state laws say nothing about hospital or governmental duties to secure paternity designations for as many children as possible,[116] notwithstanding the widely-prevalent two-parent and equality policies as well as the *Lehr* court's concern about state schemes likely omitting many "responsible fathers."[117] However, if an unwed mother seeks welfare benefits on behalf of her children, participation in federal welfare programs is usually contingent upon the "good faith" efforts by the mothers to establish legal paternity in the biological fathers.[118] Thus, designated fathers are seemingly only important when there are not only child support needs, but also potential reimbursements of governmental expenditures.

In the safe haven setting, albeit to a lesser extent, dads are similarly screwed. American safe haven laws, which are operative in most jurisdictions,[119] allow mothers to abandon their newborns with no questions asked.[120] For example, a Kentucky statute says that when a mother relinquishes child custody, no recipient of the child may pursue or follow the mother, and the recipient shall respect the mother's "right to remain anonymous."[121] This statute, as well as other safe haven laws, seems aimed at preventing child abuse and neglect.[122] Yet, safe haven

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More Fathers: Voluntary Acknowledgment Recessions and Other Paternity Disestablishments Under Illinois Law, 39 J. MARSHALL L. REV. 1295, 1298-1302 (2006).

115. 42 U.S.C. § 666(a)(5)(C) (2006). At times, such an acknowledgment is statutorily called a "certificate of parentage." N.J. STAT. ANN. §§ 9:17-41, 26:8-28.1 (West 2008).

116. 42 U.S.C. § 666(a)(5)(C) (2006).

117. *Lehr*, 463 U.S. at 264.

118. 42 U.S.C. § 654(29)(A) (2006).

119. Commentators have provided general reviews of the development of American state safe haven laws and the public policies underlying them. *See, e.g.*, Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753, 774-80 (2006).

120. While no questions may be asked during an abandonment, sometimes questions are later asked. *See id.* at 796-97.

121. KY. REV. STAT. ANN. §§ 216B.190(3), 405.075(2) (West 2008); *see also* ARIZ. REV. STAT. ANN. §13-3623.01(D) (West 2008) (maintaining parent who leaves newborn infant with safe haven provider "may remain anonymous"); IDAHO CODE ANN. § 39-8203(3) (West 2008) ("[s]afe haven shall not inquire as to the identity of the custodial parent and, if the identity of the parent is known . . . the safe haven shall keep all information as to the identity confidential.").

122. *See* Sanger, *supra* note 119, at 778-79 (reviewing safe haven laws); *see also* GA. CODE ANN. §19-10A-3 (West 2008) (stating that "express intent" behind Safe Place for Newborns Act of 2002 is "to prevent injuries to and deaths of newborn children that are caused by a mother who abandons the newborn"); KY. REV. STAT. ANN. § 211.951(4)

laws can result in lost fathers whose paternity opportunity or childrearing interests are foreclosed because safe haven personnel have no way of knowing whether the child abandoned by a mother has a genetic father who is in the process of stepping up to parenthood, like the father in *Lehr*, or who has already completed a voluntary acknowledgment of paternity.[123] Safe haven laws also result in too many children having no substantial opportunity for a parent-child relationship with their biological fathers and no opportunity of learning about their genetic backgrounds, which is often crucial to the receipt of good medical care.[124]

Finally, in the adoption arena, when unwed mothers place their newborns for adoption, biological fathers frequently receive no notice and thus no practical chance for fatherhood. When the birth certificate is blank on paternity, effective notice is difficult. In many states, notice to genetic fathers who do not appear on birth certificates is generally only required, as a practical matter, when the fathers previously registered their sexual encounters with the mothers with the state.[125] Unlike

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(West 2008) (denying confidentiality of identity of person placing a newborn infant with emergency medical services provider "when indicators of child physical abuse or child neglect are present").

123. Safe haven laws facially permit deprivations of established and potential legal fathers' federal constitutional paternity rights when they allow mothers to abandon their newborns anonymously and without question. Therefore, safe haven laws allow mothers to abandon newborns without requiring them to disclose whether the newborn has a registered father or whether a man has provided support during their pregnancies or after the newborns' births but before abandonment. *See, e.g.*, GA. CODE ANN. § 19-10A-4 (West 2008) (stating mother who abandons newborn less than one-week old will not be subject to criminal prosecution; mother need not show proof of identity or address; recipients are immune from suit if they fail to discharge their duties of intake); TENN. CODE ANN. § 68-11-255 (West 2008) (stating "mother" or "purported mother" who leaves "unharmed infant aged seventy-two (72) hours or younger" is "not required to respond" to questions about "the identity of the mother, infant or father"). Where a genetic father has secured childrearing rights, maternal abandonment denies him the "presumption of superior parental rights regarding custody" without any showing of "substantial harm" should the father have custody and without a showing that the child's "best interest" will be undermined by the father's custody. *See, e.g.*, In Matter of B.C.W., No. M2007-00168-COA-R3-JV., 2008 WL 450616 (Tenn. App. Feb. 19, 2008).

124. Commentators have provided these critiques against modern safe haven laws. *See* 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) ("[I]nfant 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."); *see generally* Parness, *supra* note 1.

125. Recall that in *Lehr*, Jonathan had no effective "control" over his notice and participation rights in Jessica's proposed adoption except if he filed his name in the putative father registry. *Lehr*, 463 U.S. at 251. As Lorraine largely concealed her

Jonathan Lehr, many genetic fathers will lose their children because they failed to register their sexual encounters before their children's births, rather than before two years after birth, since their children can be placed for adoption immediately upon birth.

Often, biological fathers' subjective, timely affirmative action regarding their unborn or born genetic offspring, where they acted as soon as they knew and reasonably could have known about their fatherhood, is irrelevant in adoption proceedings. Many laws demand paternal action be taken before or shortly after birth, regardless of circumstances.[126] These repose-like requirements operate to end paternity opportunities even though the biological fathers later stepped up to parenthood immediately upon learning of his child's birth. At times, genetic fathers of non-marital children lose their parental rights even though they came forward before any adoption proceeding had begun or before an adoption was completed.[127] Failure to register or otherwise to step up to parenthood due to a failure of knowledge of pregnancy, or even the possibility of pregnancy, or birth frequently provides no excuse, even where the failure was intentionally caused by lies about pregnancies, births, or possible genetic ties.[128]

Even timely affirmative action toward parenthood under repose-type provisions at or shortly after birth may be inadequate to prompt paternal participation rights in adoptions.[129] Thus, filing a paternity case, as Jonathan Lehr did, in a timely manner may not suffice when the statute

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whereabouts from Jonathan until Jessica was one year old, she controlled Jonathan's ability to be named as the father on the birth certificate or in a sworn statement; to be married to Lorraine; to live openly with Lorraine and Jessica; or, to be adjudicated as the father in a court proceeding. *Id.* at 250-51 (reviewing N.Y. DOM. REL. LAW § 111-a).

126. *See, e.g., In re* Petition of Doe, No. 1-92-1552, 1993 WL 330638, at *4 (Ill. App. Aug. 18, 1993) (terminating a biological father's parental rights for failure to assume a reasonable degree of concern for the newborn within 30 days of birth).

127. *See, e.g.*, Heidbreder v. Carton, 645 N.W.2d 355, 361-67 (Minn. 2002) (holding that biological father's consent to adoption and that he had missed his opportunity to file with Minnesota paternity registry).

128. *See, e.g., In re* Baby Boy K., 546 N.W.2d 86, 99-101 (S.D. 1996) (reviewing several comparable rulings).

129. *See, e.g., Heidbreder*, 645 N.W.2d at 361 (ruling genetic father lost participation rights in an adoption proceeding though he filed with the paternity registry on day he learned where the mother and child were, albeit one day late); *In re* Adoption of Baby Girl H., 635 N.W.2d 256 (Neb. 2001) (holding genetic father who filed timely petition to adjudicate paternity, but in wrong court, lost paternal rights because his "ignorance of the law" was inexcusable); Friehe v. Schaad, 545 N.W.2d 740, 743 (Neb. 1996) (contending failure by genetic father to file notice of claim to paternity within five days of birth precluded adoption participation rights, even where both parents were ignorant of this law and where father tried to "work things out with mother" and offered to pay "medical expenses of the birth").

speaks only of filing a notice of having intercourse, even where in the relevant adoption proceeding the court knew of the pending paternity case. Courts' adherence to the "sheerest formalism" permits the termination of constitutionally-protected paternity opportunities for dads who timely step up in some way to parenthood because adoption statutes are read in "grudging and crabbed" ways contrary to the public policies of dual parenthood and equality.[130]

The draconian effects of state adoption laws on genetic fathers of nonmarital children are illustrated by an Idaho statute which provides:

> The legislature finds that an unmarried mother has a right to privacy with regard to her pregnancy and adoption plan, and therefore has no legal obligation to disclose the identity of an unmarried biological father prior to or during an adoption proceeding, and has no obligation to volunteer information to the court with respect to the father.[131]

Therefore, genetic dads with no knowledge of pregnancy or birth lose participation rights in adoption proceedings involving their children because they did not "track" the "condition" of the women with whom they had sex.[132] Thus, it seems that stalking former lovers and bedmates is invited. Parental acts by genetic fathers undertaken immediately upon learning of pregnancy and birth are too late, even when these children are still very, very young.[133]

Recent changes in Florida adoption laws illustrate the increasing foreclosure of any practical chance of parenthood for unwed genetic

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130. *Lehr*, 463 U.S. at 275.

131. IDAHO CODE ANN. § 16-1501A(4) (West 2008). *See also* UTAH CODE ANN. § 78-30-4.12(4) (West 2008).

132. Escobedo v. Nickita, 231 S.W.3d 601, 609 (Ark. 2006) (J. Brown, concurring) ("It occurs to me that Mr. Escobedo had some obligation to track Misty Ford's condition after he had unprotected sex with her if he ever planned to claim notice of an adoption and the paternity and custody of the resulting child.").

133. *See In re* C.L., Juvenile, 878 A.2d 207, 211 (Vt. 2005). In this case, the court said:

> To conclude that petitioner acted promptly once he became aware of the child is to fundamentally misconstrue whose timetable is relevant. Promptness is measured in terms of the baby's life, not by the onset of the father's awareness. The demand for prompt action by the father at the child's birth is neither arbitrary nor punitive, but instead a logical and necessary outgrowth of the State's legitimate interest in the child's need for early permanence and stability. Some have suggested that adherence to such "formalism" when a genetic father steps up as soon as he knew of his child, and before any adoption order, as in Escobedo, is truly grounded on the fact that the prospective adoptive parents were projected to be better caretakers than the genetic father.

Id. at 211 (C.J. Hannah, dissenting).

fathers of nonmarital children who are placed for adoption. Prior to 2001, unless "excused by the court," post-birth written consent to a proposed adoption of a non-marital child was required of a genetic father who established paternity by court proceedings;[134] signed and filed a paternity acknowledgment;[135] or provided child support "in a repetitive, customary manner."[136] Legislative initiatives expanded participation rights to include possible genetic fathers who "attempted to provide" such consistent support during the mother's pregnancy[137] as well as men reasonably "identified" by birth mothers as potential genetic fathers.[138]

Moreover, in cases that lacked knowledge of the name or location of those men from whom consent for adoption was required, including men "identified" as potential fathers, Florida judges were required to question the mothers and their relatives who were present at adoption hearings.[139] Judges had to inquire about men who provided or promised to provide support,[140] men with whom the mothers cohabitated at the time of conception,[141] and men whom the mothers had "reason to believe" could be the genetic fathers.[142] As well, adoption entities were responsible for undertaking, where necessary, "diligent" searches to locate these same men once they were identified, if their locations remained unknown.[143] If the men were still unidentified, or if their locations remained unknown upon such inquiries, Florida laws required the mother or adoption entity to publish notice to such men in newspapers in counties where "conception may have occurred," where the mother resides, and where the possible genetic fathers reside.[144] These notices were also to contain physical descriptions of the genetic mothers and possible genetic fathers, as well as the birth dates of the children and the dates and cities where conception "may have occurred."[145]

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134. FLA. STAT. ANN. § 63.062(1) (West 2008).

135. FLA. STAT. ANN. § 63.062(1)(b)(4) (West 2008).

136. FLA. STAT. ANN. § 63.062(1)(b)(5) (West 2008).

137. FLA. STAT. ANN. §63.062(1)(d)(2) (West 2008); *see also* Act of April 18, 2001, ch.3, § 3, 2001 Fla. Laws 5, 8.

138. FLA. STAT. ANN. §63.062(1)(b)(5) (West 2008).

139. FLA. STAT. ANN. §63.088(3) (West 2008).

140. FLA. STAT. ANN. §63.088(3)(d) (West 2008).

141. FLA. STAT. ANN. §63.088(3)(c) (West 2008).

142. FLA. STAT. ANN. §63.088(3)(g) (West 2008).

143. FLA. STAT. § 63.088(4) (West 2008); *see also In re* Karen A.B., 513 A.2d 770, 772 (Del. 1986) (holding that when unwed mother is "unwilling to disclose the name of the natural father," petition for adoption should "furnish detailed information concerning the efforts made to identify and locate the natural father").

144. FLA. STAT. ANN. § 63.088(5) (West 2008).

145. *Id.*

Rightly so, the 2001 requirements for published notices to unidentified or missing fathers were challenged. A Palm Beach County circuit judge chiefly denied relief,[146] but a district court of appeal correctly invalidated the so-called Scarlet Letter provisions on notice by publication.[147] The court found that the Florida Constitution's right to privacy encompasses individual interests both in avoiding disclosures of personal matters and in making certain important decisions independently.[148] The court determined an invasion of these interests was "patent."[149] The court concluded that the state did not meet its burden to justify the "personal, intimate, and intrusive" nature of the constructive notice provisions.[150] It said nothing more specific, however, about the statutory requirements of judicial inquiry and diligent searches by adoption entities for men who may be the fathers of the children placed for adoption, though those provisions seemingly disallowed women to make certain adoption decisions "independently."[151]

After the invalidation, Florida lawmakers unanimously passed a bill in 2003 establishing the "Florida Putative Father Registry."[135] The purpose was to "preserve the right to notice and consent to an adoption."[136] That goal was not met. The new law requires a man to register with the state if he believes he may be a genetic father.[137] Once registered, a man gains a right to notification if the woman named in the registry places a child for adoption.[138] A claim of paternity may be filed at any time prior to the child's birth.[139] A potential father cannot register, however, if the mother has already initiated proceedings to terminate the genetic father's parental rights.[140] Genetic fathers thus must file very quickly. This new Florida law effectively denies paternity opportunities to many fit genetic fathers who wish to parent, even where these same

146. G.P. v. State, 842 So. 2d 1059, 1061 (Fla. Dist. Ct. App. 2003).
147. *G.P.*, 842 So. 2d at 1060-61.
148. *Id.* at 1062.
149. *Id.*
150. *Id.* at 1063.
151. The Florida court is not alone in suggesting (as arguably it was not truly holding) that maternal privacy interests include independent (i.e., exclusive) decision-making authority by women regarding any adoption (or other matter) involving their newborn nonmarital kids. Yet, as argued later, such interests are not compelled by federal constitutional precedents and run counter to the asserted policies of dual parenthood and parental equality.
135. FLA. STAT. ANN. § 63.054 (West 2008).
136. FLA. STAT. ANN. § 63.054(1) (West 2008).
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*

men have continuing child support duties long after birth and long after any significant chance for a meaningful parent-child relationship has ended. The denials are more frequent now than before because more responsibilities have shifted to unwed genetic fathers. The 2003 paternity registry bill expressly says:

> An unmarried biological father, by virtue of the fact that he has engaged in a sexual relationship with a woman, is deemed to be on notice that a pregnancy and an adoption proceeding regarding that child may occur and that he has a duty to protect his own rights and interest. He is, therefore, entitled to notice of a birth or adoption proceeding with regard to that child only as provided in this chapter.[141]

Incidentally, such an approach may have implications outside of adoption, such as when an unregistered genetic father seeks custody or visitation of his genetic offspring still living with the mother.[142]

The new Florida law eliminated the general requirement of judicial inquiries and diligent adoption-entity searches for, and advance consents by, "any man who the mother has reason to believe may be the father . . . and who . . . has been identified by the birth mother as a person she has reason to believe may be the father."[143] However, the identities of potential genetic fathers of nonmarital children placed for adoption were more likely to be discovered before 2003. The 2001 statutes required that those who petitioned, pending adoption, to terminate parental rights act in "good faith" and undertake "diligent efforts" to find the men identified by the mothers as the potential fathers. Under the 2003 amendments, "diligent" searches[144] are only required for unwed genetic fathers who

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141. FLA. STAT. ANN. § 63.088 (West 2008).

142. *See, e.g.*, J.S.A. v. M.H., 863 N.E.2d 236, 249-50 (Ill. 2007) (involving a birth mother who opposed custody or visitation with a nonmarital child for a genetic father who failed to register; genetic father initiated paternity suit and only then did mother and her husband file an adoption case; court rejected putative father registry as a ground for dismissing the paternity suit, but only because the registry law was written to apply only to adoptions). *Compare In re* Swatek-Briggs, No. 07-0730, 2008 WL 239020 (Iowa Ct. App. Jan. 30, 2008) (discussing a differing possible approach to paternity rights of genetic fathers in custody and visitation proceedings where the birth mother continues to parent; court looked to whether a genetic father, seeking paternity establishment, parental rights and visitation, who shows up five years after birth, intentionally relinquished a known right, in a setting where deceit by the mother and her husband, a presumed father, arguably caused the genetic father to step up so late).

143. FLA. STAT. ANN. § 63.062(1)(d)(3) (West 2008).

144. FLA. STAT. ANN. § 63.087(4)(d) (West 2005), *invalidated by G.P.*, 842 So. 2d 1059.

have already affirmatively stepped up by securing a judicial declaration of paternity[145] or by officially claiming or acknowledging paternity.[146] Also, since 2003, Florida courts now require the unwed genetic father's consent to adoption only if he has stepped up in the ways mentioned and either developed a "substantial" relationship with his child[147] or "demonstrated a full commitment" to parental responsibility.[148]

Under the 2003 amendments, an unwed genetic father who is unaware of the pregnancy or birth nevertheless has the "duty to protect his own rights and interest" by filing "a notarized claim of paternity form with the Florida Putative Father Registry within the Office of Vital Statistics of the Department of Health."[149] Forms typically are maintained in confidence. There is no judicial inquiry and no diligent search, however, for a potential genetic father, even if he is identifiable by the mother as the likely genetic father.[150] Additionally, a genetic father seemingly is not excused from the filing requirement even if his failure to file resulted from misrepresentations or deceit. Thus, the new Florida laws expressly provide that where a newborn (less than six months old) is placed with "adoptive parents," in order to participate in the adoption proceeding, the unwed genetic father must have filed a notarized claim of paternity form "prior to the time the mother executes her consent for adoption."[151] Under the new Florida laws, an unwed genetic mother may consent to adoption forty-eight hours after birth, or on the day she is notified that "she is fit to be released from the licensed hospital or birth center."[152] Consequently, the 2003 Florida statute leaves very little time for many genetic fathers of nonmarital kids to step up, including men who would be and want to be good fathers.[153] Men with

145. FLA. STAT. ANN. § 63.062(1)(b)(3) (West 2008).

146. FLA. STAT. ANN. §§ 63.062(1)(b)(4)-(5) (West 2008) (requiring affidavit or acknowledgment).

147. FLA. STAT. ANN. § 63.062(2)(a) (West 2008) (addressing children over six months old placed for adoption).

148. FLA. STAT. ANN. § 63.062(2)(b) (West 2008) (addressing children less than six months old placed for adoption).

149. FLA. STAT. ANN. § 63.054(1) (West 2008).

150. FLA. STAT. ANN. §§ 63.088(4)-(5) (West 2008) (requiring "diligent search" only for man who was married to or lived with the mother, who was declared a father by a court, who adopted, or who "acknowledged or claimed" paternity). *Cf.* The Adoption Place, Inc. v. Doe, No. M2007-01214-COA-R3-PT, 2007 WL 4322014, at *3-5 (Tn. Ct. App. Dec. 5, 2007) (finding that "diligent inquiry" by attorney for "unknown father" includes interrogatories to mother who can remain unidentified).

151. FLA. STAT. ANN. § 63.062(2)(b) (West 2008).

152. FLA. STAT. ANN. § 63.082(4)(b) (West 2008).

153. A greater chance for a genetic father to step up arises where the father is identified by the mother prior to birth. Then, an "adoption entity" may serve the father with "a notice of intended adoption plan at any time prior to the placement of the child in

no real "control" under *Lehr* can lose participation rights in adoption proceedings involving their offspring. Registering sexual encounters with the state cannot reasonably be deemed to constitute a form of "control" over parental opportunities. Many "responsible fathers" in Florida are now omitted from the new adoption scheme.

Absolute maternal privacy rights, at least in adoption and safe haven settings, as well as in settings where governments pay for childbirth expenses, are not compelled by federal constitutional precedents. In fact, they run contrary to the federal constitutional protections of paternity opportunities recognized in *Lehr*.[154] As well, as suggested by the dissent in *Lehr*, they run contrary to the public policy involving a mother's duty under TANF to cooperate "in good faith" in establishing legal paternity for older children for whom welfare assistance is sought.[155] Good faith cooperation can be compelled in the welfare setting since mothers have no constitutional entitlement to state aid. Therefore, governments can

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the adoptive home." FLA. STAT. ANN. § 63.026(3)(a) (West 2008). The notice includes details on how to step up and the expectations of support required by law for a father who does step up. This notice can be served during pregnancy when an adoption immediately after birth is contemplated, though the genetic father must be accorded at least thirty days to act. *See id*; *see also* Heart of Adoption, Inc. v. J.A., 963 So. 2d 189, 203 (Fla. 2007). While the court in *J.A.* spoke of a "diligent search" by the adoption entity for the genetic father who is "known and locateable," *J.A.*, 963 So. 2d at 203, it did so only in a case where the father actually became aware of the pregnancy three months before birth and before any search by the adoption entity had begun, and where the relevant statutory provision on notice speaks only to "any unmarried biological father identified by the mother or identified by a diligent search of the Florida Putative Father Registry." FLA. STAT. ANN. § 63.062(3)(a) (West 2008). Neither the statute at issue nor the high court majority in *J.A.* spoke of a pre-birth diligent search for a genetic father as yet unidentified by the expectant mother. *Cf. The Adoption Place*, 2007 WL 4322014 at *1-4. Only one concurring justice expressly recognized *Lehr* and the requirements it seemingly sets regarding the reasonable opportunity of a biological father to develop a parent-child relationship with an offspring placed for adoption. This justice apparently had the as yet unidentified father in mind when he only concurred based on the belief "that the protected interest of known, unmarried fathers in the opportunity to develop relationships with their children in this adoption context must be recognized and addressed and operate to guide any subsequent statutory construction." *J.A.*, 963 So. 2d at 210 (Lewis, C.J., concurring); *see also id.* at 206 (finding "an independent basis" for protecting paternity opportunities under the Florida Constitution's "Right to Privacy Clause").

154. Outside of the United States, and thus without *Lehr*, absolute maternal authority in adoptions has been determined to be contrary to public policy, chiefly grounded on the child's best interests and not on paternity interests. C v. XYZ County Council, 2007 WL 3389567 (Cal. App. Civ. Div. Nov. 23, 2007) (allowing young unwed mom to place child for adoption without inquiries as to her family or to the father and his family where the child is born from a one night stand, but only where the best interests of the four-month old child—in foster care since birth—points to adoption).

155. 42 U.S.C. § 654(29)(A) (2008).

attach at least certain strings to any aid dispensed.[156] Comparably, mothers have no constitutional entitlement to abandon their children to governments, whether in safe haven or adoption settings, or to have the government pay for the expenses incurred for childbirth.[157] So unwed mothers seeking government aid can have diminished privacy rights. If they do, on public policy grounds governments must then ask why only rich and single mothers should have unfettered discretion regarding paternity designations. Should only unabandoned, unadopted fatherless newborns have some real chance to bond later with their genetic dads? Extending the limitations on maternal privacy rights to unwed mothers seeking no state aid arguably raises more difficult questions. But these questions can be answered in ways more protective of paternity opportunity interests since maternal informational and decisional privacy can be limited for good reason even when no strings are pulled.[158] While the Scarlet Letter court did find that maternal privacy embodies interests in making certain childrearing decisions independently,[152] such privacy interests cannot deprive many genetic fathers of their own privacy interests. Independence from governmental interference does not require independence from paternal participation.

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156. *See, e.g.*, Bowen v. Gilliard, 483 U.S. 587, 625 (1987) (J. Brennan, dissenting) ("We are willing to accept the validity of many conditions on participation in Government programs because this Court has never held that anyone has an absolute right to receive public assistance. The Court has thus assumed that participation in a benefit program reflects a decision by a recipient that he or she is better off by meeting whatever conditions are attached to participation than not receiving benefits. In assessing the burdens imposed by a program, then, the theory has been that whatever reasonable burdens are borne by the recipient are willingly assumed.").

157. *See, e.g.*, Dubay v. Wells, 506 F.3d 422, 430 (6th Cir. 2007) ("[I]t is not a fundamental right of any parent, male or female, to sever his or her financial responsibilities to the child after the child is born."). In fact, at times governments continue parental child support duties even after allowing or requiring parental rights to be terminated. *See, e.g.*, Illinois Dept. of Healthcare and Family Servs. v. Warner, 882 N.E.2d 557, 559 (Ill. 2008) ("[S]upport payments were being used by the state to help pay for the children's foster case.").

158. *See, e.g.*, Jeffrey A. Parness and Therese A. Clarke Arado, *Safe Haven Laws: Where Are the Daddies?*, 36 CAP. U. L. REV. __ (forthcoming 2008), *available at* http://ssrn.com/abstract=1012884 (last visited July 5, 2008). *Cf.* Robert O. v. Russell K., 604 N.E.2d 99, 108 (N.Y. 1992) (noting an unwed mother's "personal- and perfectly understandable-decisions to keep her pregnancy secret from" the genetic father and "to surrender" her child for adoption without disclosing the father's identity).

152. *G.P.*, 842 So.2d at 1062.

VI. SYSTEMIC PATERNITY LAW REFORMS

Many "responsible fathers" of nonmarital children are omitted from governmental paternity schemes where their exclusions, though founded on governmental policy or custom, are beyond their "control," run counter to federal constitutional paternity opportunity interests, and undermine the generally recognized state policies on dual parenthood and equality. Greater systemic protections of these interests are quite "practicable" (and, in fact, relatively easy) for current state birth certificate, safe haven, and adoption schemes.

In the birth certificate context, paternity opportunity interests are unreasonably denied where state laws fail to address the means for securing fathers under law for the half million nonmarital kids born each year with no fathers named on their birth certificates. More fathers could easily be secured, for example, by allowing greater chances for pre-birth paternity designations. Pre-birth paternity registry is available for men in order for them to secure participation rights during any later adoption proceedings.[153] But pre-birth voluntary paternity acknowledgments are often not allowed.[159] Prospective mothers and fathers normally know no more about possible genetic ties later in pregnancies than they do at birth.

As well, more fathers seemingly would be secured if birthing hospitals were paid more than nominal sums for fully completed birth certificates.[160] Encouragement, though not coercion, of identification of actual or possible genetic fathers by hospital personnel should itself be facilitated. Incidentally, a cost-benefit analysis may well show how

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153. *See, e.g., Requirements and Effects of Putative Father Registries*, 28 A.L.R. 349.

159. *See* ARIZ. REV. STAT. § 25-812(A) (2008) (allowing establishment of paternity for "child born out of wedlock" via signed statement acknowledging paternity); ARK. CODE ANN. § 9-10-120(a) (West 2008) (allowing acknowledgment of paternity "during the child's minority"); MICH. COMP. LAWS ANN. § 722.1002(b) (West 2008) (using language of "child conceived and born"); MINN. STAT. § 257.75(1) (West 2008) (using language of "child born to a mother"); MISS. CODE ANN. § 93-9-28 (West 2008) (using language of "any child born out of wedlock"). *But see* WYO. STAT. ANN. § 14-2-604(b) (West 2008) ("Acknowledgment of paternity . . . may be signed before the birth of the child."); CAL. FAM. CODE § 7571(e) (2004) ("Prenatal clinics shall offer prospective parents the opportunity to sign a voluntary declaration of paternity."); HAW. REV. STAT. § 584-3.5 (West 2007) (providing for voluntary paternity acknowledgment "during the period immediately prior to or following the child's birth"); IND. CODE § 16-37-2-2.1 (2008) (providing for paternity acknowledgment "immediately before or after the birth of a child who is born out of wedlock").

160. *See, e.g.*, CAL. FAM. CODE § 7571(c) (2004) (providing that the "local child support agency" pay ten dollars for "each completed declaration of paternity that is filed").

greater economic incentives for paternity establishments would lead to far less governmental expenditures on welfare since more paternal child support would be collected.

Further, there is only significant governmental inquiry postbirth on the paternity of fatherless nonmarital children when welfare is sought. Certainly, postbirth state promotions of more voluntary paternity designations for fatherless children poses few dangers to maternal privacy interests, as both mothers and fathers must sign.[161] The dual parent and equality principles would, however, be significantly promoted.

More legal fathers could also be secured shortly after birth simply through postbirth follow-up measures by government officials (or their designated agents, such as hospital personnel)[162] aimed at encouraging (though not pressuring) new mothers to secure fathers under law for their nonmarital children.[163] Between 1993 and 1995 in Illinois, for example, 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."[164] Yet in Massachusetts (and elsewhere) today, genetic father identification is strongly encouraged only when the child is placed for adoption. The following Massachusetts adoption statute could be adapted to cover fatherless newborns who are not placed for adoptions:

> If an agency or person receiving a child born out of wedlock for purposes of a subsequent adoption received from the child's mother an executed consent form . . . and no person has acknowledged paternity of the child . . . or has been adjudicated the father of the child by any court . . . then the person or agency shall request that the mother voluntarily provide a sworn written statement . . . that identifies the child's father and his current or last known address. Any such statement shall be used solely for

161. State signature requirements are driven by federal law requiring both "father and mother" to sign. 42 U.S.C. §§ 666(a)(5)(D)(i)(I)-(II) (2008).

162. Hospital personnel are in the best position to help undertake effective and inexpensive follow-up procedures. Upon live birth, they have health care duties to both the mothers and their children.

163. One reporter observes that over one half of all nonmarital kids are born to mothers who cohabitate with the genetic father. Irene Sege, *Marry, Marry? Quite Contrary. The Number of Cohabitating Couples with Kids is on the Rise*, BOSTON GLOBE, July 24, 2007, at E1.

164. Law of 1993, Ill. Pub. Act 88-159 (amended 1995) (current version at 410 ILL. COMP. STAT. § 535.12(4) (2008)).

the purpose of notifying the person named as the father of the status of the child.[165]

In the safe haven setting, infant abandonment schemes could be altered to require two parent approval.[166] More sensibly, safe haven laws could simply be eliminated. Little, if anything, would be lost since these laws do not promote very well the stated objectives.[167] But much would be gained. Safe haven schemes unduly infringe upon the paternity interests of genetic fathers as they allow maternal abandonment without any concerns for potential or actual father-child relationships. Opportunities for maternal abandonments are not themselves required by any recognized constitutional privacy rights. American state and federal governments have never generally allowed any parent walk away from parental responsibilities simply because he/she felt like it.

Further, some safe haven laws allow infringements on maternal privacy because they facially permit a nonmaternal abandonment with no inquiries to the abandoner allowed. Here, maternal childrearing rights, clearly vested since birth,[168] are ignored. Of course, safe haven laws may not be followed literally. Imagine the case when a man rather than a woman seeks to abandon a newborn at a police station with no questions asked. Can anyone imagine the officers typically letting the abandoning (alleged) father walk away silently, regardless of what the statutes say?

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165. MASS. GEN. LAWS ch. 210, § 2 (2008). *See also* MONT. CODE ANN. § 42-1-111 (2008) ("An unmarried birth mother has a right of privacy with regard to the mother's pregnancy and adoption plan. Birth mothers are encouraged to provide all known information about the birth father of any child for whom an adoption is planned.").

166. While resembling in some ways parental termination hearings during adoption proceedings, safe haven parent approval procedures may not need to involve a best interests analysis.

167. *See, e.g.*, Sanger, *supra* note 119, at 829 (arguing that while safe haven laws seek "to save infants from dumpsters," their "enduring and subtle achievement" is less "criminological" and more "cultural," i.e. promoting a culture of life values); *see also id.* at 758 (arguing that, at best, safe haven laws only "possibly" prevent harm to newborns, and then just prevent "only a little" harm).

168. *See, e.g.*, ARIZ. REV. STAT. §§ 13-3623.01(B), (D) (2008) (stating that "parent or agent of a parent voluntarily delivers the parent's newborn" and providing that parent or agent of parent "may remain anonymous" and may not be required "to answer any questions"). *See also* ARIZ. REV. STAT. §§ 39-8203(1)(b), (3) (2008) (stating that child delivered to safe haven by "custodial parent," and providing that safe haven "shall not inquire as to the identity of the custodial parent"). *See also* WYO. STAT. § 14-11-103(a) (providing that parent or parent's designee may relinquish a newborn child to a safe haven provider); *id.* § 14-11-103 (c) (stating that provider "may presume that the person relinquishing is the child's parent or parent's designee"); *id.* § 14-11-103(d) (stating that provider "may not require that any information be given").

Non-safe haven, post-infancy child abandonment by parents are only allowed after significant state inquiries, usually focusing on the child's best interests. Parental duties to children under law are not absolutely discretionary with the parents.[169] Similar policies apply to newborns and older children alike.

Safe haven laws, even though rarely employed, also send the wrong message about genetic fathers. Post-birth settings under *Lehr* differ from pregnancy settings under *Roe v. Wade*. Maternal privacy rights differ in post-birth and pre-birth settings. Safe haven abandonment laws must themselves be abandoned.

In the adoption arena, paternity interests are infringed when a genetic father's failure to register his earlier sexual encounter with the state, or to step up to the parenthood very soon after birth, can foreclose participation in a later adoption proceeding regardless of the circumstances surrounding his failure (i.e., deceit), how easy he is to locate, and when he actually steps up. In adoption settings, as in welfare and safe haven settings, there are also only limited maternal privacy interests that must be accommodated.[170] Here too, genetic mothers have no constitutionally-protected right to walk away from parenthood under law. The strings of "good faith" cooperation could be employed. Yet, during many adoption proceedings there is no general duty to investigate paternity in order to discover genetic fathers whose potential or realized parental interests will be lost. During some adoption proceedings there is a duty to investigate paternity when there is reason to think there were factual misrepresentations (or errors) in the words of birth mothers, prospective adopting parents, or adoption facilitators.[171] Thus, informal or off-the-record misrepresentations by unwed mothers to genetic fathers about pregnancy or paternity often are not revealed and usually do not excuse the men from compliance with rather demanding requirements for

169. *See, e.g.*, Rivera v. Minnich, 483 U.S. 574, 580 (1987) ("[P]utative father has no legitimate right and certainly no liberty interest in avoiding financial obligations to his natural child that are validly imposed by state law.").

170. One such interest involves nondisclosure of the name of the mother placing her child for adoption. *The Adoption Place*, 2007 WL 4322014, at *4. *But see* Cecilly L. Helms & 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) (arguing that a father's rights in adoption should not depend on a birth mother's disclosures because she has a fundamental right to privacy); 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) (arguing that a birth mother's "constitutional right to direct moral upbringing of her child should include . . . the power to prevent another from becoming a parent to her child").

171. *See* Douglas H. Reiniger, *Wrongful Adoption: Duty to Investigate Birth Parent Information*, ADOPTION LAW INSTITUTE (2007).

securing adoption participation rights. These requirements typically include pre-birth paternity registrations or significant child-support that is provided both pre-birth and shortly after birth.[172]

So, during many adoption proceedings there are no "diligent" searches conducted for the genetic fathers where unwed mothers pursue adoptions for their children with no fathers designated on birth certificates.[173] Not infrequently, more governmental concern is shown for prospective adoptive parents, with few family bonds as yet, than for genetic fathers interested in parenting, but unaware of their offspring.[174]

Finally, there is little accommodation in adoptions for the late-arriving father who stepped up to parenthood very soon after he learned of the pregnancy, birth and potential adoption, where such parenting occurred when the child was an infant and preceded the development of any strong familial relationship between the child and the prospective adopter(s), or even preceded the identification of prospective adopter(s). Bad parents typically get reunification services after their children are removed due to abuse or neglect, meaning that even some very bad acts do not necessarily result in the termination of parental rights. Putative

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172. *See, e.g., In re Baby Boy K.*, 546 N.W.2d at 99-101 (reviewing several comparable rulings); *see also In re* Paternity of Baby Doe, 734 N.E.2d 281 (Ind. App. 2000) (reviewing adoption cases involving late-arriving genetic fathers).

173. *See, e.g.*, GA. CODE ANN. § 19-8-12(d)(3) (West 2008) (proposed adoption not noticed to biological father where there was no pregnancy support, attempt to legitimate, or the like, as shown by mother's affidavit); GA. CODE ANN. § 19-8-26(h) (West 2008) (identity and last known address of biological father can be included in mother's affidavit, but "the mother shall have the right not to disclose the name and address of the biological father of her child should she so desire"). *See also* In Matter of Adoption of N, 673 P.2d 864 (Or. Ct. App. 1983) (finding no notice of adoption of unwed mother's child sent to genetic father as he did not initiate filiations proceedings before child's placement for adoption, although mother "had named the putative father" in her paperwork for the placement agency (indicating a one night stand); acknowledging that the father may be unaware of the child's existence; finding no due process violation though the case is different, and perhaps more difficult, than *Lehr*).

174. *See, e.g.*, GA. CODE ANN. § 19-8-12 (West 2007) (finding that state has "a compelling interest . . . in preventing the disruption of adoption placements" and that prospective adoptive parents have liberty and privacy interests in retaining custody; finding also that a genetic father, who is not a "legal father," has only an "inchoate interest" in his biological child placed for adoption which can be "lost by failure to develop a familial bond with the child" and "has a duty to protect his own rights and interests" which may be lost though the father had a "subjective intent" to parent); *see also* FLA. STAT. ANN. § 63.022 (West 2008) (finding that while an unmarried mother placing child for adoption "is entitled to privacy" and the "state has a compelling interest . . . in preventing the disruption of adoptive placements," an unmarried biological father had only "an inchoate" interest that must be acted upon "both during the pregnancy and after the child's birth"). *Cf.* FLA. STAT. ANN. § 63.053(3) (West 2008) ("The Legislature finds that a birth mother and a birth father have a right to privacy.").

fathers, however, usually receive very little leeway though they would be fit parents and though their failures to step up to parenthood involve more negligence or mistake than crime.[175] The "sheerest formalism" and "grudging and crabbed" legal doctrines systematically stifle many responsible fathers in adoption proceedings for reasons beyond their actual control.[154] At least Jonathan Lehr knew for two years that he had a daughter whom he could seek to parent. Many biological fathers lose their children to adoptions before they even learned of their offspring.

VII. CONCLUSION

In August, 2007, California Appeals Court Judge Paul Coffee repeated his "frustration over the state of the law in paternity cases."[176] After urging legislative reform he asked the same question I now ask: "Is anyone listening?"[177] The systematic denials of genetic fathers' paternity opportunity interests in their nonmarital kids in birth certificate, safe haven and adoption settings must be ended. There are feasible systemic reforms that will promote much better dual and equal parenthood without burdening constitutional maternal privacy interests. Legal paternity should not be lost by genetic fathers of nonmarital kids because their mothers wish to parent alone or wish strangers or others to parent. Safe haven laws should not deny legal paternity to genetic fathers of nonmarital kids where the men had little, if any, real "control" over

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175. *See, e.g.*, MINN. STAT. § 260C.301(1) (2008) (providing that father of child born to unwed mother gets no notice of adoption unless registered with father's adoption registry; providing also that existing father will not have parental rights terminated unless abandonment, continuous failure to support "without good cause," "consistent pattern" of bad parenting, or out-of-home placement plan that has not led to correction of conditions leading to the placement). *See also In re* E.A.W.S., No. 2-06-00031-CV, 2006 WL 3525367, at *18 (Tex. App. Dec. 7 2006) (reversing order terminating father's parental rights as state failed to make reasonable efforts to return child to father after child was placed with paternal aunt); *In re* B.J., 879 N.E.2d 7, 12 (Ind. App. 2008) (finding that unwed father, assumed to have parental rights, "had not established paternity" nor shown an ability or willingness to appropriately parent: "yet, though child was made ward of the state and removed from mother, the "sole legal custodian," the father was still afforded a "participation plan" involving, e.g., parenting and drug use assessments and only later lost parental rights because bad parenting conditions had not been remedied); Adoption of Hayden T., No. A118580, 2008 WL 442628, at *3 (Cal. Ct. App. Feb. 19, 2008) (holding that, before father's rights are ended in order to allow adoption, "comprehensive report" by neutral party is needed, as are specific findings, including findings on best interests of the child).

154. *See Lehr*, 463 U.S. at 275 (White J., dissenting).

176. Ventura County Dept. of Child Support Servs. v. V.F., 2d Civ. No. B191218, 2007 WL 2391262, at *4 (Cal. Ct. App. Aug. 23, 2007).

177. *Id.* at *4.

establishing parent-child relationships, especially if they step up to parenthood when their kids are still young and especially if their kids have not yet been finally placed with prospective adoptive parents.[178] Constitutional and other public policies have never supported denying fit dads their parental opportunities for nonmarital kids even though the moms might object and even though there may be more fit potential parents.

178. The unfairness of such losses has even been recognized by courts imposing rigid statutory guidelines on genetic fathers who knew about the pregnancies, if not the births. *See, e.g.*, Helen G. v. Mark J.H., 175 P.3d 914, 925 (N.M. 2007) ("We are mindful of the fact that there may be biological fathers who do not know or who have no reason to know that they have fathered a child. In such a case, a father may not be able to take action prior to the filing of the adoption petition, because the petition may be the first notice he receives that a child has even been conceived. Additionally, there may be biological fathers whose offers of support are affirmatively rejected by the biological mother and who only receive notice of the pending adoption through the filing of the adoption petition. These situations present special statutory and constitutional considerations that are not present in this appeal.").