

Fall 2007

Lost Paternity in the Culture of Motherhood: A Different View of Safe Haven Laws

Jeffrey A. Parness

Follow this and additional works at: <https://scholar.valpo.edu/vulr>

 Part of the [Law Commons](#)

Recommended Citation

Jeffrey A. Parness, *Lost Paternity in the Culture of Motherhood: A Different View of Safe Haven Laws*, 42 Val. U. L. Rev. 81 (2007).

Available at: <https://scholar.valpo.edu/vulr/vol42/iss1/3>

This Article is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



LOST PATERNITY IN THE CULTURE OF MOTHERHOOD: A DIFFERENT VIEW OF SAFE HAVEN LAWS

Jeffrey A. Parness*

I. INTRODUCTION

In her recent article, *Infant Safe Haven Laws: Legislating in the Culture of Life*,¹ Professor Carol Sanger explores state laws intended to protect newborns from maternal harm by legalizing abandonment.² She concludes that such laws have “had relatively little impact on the phenomenon of infant abandonment” by mothers, largely due to disconnects between the varying legislative schemes and the characteristics of neonaticidal mothers. These disconnects make “the use of Safe Havens less likely.”³ Yet, Professor Sanger’s major concerns are not with what the “laws fail to accomplish,” but rather with “what they achieve.”⁴

Sanger argues that Safe Haven laws are best understood “within a larger political culture,” working “subtly to promote the political goal of the culture of life: the reversal of *Roe v. Wade*.”⁵ They do so, she maintains, by “connecting infant life to unborn life and infanticide to abortion.”⁶ Thus, in her view, Safe Haven laws primarily are “cultural” rather than “criminological.”⁷ Professor Sanger laments the connections made in Safe Haven settings between newborns and the unborn, while acknowledging the “brilliant addition to the rhetoric of abortion politics.”⁸ She says that those who categorize tend to “cheek by jowl” Safe Havens laws by

* Professor of Law, Northern Illinois University College of Law; Visiting Professor of Law, Washington and Lee University School of Law, 2006-2007; B.A., Colby College; J.D., The University of Chicago Law School.

¹ Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753 (2006).

² According to Sanger, talk of culture “disarms the combativeness of rights talk,” by referencing “socially established structures of meaning.” Sanger, *supra* note 1, at 805 (quoting Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, in THE INTERPRETATION OF CULTURES 1, 1-12 (1973)).

³ *Id.* at 753; cf. Carol A. Docan, *She Could Have Safely and Anonymously Surrendered Her Newborn Under California Law – Did She Know That?*, 4 J. LEGAL ADVOC. & PRAC. 15 (2002) (suggesting that more efforts at creating public awareness of Safe Haven laws would lead to more use).

⁴ Sanger, *supra* note 1, at 753.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 801.

82 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 42]

restricting stem cell research,⁹ implementing abstinence-only education, and protecting all forms of potential human life. Further, they lump policies together in order to create the appearance of unity “in good purpose,” even though “there *are* strong differences of opinion.”¹⁰

Safe Haven laws not only undercut the freedoms of *Roe v. Wade*, they are also ineffective in achieving significant infant rescue. Yet many, if not all, Safe Haven laws can clearly be tied in some way to “the culture of life,” a concept originally described by Pope John Paul II as the “unconditional respect for the right to life of every innocent person - from conception to natural death.”¹¹ This concept is now employed by President George W. Bush and many of his supporters.¹² Such culture of life proponents seek legal protection for the human unborn, for newborns,¹³ and even for Terri Schiavo – if not also for death row inmates.

Yet, Safe Haven laws are also tied to a second culture, the culture of motherhood. The culture of motherhood holds that an unwed genetic mother knows what is best for her child, prompting an unconditional respect under the law for her right to act alone on matters involving her young child.¹⁴ This results in a projection, which some have stated is “not

⁹ See John A. Robertson, *Embryo Culture and the “Culture of Life”: Constitutional Issues in the Embryonic Stem Cell Debate*, 2006 U. CHI. LEGAL F. 1, 39 (2006) (giving an in-depth review of the “culture of life” and embryonic stem cell research, suggesting “culture of life” laws could be challenged on substantive due process grounds involving “a negative right to privately funded safe and effective medical treatments”).

¹⁰ Sanger, *supra* note 1, at 805-06.

¹¹ *Id.* at 801 n.302 (quoting POPE JOHN PAUL II, EVANGELIUM VITAE: ENCYCLICAL LETTER ON THE VALUE AND INVIOABILITY OF HUMAN LIFE, para. 101, March 25, 1995).

¹² *Id.* at 802-05.

¹³ It should be noted that at least some proponents of greater legal protections for the human unborn understand “differences[,]”, and thus support, for example, criminal laws making third parties responsible for harms to potential human life (or the unborn or the fetus) without supporting the reversal of *Roe v. Wade*. *Id.* at 805-06. See also, e.g., Jeffrey A. Parness, *Social Commentary: Values and Legal Personhood*, 83 W. VA. L. REV. 487, 503 (1980-1981). I have concluded that:

the consequences of constitutionally equating genetic conception with the inception of personhood are unacceptable. Long-recognized freedoms enjoyed by an unborn child’s parents, as well as by other family members and various third parties, would be substantially undermined. This loss is particularly unwarranted because other channels now exist for advancing the protection of unborn human life without diminishing individual freedom and the overall quality of life.

Id.

¹⁴ Of course, the culture of motherhood does not always prevail. See, e.g., Laura Oren, *Honor Thy Mother?: The Supreme Court’s Jurisprudence of Motherhood*, 17 HASTINGS WOMEN’S L.J. 187, 188 (2006) (“Despite some positive developments and much lip service, the [U.S. Supreme] Court’s jurisprudence of motherhood fails to follow one of the fundamental precepts of our culture, ‘Honor Thy Mother.’”).

much of a stretch,"¹⁵ of the genetic father as, at best, a stranger to his newborn offspring or, at worst, a "folk devil of high order," better known as a deadbeat dad.¹⁶ Concerns over the employment of the culture of motherhood in Safe Haven laws go wholly unnoted by Professor Sanger, although it is promoted far less subtly than the culture of life.¹⁷ Similar to culture of life proponents, culture of motherhood proponents categorize issues in order to suggest unity in "good purpose[,]" though there are strong differences of opinion. "Safe Havens' enduring achievement" may not be "connecting infanticide to abortion" so as to reinforce "anti-abortion sentiment," as suggested by Professor Sanger.¹⁸ Instead, the enduring achievement of Safe Haven laws may be connecting pre-birth and immediate post-birth parenthood under law,¹⁹ so as to reinforce a "mother-knows-best" sentiment, as well as the stereotype of the unwed, deadbeat dad.²⁰

After briefly reviewing Safe Haven laws, this Article will examine their ties to the culture of motherhood and then survey manifestations of the motherhood culture in a few other settings. It will urge that with the culture of motherhood, as with the culture of life, there is some unfortunate, "stealth symbolism,"²¹ however "brilliant" the "rhetoric."²² Persuasion on the dangers of culture of motherhood laws will be difficult since, as with

¹⁵ Sanger, *supra* note 1, at 783.

¹⁶ *Id.* at 784.

¹⁷ See generally Sanger, *supra* note 1. Thus, Professor Sanger notes only three sources of opposition to Safe Haven legislation: (1) "the child welfare community" (which argues that Safe Haven laws are "a hasty and unproven response to the problem of unwanted pregnancy"); (2) "adult adoptees" (who argue that such laws "violate the human rights of adopted children"); and, (3) "those concerned with Safe Havens' moral implications" (who argue that Safe Haven laws "normalize disgusting (maternal) behavior"). *Id.* at 778. The opposition, she concludes, was "scant." *Id.* at 773. Professor Sanger, in setting aside "whether Safe Haven laws should have *different* terms," does recognize that at least some, including child welfare experts, object to current Safe Haven laws as they "disadvantage" a birth father "who may know nothing about the child or its placement." *Id.* at 791 (emphasis added).

¹⁸ *Id.* at 809; see also Elizabeth Rapaport, *Mad Women and Desperate Girls: Infanticide and Child Murder in Law and Myth*, 33 FORDHAM URB. L.J. 527, 530 (2006) ("[I]nfanticide, from the dawn of the criminalization of this ancient practice to the present, has been less about the protection of children than the regulation of women.").

¹⁹ Thus, Safe Haven laws, in my view, promote more a culture of motherhood creep rather than a "culture of life creep." Sanger, *supra* note 1, at 806.

²⁰ Professor Sanger recognizes the "near-total entanglement of law and culture." *Id.* at 809 (quoting Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 56 (2001)). Thus, legislation can alter cultural norms (i.e., "rhetoric morphs into substance."). *Id.* at 811; see, e.g., Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 353-54 (2005-2006) (critiquing the problems with the "deadbeat" dad, or dad doesn't care, stereotype for low-income unwed fathers).

²¹ Sanger, *supra* note 1, at 829.

²² *Id.* at 801

culture of life laws, there is a “difficult rhetorical challenge.”²³ Additionally, it is hard to align the culture of motherhood “with its opposite number”²⁴ or “to tout membership” in a culture of fatherhood.²⁵ However, this paper will attempt to argue that, at times, mothers do not know best.

II. SAFE HAVEN LAWS AND THE CULTURE OF MOTHERHOOD

Safe Haven laws were enacted in many states following the passage of the 1999 “Baby Moses” provisions in Texas.²⁶ Typically they are justified on child protection grounds, and they usually guarantee the parents and guardians of newborns both anonymity and immunity from criminal prosecution for child abandonment. However, Safe Haven laws vary widely, differing on such matters as which children may be left (i.e., younger than three or thirty days old or abused children), where children may be left (i.e., hospitals only or also at police and fire stations), who may leave children (i.e., genetic parent only or any person with lawful custody), and the procedures for accepting children (i.e. strict anonymity or permissive questions by the recipients).²⁷

As Professor Sanger recognizes, despite variations among state statutes, all Safe Haven laws effectively permit abandonment of very young children by genetic mothers without requiring the mothers to reveal much, if anything, about the genetic fathers.²⁸ The lost fathers need not be alleged rapists, unfit parents, or unwilling parents. They could be married men with genetic ties to the children their wives bear, with presumed paternity under law, and with positive feelings about impending parenthood. They could also be unmarried men who long to raise sons or daughters, who stepped up to parenthood during the pregnancies of their unmarried mates.

²³ *Id.* at 806; see also Katharine T. Bartlett, *Tradition, Change, and the Idea of Progress in Feminist Legal Thought*, 1995 WIS. L. REV. 303, 306, 342 (1995). Of course, after persuasion there is difficult work ahead, including the translation of visions into “terms that can be transmitted and received as part of a complex, never-ending narrative of change.” *Id.*

²⁴ Sanger, *supra* note 1, at 806.

²⁵ *Id.*

²⁶ TEX. FAM. CODE ANN. § 262.301 (Vernon 2002).

²⁷ See Jeffrey A. Parness, *Deserting Mothers, Abandoned Babies, Lost Fathers: Dangers in Safe Havens*, 24 QUINNIPIAC L. REV. 335 (2006) (critically reviewing Safe Haven laws).

²⁸ See Sanger, *supra* note 1, at 789-90. Professor Sanger approaches Safe Haven laws as opportunities for maternal abandonment by women who have hidden their pregnancies, stating for mothers to benefit from Safe Haven laws, “they must conceal their pregnancies from conception to childbirth.” *Id.* Further, Sanger notes that fathers “rarely kill newborns” so neonaticide “is a mother’s crime.” *Id.* at 765. Yet, Sanger also notes that Safe Haven laws often allow any genetic parent or perhaps a guardian to abandon children, stating that most states “authorize delivery by either parent.” *Id.* at 765.

They could even be married men who welcome the births of their genetic offspring to their mistresses.

In most instances, the identities of genetic fathers of Safe Haven children will be forever undiscoverable, even in adoption proceedings. For example, a Wisconsin statute says that when a genetic mother relinquishes child custody and there is no evidence of abuse or neglect, no person “may induce or coerce or attempt to induce or coerce a parent . . . who wishes to remain anonymous into revealing . . . her identity.”²⁹ Less restrictive is a West Virginia statute which declares that a hospital taking possession of an abandoned child from a parent “may not require” the parent to identify him or herself and shall “respect the person’s desire to remain anonymous.”³⁰ The New Mexico statute is more sympathetic to lost fathers, but ultimately provides little practical help. It states that “[a] hospital may ask the person leaving the infant for the name of the infant’s biological father [,] . . . the infant’s name and the infant’s medical history, but the person leaving the infant is not required to provide that information to the hospital.”³¹ In South Carolina, a statute declares that, while a receiving hospital “must ask the person leaving the infant to identify any parent . . . other than the person leaving the infant[,]”³² the person leaving the infant “is not required to disclose his or her identity.”³³ Thus, Safe Haven laws facilitate not only voluntary termination of the maternal rights by new mothers, but also the involuntary termination of paternal rights of new fathers.

A few Safe Haven laws actually appear, in part, quite sympathetic to fathers. In Florida, the statutory procedures for women who abandon newborns reasonably believed to be less than four days old, include requirements on diligent searches for, and notices to, interested fathers.³⁴ Such statutes also grant potential lost fathers the opportunity to void earlier parental rights terminations or adoptions within a year if a court finds “that a person knowingly gave false information that prevented the birth parent from timely making known his or her desire to assume parental responsibilities toward the minor or from exercising his or her parental rights.”³⁵ However, there is also a Florida Safe Haven provision which states that, except “where there is actual or suspected child abuse or neglect, any parent who leaves a newborn infant . . . and expresses an intent to leave

²⁹ WIS. STAT. ANN. § 48.195(2)(a)(1) (West 2003).

³⁰ W. VA. CODE ANN. § 49-6E-1 (West 2004).

³¹ N.M. STAT. ANN. § 24-22-3(B) (West 2004 & Supp. 2006).

³² S.C. CODE ANN. § 20-7-85(B)(2) (Supp. 2006).

³³ S.C. CODE ANN. § 20-7-85(A)(2) (Supp. 2006).

³⁴ FLA. STAT. ANN. § 63.0423(4) (West 2005).

³⁵ FLA. STAT. ANN. § 63.0423(9)(a) (West 2005).

... and not return, has the absolute right to remain anonymous and to leave at any time" and that person will "not be pursued or followed."³⁶ Thus, the Florida Safe Haven law provides genetic fathers of abandoned newborns no practical opportunities for diligent searches.

In contrast, when unwed genetic mothers place children for adoption who are at least four days old, the proceedings to terminate parental rights in anticipation of later adoptions usually require judicial inquiries and, perhaps, adoption entity searches for genetic and non-genetic fathers. Such fathers include men who were married to the mothers, men who acknowledged or otherwise claimed paternity, men with biological ties, and men who cohabitated with the mothers at the times of conception.³⁷ The differences between adoption statutes and Safe Haven laws beg the question: are there good reasons to facilitate lost fatherhood for children under four days old but not for children over four days old? Further, are there good reasons to facilitate lost fatherhood for children in Safe Haven settings, but not in adoption settings?

Safe Haven laws have "little impact on the phenomenon of infant abandonment" by mothers³⁸ because they do not adequately promote child protection, or prompt Safe Haven placement of many at-risk children. However, Safe Haven laws clearly advance the culture of motherhood by supporting the social norm³⁹ that women can terminate the childrearing and paternity opportunity interests of men, both before and after birth.⁴⁰

³⁶ FLA. STAT. ANN. § 383.50(5) (West 2007).

³⁷ FLA. STAT. ANN. § 63.088(4)-(5) (West 2005).

³⁸ Sanger, *supra* note 1, at 753.

³⁹ See, e.g., Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921 (2004-2005) (showing how family laws on child custody have influenced social norms).

⁴⁰ See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (exploring rebuttable and irrebuttable state marital presumption laws); *Lehr v. Robertson*, 463 U.S. 248 (1983) (discussing the paternity opportunity interests that can be afforded by state laws to genetic fathers of children born outside of marriage). As both *Michael H.* and *Lehr* illustrate, unlike most husbands of birth mothers, not all genetic fathers have available state laws allowing federal constitutional childrearing interests in newborns to arise. *Lehr*, 463 U.S. at 249. For example, many men who father children with unmarried women only have available the lesser-protected, federal constitutional paternity opportunity interests. *Id.* Other genetic fathers, such as rapists and men who fathered children with married women, may have no opportunities for federal constitutional interests. *Michael H.*, 491 U.S. at 125; see also *Barnes v. Jeudevine*, 718 N.W.2d 311, 312 (Mich. 2006) (illustrating a particularly restrictive state provision denying legal paternity to genetic fathers of children born to mothers married to others in the form of a Michigan law disallowing unwed genetic father standing to maintain paternity suit even though (1) pregnant mother's divorce judgment indicted no child was "expected" from the marriage; (2) the unwed father, with mother's aid, signed affidavit of parentage so that the birth certificate named him as father; and, (3) the unwed father cohabited as family with mother and child for over four years); *Matter of Adoption of Doe*, 543 So. 2d 741 (Fla. 1989)

Notwithstanding their pre-birth abortion rights⁴¹ under *Roe v. Wade*,⁴² outside of Safe Haven laws, women have never been accorded absolute veto powers over the parental interests of their husbands or of genetic fathers for children born alive, especially where the women are unwed genetic mothers whose pregnancies resulted from consensual sexual intercourse.⁴³ Such maternal authority is “foreign to our legal tradition,”⁴⁴ has no “pedigree,” and lies outside “traditional” notions of justice.⁴⁵ Whatever else it does, Safe Haven child abandonment precipitates a loss of a father for the child, which is contrary to state law policies preferring two parents for every child born. Such a desertion is an effective end to the benefits, but not necessarily the financial obligations,⁴⁶ of parenthood, even for a man who,

(illustrating a particularly restrictive state laws denying legal paternity to genetic fathers of children born to unwed mothers, holding that implied consent to adoption by an unwed genetic father who failed to provide meaningful support to the unwed mother during pregnancy and to provide adequate child support for the first two days after birth, though he acknowledged paternity within a week of birth, was put on the birth certificate, married the mother within two months of his child’s birth, and though he provided some pre-birth support); Jeffrey A. Parness, *Prospective Fathers and Their Unborn Children*, 13 U. ARK. LITTLE ROCK L.J. 165 (1990-1991) (criticizing the *Doe* decision).

⁴¹ See generally Sanger, *supra* note 1.

⁴² 410 U.S. 113 (1973).

⁴³ See, e.g., Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 306-07 (1988). Bartlett describes the legal background of unmarried women seeking to terminate the parental rights of the children’s biological father, stating:

Unmarried women claiming parental rights without interference from the child’s biological father run head-on into a legal tradition in family law that assumes that every child should have two parents. The law has not always insisted that these two parents be treated equally with respect to custody, especially where the parents are unmarried. In many states mothers have superior custodial rights and fathers, to have any rights at all, need to take steps to perfect their rights that mothers need not take. But if a father is intent upon doing so, he will ordinarily be able to assert some parental rights over the objection of a mother who seeks to raise the child without him.

Id. But see, 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, 100 (2006). Spitko argues that as the initial constitutional parent, the biological mother enjoys the right to determine who else shall be allowed to parent the child. *Id.* at 100. Spitko goes on to state that “[i]n all but the most extraordinary of cases, therefore, the biological father should not enjoy the right to override the mother’s decision to place their biological child for adoption at birth.” *Id.* at 126.

⁴⁴ *N.E. v. Hedges*, 391 F.3d 832, 836 (6th Cir. 2004) (guidelines on fundamental right).

⁴⁵ *Burnham v. California*, 495 U.S. 604, 621-622 (1990) (guidelines on fundamental right); see also *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (in a federal constitutional childrearing setting, due process liberty said to include “those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men”).

⁴⁶ See, e.g., *In re Marriage of Thomsen*, 371 Ill. App. 3d 236 (2007). *Thomsen* demonstrates that when blameless, genetic fathers lose childrearing or paternity opportunity interests in their children in adoption proceedings, for example, they do not necessarily lose their child support

both prebirth⁴⁷ and postbirth,⁴⁸ established an “actual” parent-child relationship⁴⁹ or was subject to a marital paternity presumption.⁵⁰ Imagine a reversal of usual roles. What would hospital, police, or fire personnel likely do if a man, as an alleged parent, sought to abandon a newborn and walk away with no questions asked?

In addition to Safe Haven laws, there are other settings in which culture of motherhood proponents have promoted legally-sanctioned, unconditional maternal action regarding their children. Too often, innocent genetic fathers lose chances to establish paternity.⁵¹ These settings typically

responsibilities as support duties are often solely dependent upon genetic ties (though with child support obligations there may be a revival of childrearing rights or paternity opportunity interests that were lost earlier). *Id.* Child support responsibilities are continued in the event there is no later adoption and the child (perhaps then in governmental care) needs financial aid. *Id.*

⁴⁷ Some state laws recognize that parental interests for unwed genetic fathers in adoption proceedings may be established prior to birth, as through rendering financial assistance to expectant mothers during their pregnancies or through registering in a putative father registry. *See, e.g.,* FLA. STAT. ANN. §§ 63.062(1)-(2)(b)(3) (West 2005); 750 ILL. COMP. STAT. 50/12.1(b) (1999). Both state laws recognize that parental interests for unwed genetic fathers in adoption proceedings may be established prior to birth, as through rendering financial assistance to expectant mothers during their pregnancies or through registering in a putative father registry, with the Florida statute stating that payment of “a fair and reasonable amount of the expenses incurred in connection with the mother’s pregnancy” leads to requirement of “written consent” to adoption. §§ 63.062(1)-(2)(b)(3). Meanwhile, the Illinois statute states “[a] putative father may register . . . before the birth of the child” in order to secure notice of an adoption proceeding. 50/12.1(b).

⁴⁸ *See, e.g.,* 750 ILL. COMP. STAT. 50/12.1(b) (1999) (an example of a state law recognizing that parental interests for genetic fathers in adoption proceedings may be established after birth, even without maternal knowledge or approval, through registering in a putative father registry, in this case within 30 days after birth).

⁴⁹ *See, e.g.,* HAW. REV. STAT. § 578-2(a)(5) (1993) (consent of natural father needed where father has “demonstrated a reasonable degree of interest, concern or responsibility as to the welfare of the child”). *Contra* MISS. CODE ANN. § 93-17-6(4)(a) (1973-2004) (alleged father hoping to contest adoption must show “full commitment to the responsibilities of parenthood,” including providing “financial support” during pregnancy and after birth; visits with the child after birth “frequently and consistently” made; and a willingness and ability “to assume legal and physical care custody of the child”).

⁵⁰ *See, e.g.,* FLA. STAT. ANN. § 63.062(1)(b)(1) (West 2005) (one of many state laws recognizing that parental interests for men in adoption proceedings may arise, even without maternal knowledge or approval, as through a marital paternity presumption (as to genetic ties) founded on marriage to the genetic mother at the time of conception or for some time during the pregnancy, even if not at the time of birth, requiring a father to consent to adoption provided the “minor was conceived or born while the father was married to the mother”); UTAH CODE ANN. § 30-1-17.2(2)(d) (Supp. 2006) (“a man is presumed to be the father of a child if: . . . after the birth of the child, he and the mother of the child have married . . . he voluntarily asserted his paternity of the child, and there is no other presumptive father”).

⁵¹ Paternity herein means legal fatherhood at the time of a child’s birth while the chance for paternity encompasses the opportunity interest afforded most genetic fathers to establish paternity by stepping up to fatherhood in some way.

involve unwed mothers and include adoptions and birth certificates. These laws reinforce American support for “Jodie Foster” mothering.⁵²

III. ADOPTIONS AND THE CULTURE OF MOTHERHOOD

Adoptions of children born in the United States to unwed parents typically prompt inquiries into legal maternity and paternity which, when established, necessitate (or may necessitate) participation rights, under which parents often can veto proposed adoptions. One underlying premise is that marriage should not be the sole route to parental rights. A second premise is that the post-birth parental rights of genetic mothers and genetic fathers should be similar. A third premise is that it is preferable for children to be raised by at least one genetic parent rather than by non-genetic strangers. Thus, when children are born to the unwed, the genetic parents in adoption proceedings frequently are accorded the same, or at least similar, participation rights as those accorded married and divorced genetic parents whose children are placed for adoption.

Nevertheless, unwed parents are not always treated comparably in adoption proceedings. Genetic mothers and genetic fathers typically have distinct ways to secure parental status under law that warrants an opportunity for participation. In settings involving consensual sexual intercourse, only genetic mothers automatically achieve legal parenthood, thereby acquiring parental rights solely based on biological ties. Parental rights for unwed fathers often only arise if there are both biological ties and an actual parent-child relationship. While some distinctions between mothers and fathers are needed, unfortunately the parental opportunity interests and childrearing rights of unwed fathers are too often not fully respected in adoption proceedings.⁵³ Frequently, unwed fathers have little or uncertain information about their offspring around the time of birth. Even when aware, these fathers may have had little practical opportunity to develop parent-child relationships, or to overcome obstacles to paternity designation under law because mothers control both information and access.⁵⁴ As a result of this culture of motherhood, schemes for paternity

⁵² See generally Jeffrey Zaslow, *Jodie Foster's Other Starring Role*, USA WEEKEND MAGAZINE, March 3, 2002. Jodie Foster, a well-known and accomplished, American actress, has borne two children, by many news accounts, without revealing the man (or men) [if known to her] with actual possible genetic ties.

⁵³ Bartlett, *supra* note 43, at 339 (“The fact that women by virtue of their biological and current social positioning often have an edge with respect to the parent-child relationship is unfortunate from the point of view of any androgynous goals we might have.”).

⁵⁴ See, e.g., *In re Baby Boy V.*, 140 Cal. App. 4th 1108 (Cal. App. 2d 2006) (exemplifying that even when compelled to reveal the names of potential fathers, unwed mothers frequently refuse to comply, with little consequence, in this case cooperation was ordered in a February

recognition in newborn adoptions are unfair to unwed genetic fathers. In many newborn adoptions, for example, governmental inquiries into paternity, as well as available methods of proving genetic ties or necessary parent-child relationships, are procedurally flawed.⁵⁵ Often, unwed mothers effectively deposit their children with adoption facilitators in hospitals shortly after giving birth, much the way they drop off their children at Safe Havens.⁵⁶ Significant and undesirable harm to unwed genetic fathers often results from adoption and Safe Haven drop-offs.⁵⁷ While many birth mothers quite reasonably believe that their children will live happier lives in adoptive homes than in their genetic fathers' homes, neither birth mothers nor child welfare officials should be entitled under otherwise applicable public policies to act on these beliefs.⁵⁸

hearing; however the father was not informed by mother until September, long after prospective adopting couple had secured custody). *See also* Adoption of Baby A., 944 So. 2d 380, 383-84 (Fla. 2d Dist. App. 2006) (trial judge ordered unwed mother in an adoption proceeding "to identify the father so he could be notified of the proceedings[;]" yet because identification was sought only after the adoption case had begun, the genetic father's attempt to secure custody would have failed under strict application of the Florida statutes that required him to file with the putative father registry before such a petition was filed. The court held that his paternity lawsuit before, occurring the adoption was completed, allowed the genetic father the chance to pursue legal paternity).

⁵⁵ *See, e.g.,* Jeffrey A. Parness, *Participation of Unwed Biological Fathers in Newborn Adoptions: Achieving Substantive and Procedural Fairness*, 5 J.L. & FAM. STUD. 223, 237 (2003) (suggesting state law reforms after finding that in many newborn adoptions, "the participation rights of too many unwed, fit biological fathers are unfairly considered").

⁵⁶ Sanger, *supra* note 1, at 784. Professor Sanger recognizes that in-hospital abandonments dwarf the number of Safe Haven abandonments by mothers. *Id.*

⁵⁷ *See* UTAH CODE ANN. § 78-30-4.15 (1) (2002) (imposing "strict" requirements on unwed fathers' participation rights in newborn adoptions, including manifesting "a full commitment to his parental responsibilities" by commencing paternity proceedings and taking on financial responsibilities for pregnancy expenses); UTAH CODE ANN. § 78-30-4.14 (2)(b) (2002) (in which legislators do find that harmed unwed fathers can "pursue civil or criminal penalties in accordance with [unstated] existing law"); UTAH CODE ANN. § 78-30-4.15 (2) (2002) (concluding fraud is "not a defense" to "strict compliance" and may not serve to undo an adoption); UTAH CODE ANN. § 78-30-4.15 (3) (2002) (finding that an "unmarried biological father is in the best position to prevent or ameliorate the effects of fraud"). *Cf. Doe v. Queen*, 552 S.E.2d 761, 764 (S.C. 2001) (holding that a genetic father's consent to adoption is needed as his "strict" compliance with pre-birth support duty is excused when caused by "the whim" of the mother, especially as the father acted sufficiently and promptly upon learning of birth); *Wallis v. Smith*, 22 P.3d 682 (N. Mex. App. 2001) (public policy forecloses unwed man's claims against unwed mother in contract and tort for lying about her birth control practices); *Day v. Heller*, 653 N.W.2d 475 (Neb. 2002) (public policy forecloses fraud and others claims by former husband against former wife based on her misrepresentation during marriage of his genetic ties to a child born during the marriage); *Denzik v. Denzik*, 197 S.W.3d 108 (Ky. 2006) (former husband can recover five years of child support payments from former wife if she committed fraudulent misrepresentation).

⁵⁸ *See Lehr v. Robertson*, 463 U.S. 248, 263-64. While the U. S. Supreme Court has not yet examined the procedural and substantive due process implications of state newborn adoption

IV. BIRTH CERTIFICATES AND THE CULTURE OF MOTHERHOOD

State laws regarding birth certificate records also promote the culture of motherhood. Before the 1996 federal mandates on voluntary paternity acknowledgments,⁵⁹ state laws on birth certificates for children born in the United States to unwed mothers typically permitted the certificates themselves to establish legal paternity.⁶⁰ In Illinois, from 1993 to 1996, birth certificates could include a purported genetic father's name with his consent, if accompanied by the written consent of the mother.⁶¹ Before 1993, however, maternal consent to paternity recognition was not expressly required.⁶² Additionally, and more importantly, hospital personnel in Illinois, as of 1993, were required to attempt to secure both paternal and maternal designations under a statute declaring that the "person responsible for preparing and filing the birth certificate . . . shall make a reasonable effort to obtain the signatures of both parents."⁶³ Since the advent of the federal mandates in 1996, alleged genetic fathers can be included on birth certificates of children born to unwed mothers only if both the father and the mother signed and had witnessed acknowledgments of parentage.⁶⁴ In practice, such acknowledgments are generally only available in hospitals at the time of birth, or in government agency offices sometime thereafter. Acknowledgments by a mother and a purported father are usually pursued simultaneously. So what is a male soldier in Iraq to do when his beloved fiancé expects and then delivers a child in the United States?

Furthermore, new federal voluntary paternity acknowledgment laws have facilitated so-called "Jodie Foster" mothering, wherein unwed mothers

schemes permitting such maternal drop offs, the court has suggested that any such schemes that "omit many responsible [unwed genetic] fathers" (those who "assumed some responsibility for the care of their natural children") for reasons "beyond the control of an interested putative father might be thought procedurally inadequate." *Id.*; see also *Parratt v. Taylor*, 451 U.S. 527, 541 (1981) (no predeprivation process is possible where loss of liberty results from "random and unauthorized" governmental action; yet where liberty loss is subject to "the control of the State" in that fair process can be planned in advance, a meaningful predeprivation hearing is usually required); *Kristine M. v. David P.*, 135 Cal. App. 4th 783 (Cal. App. 1st 2006) (once paternity is established, parents cannot waive or limit by agreement a child's right to support, where mother sought by contract to end contact between father and child as well as to end any support by father).

⁵⁹ 42 U.S.C. §§ 666(a)(5)(C)-(E) (2000).

⁶⁰ See Jeffrey A. Parness, *New Federal Paternity Laws: Securing More Fathers at Birth for the Children of Unwed Mothers*, 45 BRANDEIS L.J. 59 (2006) (reviewing the pre-1996 state laws as well as the 1996 federal mandates).

⁶¹ Ill. Pub. Act. 89-641 (1996) (amending 410 ILL. COMP. STAT. ANN. 535/12(4)).

⁶² Ill. Pub. Act. 88-159 (1993) (amending 410 ILL. COMP. STAT. ANN. 535/12(4)).

⁶³ *Id.*

⁶⁴ 410 ILL. COMP. STAT. ANN. 535/12(5)(a) (1999).

choose to parent their children alone. Without maternal consent, no man's name may be entered as a father on a birth certificate. Of course, incorrect entries can always be changed via rescissions or paternity disestablishment proceedings. There are no longer duties on hospital personnel or on government officers at birth or shortly thereafter to locate unnamed male genetic parents of children born to unwed mothers. Indeed, there has never been serious American governmental interest in exploring the legal paternity of children whose birth certificates included only the names of mothers. Yet, there is significant governmental interest where mothers receive governmental assistance on behalf of their children and where welfare officials seek reimbursement for past child support and avoidance of future child support.⁶⁵ Though men who engaged in unprotected heterosexual acts may register under state paternity registration schemes in order to safeguard certain paternity rights, their partners have no obligation to inform them of related pregnancies or births.⁶⁶ Also, should women lie, there is little recourse for men interested in parenting who come forward late, even if the men acted as soon as they learned of the births of their genetic offspring.

V. PRACTICAL CONSEQUENCES OF THE CULTURE OF MOTHERHOOD

While the culture of motherhood underlies Safe Haven laws, its dangers to actual and would-be legal fathers are far more pronounced in birth certificate and adoption notice laws. This is because, as Professor Sanger noted, there are relatively few uses of Safe Haven laws.⁶⁷

There are, however, increasing numbers of children born in the United States to unwed mothers⁶⁸ where there is no marital presumption automatically designating a man as the legal father. Also, there are large numbers of out-of-wedlock children with no fathers designated on their birth certificates. Whereas a half century ago, about one-in-twenty children were born out-of-wedlock in the United States, today, the statistic is about

⁶⁵ See, e.g., 42 U.S.C. § 654 (29)(A) (2000) (requiring mothers receiving government aid on behalf of their children to cooperate "in good faith" to establish legal paternity).

⁶⁶ Participation rights in adoption proceedings are secured, but the onset of other rights (as childrearing, where there is no adoption as the birth mother maintains custody) seems uncertain. Thus, paternity registration may not act (nor should it act as it is unilateral) like a voluntary paternity acknowledgment which carries the effect of a judgment.

⁶⁷ Sanger, *supra* note 1. Sanger states that only 105 cases of baby abandonment in public places were reported in 1998. *Id.* at 763. Further, Sanger notes that numbers of newborns left at Safe Havens often are fewer than numbers of newborns illegally abandoned. *Id.* at 789.

⁶⁸ Kelleen Kaye, *New Urgency for Early-20's Single Moms*, CHRISTIAN SCI. MONITOR, July 11, 2006, at 9 (noting that births to single mothers are to teens and especially to young adults age 20-24 whose levels surpass even "epidemic" levels of teen childbearing, with 550,000 births annually, as compared to 415,000 births to teens).

one-in-three. Thus, there are approximately one-and-a-half million out-of-wedlock children born each year in the United States, and while the data is scarce, about one-in-three of these children, i.e., a half a million children, are born each year without a father designated under law.⁶⁹

In the adoption arena, there are also rising numbers of lost fathers as the numbers of adoptions resulting from births to unwed mothers rise. Newborns placed for adoption by unwed mothers often have no designated father under law. In the parental rights termination hearing that precedes any adoption decree, if the birth certificate for the child to be adopted names no father, little is done to identify, locate, and notify the genetic father, even when there are no allegations or even hints of paternal abandonment, unfitness, domestic abuse, or ambivalence.

VI. REIGNING IN MOMS THROUGH SAFE HAVEN LAWS, ADOPTION LAWS, AND BIRTH CERTIFICATE LAWS

Given the significant costs of allowing a new mother free reign regarding paternity identification and misidentification, especially where there is no automatic father under law, how might mothers be reigned in under law so as to better secure two legal parents for each child born alive in the United States? The public policy desiring two parents is especially strong in settings involving a birth to a married woman resulting from consensual sexual intercourse, in which the designation of a male parent arises through a paternity presumption based on marriage.⁷⁰ This policy is also strong in settings involving a birth to an unmarried woman resulting from consensual sexual intercourse. For example, in 2003, in *Rosero v. Blake*, the North Carolina Supreme Court effectively eliminated the common law rule that the custody of a non-marital child presumptively vests in the mother.⁷¹ The court relied on U.S. Supreme Court decisions because “[t]hese decisions acknowledge that, absent a showing that the biological or adoptive parents are unfit, that they have otherwise neglected their children’s welfare, or that some other compelling reason exists, the

⁶⁹ See Parness, *supra* note 60 (examining fatherless children born out-of-wedlock in the United States). See also CAL. FAM. CODE § 7570(a) (West 2004). The California statute states:

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

Id.

⁷⁰ See, e.g., CAL. FAM. CODE § 7611(a)-(c) (West 2004); 750 ILL. COMP. STAT. ANN. 45/5(a)(1)-(2) (1999).

⁷¹ *Rosero v. Blake*, 581 S.E.2d 41 (N.C. 2003).

paramount rights of both parents to the companionship, custody, care and control of their minor children must prevail.”⁷² The North Carolina court concluded “that the father’s right to custody of his illegitimate child is legally equal to that of the child’s mother.”⁷³ There are also statutes promoting this same policy. A Delaware law declares:

The father and mother are the joint natural guardians of their minor child and are equally charged with the child’s support, care, nurture, welfare and education. Each has equal powers and duties with respect to such child, and neither has any right, or presumption of right or fitness, superior to the right of the other If either parent should die, or abandon his or her family . . . then, the custody of such child devolves upon the other parent. Where the parents live apart, the Court may award the custody of their minor child to either of them and neither shall benefit from any presumption of being better suited for such award.⁷⁴

In the Safe Haven setting, the problem of mothers failing to identify genetic fathers could be eliminated by abolishing Safe Haven laws all together. As Professor Sanger and others have noted, Safe Haven laws could be eliminated without much cost because they are ineffective in achieving their stated goals and they are dangerous.⁷⁵ Professor Sanger and I also find differing yet significant dangers in these laws, including the unfortunate promotion of either the culture of life or the culture of motherhood. Alternatively, Safe Haven laws could be modified so as to operate only when child abandonment, or desertion, is pursued by both spouses or both unwed genetic parents, at least where each has federal constitutional or state law parental rights or interests.⁷⁶

⁷² *Id.* at 47.

⁷³ *Id.* at 50.

⁷⁴ 13 DEL. CODE ANN. tit. 13, § 701(a) (Supp. 2006).

⁷⁵ See, e.g., 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). Oren argues that “the *Baby Moses* infant abandonment laws are of questionable constitutional validity. They create thwarted fathers by legal design who do not enjoy even a modicum of procedural due process.” *Id.*

⁷⁶ See *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting) (adopted by six justices in *Lehr v. Robertson*, 463 U.S. 248, 260 (1983) (holding that where the genetic parents are unwed, a man with no genetic ties occasionally can acquire federal constitutional or state law parental rights or interests where an “actual relationship” has developed between the man and the child); see also CAL. FAM. CODE § 7611(d) (West 2004) (recognizing paternity for non-genetic fathers arising from actual parent-child relationships that is recognized as a presumption of

In the adoption setting, there is also the need and the opportunity to rein in unwed mothers so that adoption placements involve both genetic parents of children born from consensual sexual intercourse. Reforms need not be overly coercive to women. For example, when an adoption is being considered with an adoption facilitator prior to birth, laws could better insure that unwed expectant mothers fully comprehend the applicable legal standards, by mandating information flow via websites and pamphlets.⁷⁷ Also, laws could better encourage mothers to voluntarily notify the known, expectant fathers of impending births. To facilitate trouble-free adoptions, pre-birth waivers or terminations of any paternity rights, if not responsibilities,⁷⁸ could then be secured through fair procedures.

Additionally, when adoption is being considered with an adoption facilitator after birth, laws should seek to promote better comprehension of legal norms and encourage greater father notification, while recognizing more significant or new paternity inquiry duties by an adoption facilitator, both in and outside of the government. Thus, when a newborn with no father noted on a birth certificate is placed for adoption by an unwed mother, there should be significant attempts to prompt “good-faith” cooperation by the mother in identifying the man or men who may be eligible for legal paternity designations. Whatever a mother’s privacy interests in secreting information about sexual encounters,⁷⁹ they are insufficient to overcome the father, the child, and the public’s interests in establishing paternity, especially when information from the mother can be used discretely so that it is only used during a paternity inquiry. This is especially true considering that mothers with children whose fathers are unnamed on birth certificates must cooperate in paternity proceedings in order to receive certain welfare benefits.⁸⁰

natural fatherhood for men who lived with the children and held them out in the community as their own natural children).

⁷⁷ See, e.g., ALA. ADMIN. CODE r. 420-5-13-05(2) (“patient and family” are counseled and instructed prior to birth on nutrition and on the birthing process).

⁷⁸ It seems unwise as a matter of social policy always to end prior to birth any prenatal and post-birth child support responsibilities for a genetic father who does not step up to parent, especially where the mother’s waiver of parental rights has not been secured or can later be revoked easily and, thus, where there is uncertainty as to whether an adoptive family will be needed or found.

⁷⁹ See, e.g., Jeffrey A. Parness, *Adoption Notices to Genetic Fathers: No to Scarlet Letters, Yes to Good-Faith Cooperation*, 36 CUMB. L. REV. 63 (2005) (reviewing the so-called Scarlet Letter laws in Florida and the inadequate substitute once that law was voided).

⁸⁰ Compare 42 U.S.C. 654 § (29)(A) (2000) (mothers seeking certain governmental assistance under the Social Security Act must cooperate “in good faith” in paternity establishment initiatives), with 25 U.S.C. §§ 1901-1917 (2000) (significant paternity inquiry duties when Native American Indian descent is suspected).

Finally, in the birth certificate setting, both wed and unwed mothers should be better reined-in so that birth certificate designations of paternity actually, or more accurately, reflect the men who will be the legal fathers as of the time of birth. For married women, due to paternity presumptions, their husbands are routinely named on birth certificates with no inquiries made into male genetic ties and with no maternal affirmations about the male genetic ties that could trigger perjury or similar sanctions if the husbands are not genetically tied. Such presumptions may work very well in promoting the public policy of having two parents of a different gender at birth, for each child born alive as a result of consensual sex. Yet, not infrequently, these marital presumptions can be easily overridden, due to a lack of genetic ties, so that fatherhood is retroactively disestablished at birth. Here, a child's best interests test is not employed and a child can become fatherless because the disestablishment of one man's paternity need not be accompanied by the establishment of another man's paternity.⁸¹

Moreover, laws should facilitate the reflection of the actual genetic fathers on birth certificates of children born to unwed mothers, absent rape, incest, and artificial insemination. As noted, one-in-three, or about a half million, children born annually to unwed mothers in the United States now have no designated legal fathers at the time of birth. As in the adoption setting, there should be new laws promoting better comprehension of legal norms on paternity and more laws prompting significant paternity inquiries into absent fathers via good faith maternal cooperation or otherwise. New laws would reduce the numbers of fatherless children at birth.

Legal reforms are also needed for some settings where men are named as fathers on the birth certificates of children born to unwed mothers as a result of consensual sex. As with marital paternity presumptions, such fatherhood can be disestablished retroactively. Disestablishment due to a lack of genetic ties often does not lead to the man with genetic ties. While paternity designations at birth for children born to unwed mothers should not always await testing that proves actual genetic links (and could not under state laws given the current federal Social Security Act guidelines), in-hospital, voluntary paternity acknowledgments should more frequently reflect the biological realities. Admittedly, education efforts aimed at better comprehension of legal norms might reduce the numbers of acknowledging

⁸¹ See, e.g., 750 ILL. COMP. STAT. ANN. 45/7(b-5) (West 1999) (court adjudication of paternity founded on marital presumption may be challenged later with DNA tests showing no genetic ties); 750 ILL. COMP. STAT. ANN. 45/8(a)(3) (such a challenge may be pursued within 2 years of when petitioner "obtains knowledge of relevant facts"; this challenge can be made until the child reaches 18 and there is no requirement that disestablishment of one man be considered together with a paternity establishment request involving another man).

men. Some men might choose to await testing once they are aware of the difficulties of paternity disestablishment without genetic ties. Some women might choose to forego paternity acknowledgments at birth once they are aware of the avenues for paternity disestablishment due to lack of genetic ties and the difficulties of establishing paternity for the man with genetic ties long after birth. Nevertheless, the public and individual family members are better served when paternity designations made at birth are both informed and accurate as to the requisite facts.

VII. CONCLUSION

Professor Carol Sanger has demonstrated that American Safe Haven laws, viewed “within a larger political culture,”⁸² do somewhat promote the “goal of the culture of life: the reversal of *Roe v. Wade*.”⁸³ Their effectiveness in that pursuit, she correctly notes, depends on whether judges, legislators, voters and others recognize the “strong differences”⁸⁴ between certain culture of life settings. Like Professor Sanger, I see differences between Safe Haven abandonment and abortion. Unfortunately, Professor Sanger failed to note that American Safe Haven laws, within a larger political culture, also significantly promote the culture of motherhood, that is, the unconditional respect for the relatively exclusive maternal decision-making about newborns, regardless of children’s best interests, of any legal paternity interests, and of strong social policy favoring two parents for each child born as a result of consensual sex. As with culture of life settings, there are “strong differences” in culture of motherhood settings. I see significant differences between protecting potential human life from maternal harm and protecting actual or born alive human life from maternal harm. I see differences between pursuing actual deadbeat dads and simply projecting certain dads as deadbeats. I see differences between children conceived as a result of artificial insemination via an anonymous donor, as is likely the case with the children of Jodie Foster, and children conceived as a result of consensual sex. I see differences between terminating potential or actual legal paternity before and after birth.⁸⁵ The culture of motherhood, like the culture of life, merits our serious attention. There “*are* strong differences of opinion” on certain “Jodie Foster” mothering choices that need to be better

⁸² Sanger, *supra* note 1, at 753.

⁸³ *Id.*

⁸⁴ *Id.* at 805-06.

⁸⁵ As with culture of life supporters, culture of motherhood proponents sometimes seek “to blur the boundaries between prenatal and postnatal life.” *Id.* at 808. See, e.g., Jeffrey A. Parness, *Arming the Pregnancy Police: More Outlandish Concoctions?*, 53 LA. L. REV. 427 (1992-1993) (reviewing and refuting the notion that during pregnancies, women have comparable privacy interests in acting in all ways harmful to their unborn [abortion versus illegal drug use] and thus can similarly act whether or not the live births of children are anticipated).

considered by American lawmakers. In particular, beyond revisiting Safe Haven laws, state legislators (and Congress, through the Social Security Act) need to reform many of the adoption and birth certificate laws governing children born as a result of consensual sex. American laws should better assure that the men named as legal fathers at birth merit that designation and that more children have legal fathers named at the time of birth.