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THE FAILURE TO NOTIFY PUTATIVE FATHERS OF ADOPTION PROCEEDINGS: BALANCING THE ADOPTION EQUATION

There are over 100,000 adoptions each year in the United States.¹ Adoption involves the relinquishment of legal rights to a child by the natural parents and a subsequent creation of those rights in the adoptive parents.² Due to the permanent results of adoption proceedings, it is essential to balance carefully the competing rights and interests of the biological parents, the adoptive parents, and the children.³ Putative fathers pose a great challenge

1. According to a survey by the National Committee For Adoption, Washington, D.C., there were 104,088 domestic adoptions in 1986. NATIONAL COMMITTEE FOR ADOPTION, 1989 ADOPTION FACTBOOK 60 (1989). Of these, 52,931 were related adoptions (adoptions by people related to the child), and 51,157 were unrelated adoptions (adoptions by people not related to the child). *Id.* Of the unrelated domestic adoptions, 20,064 were arranged by public agencies, 15,063 by private agencies, and 16,040 privately (usually by attorneys). *Id.* Approximately half of the unrelated domestic adoptions were of infants (under two years of age) of all races and ethnic backgrounds. *Id.* The remaining were children with physical, mental or emotional disabilities (infants or older children) and healthy children over two years of age. *Id.*

2. The laws applicable to adoption vary extensively from state to state. National Council for Adoption, Factsheet on Adoption 1 (Washington, D.C., 1991) [hereinafter Factsheet] (unpublished paper on file with the *Catholic University Law Review*). In most states, the birthparent or parents "sign a consent to the adoption or a relinquishment of parental rights." *Id.* Both can be revoked within a specified time after the child's birth, however this possibility varies by state. See STANLEY B. MICHELMAN & MEG SCHNEIDER, THE PRIVATE ADOPTION HANDBOOK 36-56 (1988) (analyzing when consent may be revoked in the various states). At the same time, the prospective adoptive mother and father file a petition to adopt. Factsheet, *supra*, at 1. Court supervision of the adoptive parents and the child lasts from six months to one year, and after this period, the adoption is considered final. *Id.* Once the adoption is finalized, an adopted child is entitled to the same legal rights and privileges in the family as the biological children. *Id.*

3. The termination of parental rights "is the most serious of all state interferences between parent and child" because of the irreversible nature of the proceeding. Elizabeth Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson*, 45 OHIO ST. L.J. 313, 316 (1984). When an adoption takes place, both the biological mother's and biological father's rights to the child are terminated. *Id.* at 314. Buchanan states that adoption's "double effect" is that "while a child may have no parents in the eyes of the law, she can never legally have more than one mother and one father." *Id.* at 314-15; see also *Santosky v. Kramer*, 455 U.S. 745 (1982). In *Santosky*, the Supreme Court held that "[w]hen the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it. . . . 'A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one.'" *Id.* at 759 (quoting *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 27 (1981)).

to those responsible for ensuring the proper balance among all parties to an adoption.⁴ Only a few decades ago, the consent of a putative father was not needed to complete an adoption.⁵ However, four significant United States Supreme Court cases and a number of lower court decisions have duly broadened the scope and defined the extent of putative fathers' rights in adoptions.⁶ These decisions, overriding age-old perceptions that unwed fathers are unfit parents,⁷ recognize that unwed fathers are as capable of parenting as married fathers. The decisions also acknowledge that an unwed

4. Unwed fathers are referred to by the courts as "putative fathers," meaning they are men "reputed to be" the legal fathers of children. National Council for Adoption, Putative Fathers' Rights 1 (Washington, D.C., 1992) [hereinafter *Fathers' Rights*] (unpublished paper on file with the *Catholic University Law Review*). This Comment uses the terms "putative father" and "unwed father" interchangeably, as do the courts and state legislatures.

5. Until the 1972 Supreme Court decision in *Stanley v. Illinois*, 405 U.S. 645 (1972), unmarried fathers had few rights under the law. In *Stanley*, the Supreme Court held that an unmarried father of two children, who had a relationship with the children's mother and the children for eighteen years, was entitled to the same due process rights as a married father. *Id.* at 658; see *infra* notes 29-45 and accompanying text. Despite the *Stanley* holding, state statutes often provided that only the consent of the mother was necessary for the adoption of illegitimate children. See *infra* note 71.

6. See, e.g., *Lehr v. Robertson*, 463 U.S. 248, 267-68 (1983) (finding that an unwed father's failure to take advantage of state procedural avenues to protect his right will destroy the right); *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (holding that a state may not discriminate against unwed fathers who have openly acknowledged their parental role); *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978) (stating that unwed fathers can protect their rights by participating and supporting the mother during and following her pregnancy); *Stanley*, 405 U.S. at 658 (establishing a due process right that unwed fathers cannot be deprived of their children without the same procedural protections provided to married fathers); see also *In re M.N.M.*, 605 A.2d 921, 930 (D.C.) (expressing that an unwed father's due process right is violated by the failure to notify him of an adoption proceeding), *cert. denied*, 113 S. Ct. 636 (1992); Appeal of H.R., 581 A.2d 1141, 1167 (D.C. 1990) (finding that an adoption agency's interference resulted in a violation of the unwed father's rights to due process) (*appeal after remand*, *In re Baby Boy C.*, 1993 D.C. App. LEXIS 202 (Aug. 19, 1993) (affirming second trial court's grant of adoption to adoptive parents)); *Robert O. v. Russell K.*, 604 N.E.2d 99, 105 (N.Y. 1992) (holding that an unwed father who failed to establish a relationship with his child would be denied custody); *In re B.G.C.*, 496 N.W.2d 239, 246 (Iowa 1992) (awarding the custody of a two year-old child to the biological father following a flawed adoption proceeding). There was a great deal of litigation surrounding the B.G.C., or Baby Girl Clausen case. Following the Iowa Supreme Court's award of custody to the biological father, the potential adoptive parents moved the proceedings to Michigan in hopes of obtaining a favorable ruling, however, the Michigan Court held it did not have jurisdiction over the case. *In re Clausen*, 501 N.W.2d 193 (Mich. App.), *aff'd* 502 N.W.2d 649 (Mich. 1993). The potential adoptive parents then appealed the custody award to the United States Supreme Court, which denied their request to review the case. *DeBoer v. DeBoer*, Nos. A-64, A-65, 1993 U.S. LEXIS 4662 (July 26, 1993) (declining to hear the case); *DeBoer v. DeBoer*, Nos. A-64, A-65, 1993 U.S. LEXIS 4665 (July 30, 1993) (dissenting views filed by Justices Blackmun and O'Connor).

7. The Supreme Court has rejected a conception of the unwed father as an intruder, focused on his own interests rather than those of his child. See, e.g., *Caban*, 441 U.S. at 390-93. In *Caban*, the Supreme Court responded to the premise that if "given the opportunity, some unwed fathers would prevent the adoption of their illegitimate children," by noting that impediments to adoption are usually caused by "a natural parental interest shared by both

father's right to develop a relationship with his child is as important as that of a married father, thus establishing distinct due process rights for unwed fathers,⁸ which include notice to putative fathers of adoption proceedings and have lead to a growing preference for unwed father custody over that of an adoptive family.⁹

Despite the creation of these rights, however, in practice infants are placed in adoptive homes without notice to or the consent of the unwed father.¹⁰ Adoption agencies are placed in a difficult position when attempting an exhaustive search for a putative father.¹¹ The process is hindered by the fact

genders alike; it is not a manifestation of any profound difference between the affection and concern of mothers and fathers for their children." *Id.* at 391-92.

8. *See Stanley*, 405 U.S. at 651. In *Stanley*, the Supreme Court recognized that the private interest "of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." *Id.*; *see also* *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 27 (1981) ("A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is . . . a commanding one.").

9. *See Stanley*, 405 U.S. at 658. The *Stanley* Court's holding determined that the due process rights of an unwed father are violated if he is deprived of the custody of his children without notice, a hearing, and proof of his unfitness for parenthood. *Id.* Thus, the Court found that an unwed father is entitled to the same procedural protections as married or divorced parents. *Id.*

In most cases, courts distinguish between custodial fathers, those who have actually lived with their children at some point, and non-custodial fathers, who never have lived with their children. For background information on the distinction between custodial and non-custodial fathers, *see Buchanan, supra* note 3, at 319-24. Buchanan asserts that "[c]onstitutional protection for a parent's right to maintain a relationship with his or her child does not derive from some kind of parental possessory right existing in a vacuum. Rather, the protection is inextricably entwined with the parent's constant responsibility to care for the child." *Id.* at 319; *see also Lehr*, 463 U.S. at 262. In *Lehr*, the Court termed the non-custodial father's constitutionally protected interest to develop a relationship with his child as his "opportunity." *Id.* Since *Lehr*, courts have renamed the unwed father's interest in his child his "opportunity interest." *See Buchanan, supra* note 3, at 351-53; *see also infra* notes 88-91 and accompanying text (discussing the opportunity interest).

10. *See infra* notes 98-171 and accompanying text. Unwed fathers' rights advocates assert that this is due, in part, to the fact that the creation of rights for unwed fathers has not eliminated a perception of unwed fathers as "fleeting impregnator[s]." Peter Marks, *The Quest of the Fathers*, *NEWSDAY*, Apr. 1, 1992, at § 2, 56 (quoting Jon Ryan, President of the National Organization for Birth Fathers and Adoption Reform ("NOBAR")). Ryan asserts that the negative image of unwed birth fathers is "a deeply ingrained stereotype in our society. When we hear the word 'parent' we think the word 'mother.'" *Id.*; *see also* EVA R. RUBIN, *THE SUPREME COURT AND THE AMERICAN FAMILY* 3-8 (1986) (asserting that the Supreme Court, holding on to an ideological view of the family, has been slow to recognize non-traditional family structures).

11. *See, e.g., Appeal of H.R.*, 581 A.2d 1141, 1169 (D.C. 1990). The *H.R.* court held that "a child placement agency supporting termination of parental rights and approval of a proposed adoption is in a potentially difficult position when acting as agent for the court in officially notifying the putative father—who may have objections—about the situation." *Id.* This quandary has had disastrous results. *See id.* at 1144-53 (explaining how an adoption agency's failure to notify a putative father of a pending adoption proceeding led to a seven-year court battle for custody by the putative father); *see also In re M.N.M.*, 605 A.2d 921, 922-25 (D.C.

that some mothers may provide inaccurate or incomplete information to the agency in an effort to avoid the putative father's participation.¹² Private attorneys may consciously or unconsciously take steps that avoid the required involvement of the putative father.¹³ Since courts are generally reluctant to remove a child from an adoptive home once the child is placed, the time to protect the putative father's due process rights is prior to an adoption placement.¹⁴ Currently, state courts, state legislatures, adoption rights and fathers' rights groups are searching for a means to balance the need for final-

1992) (describing how an unwed father, deprived of notice of pending adoption proceedings, commenced a custody battle), *cert. denied*, 113 S. Ct. 636 (1992).

12. The National Council for Adoption reports that

[i]n many cases, the putative father is not involved because of actions taken by the male himself. Sometimes his whereabouts are unknown or he has denied paternity and involvement in the pregnancy. In other cases, his behavior or lack of support during the pregnancy discourages the pregnant woman from naming him. Some women are fearful he may abuse them, their children, or both. Some women are fearful that the putative father will prevent them from carrying out the adoption plan that they believe to be in the child's best interest. Some women believe that since the putative father has provided no support for her or the child during pregnancy, he should not have the same right as the mother to be involved in decisions about the child's future. Women who have been victims of rape or incest may understandably hesitate to involve the perpetrator or perpetrators in their decision-making process. And women from some cultural and other groups have very serious reasons for not involving the father.

Fathers' Rights, *supra* note 4, at 1-2.

13. Interview with Mary Beth Seader, M.S.W., Vice President for Public Policy and Professional Practice, National Council for Adoption, in Washington, D.C. (Jan. 13, 1993). This is generally an unwise activity. See Joseph R. Carrieri & Mary Meyer, *Avoiding Pitfalls In Private Adoptions*, N.Y. L.J., Nov. 2, 1990, at 1. Adoption attorney Carrieri reports that because adoptions are "fraught with legal pitfalls," it is imprudent to "avoid[] the rights of putative fathers." *Id.* at 4. Similarly, Carrieri asserts that it is unwise to "take at face value the mother's statement that the child's father is unknown." *Id.* Although an adoption proceeding "may go more smoothly initially if no father is named, the adoption proceeding may be in doubt if a father is known but simply not named for convenience sake." *Id.*

14. This reluctance is due to the overriding best interests of the child standard, which most states apply in cases involving infants and children. When the best interests standard is used, the child's existing emotional ties to adoptive parents, siblings, and others are weighed to make a final custody decision. See Judy E. Nathan, *Visitation After Adoption: In the Best Interests of the Child*, 59 N.Y.U. L. REV. 633 (1984) (discussing the best interests of the child standard); see also JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 22 (1979). The authors point out that "[a]doption in the early weeks of an infant's life gives the adoptive parents the biological parents' chance to develop a psychological parent-child relationship." *Id.* For these reasons the courts are often reluctant to remove a child once he or she has been placed in an adoptive home. See, e.g., *H.R.*, 581 A.2d at 1178-83 (wrestling with the possible detrimental effects that removal from the adoptive home might have on the child); see also *Robert O. v. Russell K.*, 604 N.E.2d 99, 105 (N.Y. 1992) (awarding custody to adoptive father where biological father had established no custodial relationship); *contra In re B.G.C.*, 496 N.W.2d 239, 241 (Iowa 1992) (awarding custody of a two-year old child to her biological father, after she had lived with prospective adoptive parents since birth) (see *supra* note 6, outlining related proceedings in the *B.G.C.* case).

ity in adoptions with the need for adequate protection of the due process rights extended to putative fathers.¹⁵ The fruits of this search have been disappointing, leaving a trail of frustrated fathers, heartbroken adoptive families, confused children, and hundreds of pages of court reports.¹⁶

The growing acceptance of non-traditional families and increasing number of single fathers attempting to exercise their right to become parents¹⁷ reveal that it is essential that the unwed father's interest be handled efficiently and in a determinative manner from the outset of an adoption.¹⁸ There are few legal remedies for a putative father who has lost the opportunity to develop a relationship with his child because a party to the adoption failed to notify him of a pending adoption proceeding.¹⁹ In response, courts are alluding to a duty on the part of adoption agencies to notify unwed fathers of pending adoption proceedings.²⁰ The imposition of this duty may be difficult to ap-

15. See, e.g., *M.N.M.*, 605 A.2d at 925. The *M.N.M.* case highlights the "conflict between the powerful demand for finality in adoption proceedings . . . and a serious apparent defect . . . namely, the failure to give notice of the pendency of the adoption proceedings to the putative natural father." *Id.*; see GOLDSTEIN ET AL., *supra* note 14, at 35-37 (emphasizing the importance of finality in adoptions for both the adoptee and the adoptive parents).

16. See *H.R.*, 581 A.2d at 1141, *appeal after remand*, *In re Baby Boy C.*, 1993 D.C. App. LEXIS 202 (Aug. 19, 1993) (involving a ten year custody battle); *M.N.M.*, 605 A.2d at 921 (dealing with a four year custody battle); *Robert O.*, 604 N.E.2d at 99 (involving a four year custody battle); *In re B.G.C.*, 496 N.W.2d at 239 (pertaining to a nearly two year custody battle) (see *supra* note 6, outlining related proceedings in the *B.G.C.* case).

17. See Marks, *supra* note 10, at 52. Marks notes that:

[t]raditionally, it has been birth mothers who have initiated searches for the children they have given up. In the post-'Kramer vs. Kramer' world, where men are encouraged to express a need to nurture, experts say more and more men are asserting their rights of fatherhood, regardless of their social circumstances.

Id.; see also RUBIN, *supra* note 10, at 4 (asserting that current facts and figures about American families reveal that in fact, few families correspond with the traditional family configuration, "a model that is perhaps largely mythological"); see also GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 966 (2d. ed. 1991) (pointing out that *Stanley v. Illinois*, 405 U.S. 645 (1972), "legitim[ized] relationships that do not fit within the 'traditional' family structure"); *infra* notes 29-45 (discussing the *Stanley* decision).

18. See Robert S. Rausch, Note, *Unwed Fathers and the Adoption Process*, 22 WM. & MARY L. REV. 85, 140 (1980) (concluding that a mother's right to privacy and the "necessity of minimal disruption of the child's psychological and emotional relationships," among other factors, require dispositive and prompt handling of the unwed father's claim).

19. See *infra* notes 173-240 and accompanying text; see also Buchanan, *supra* note 3, at 377-78. Buchanan notes that once "a decree of adoption is entered, the father may not demand custody because of the harm to the child, but the father should be able to pursue other remedies for vindication of his constitutional rights." *Id.* (footnotes omitted). The difficulty in remedying an unwed father arises from the fact that "[t]he child is a human being and may not be treated like a piece of property to be awarded to the prevailing party." *Id.* at 378 n.486. Still, Buchanan emphasizes that "some means must be devised to deter state actors from depriving people of their constitutional rights." *Id.*

20. See *H.R.*, 581 A.2d at 1167. The *H.R.* court held that the adoption agency's "role as a state actor in the adoption process requires that it provide a natural father a minimum amount of information concerning his procedural rights in an adoption proceeding." *Id.* The

ply in practice, however, due to powerful public policies that suggest that to burden adoption agencies with liability would essentially destroy adoption as a viable parenting option.²¹

This Comment focuses on the various manners in which the claims of putative fathers are handled by the courts. It begins by examining the Supreme Court's development of the due process rights of putative fathers in adoption proceedings. Next, this Comment reviews the recent treatment of putative fathers by several state courts. It then surveys the possible causes of action available to an unwed father whose right to develop a relationship with his child is destroyed, and reviews the public policies surrounding adoption that might frustrate his claim. This Comment then analyzes state legislative solutions that address and protect the rights of putative fathers. Finally, this Comment recommends that the best route to a successful balancing of the rights of putative fathers with the vital state interest in adoptions is through state development of statutory protections for putative fathers. Such protections will concurrently allow those fathers truly desirous of relationships with their children to maximize their ability to protect their rights, and shield adoptive families and children from unnecessary uncertainty in adoptions.

I. HISTORICAL DEVELOPMENT OF FATHERS' RIGHTS

The family has been of fundamental legal importance in our society for decades,²² and the freedom to preserve the relationships between members of a family is a liberty interest entitled to constitutional protection.²³ Because

H.R. court went on to state that "we should not foreclose the possibility of a damages remedy, however inadequate, for violations of the father's statutory and constitutional rights that may have caused prejudicial delay." *Id.* at 1180.

21. See *infra* notes 241-54 and accompanying text.

22. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 505 (1977). The *Moore* Court recognized the significance of the family, in stating that "[o]ut of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home." *Id.* The Court also commented that "[e]specially in times of adversity . . . the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life." *Id.*; see also *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (holding that the family unit can find a safeguard in the Ninth Amendment); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (finding security for the family in the Equal Protection Clause of the Fourteenth Amendment); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that the right to marry, organize a home, and raise children are rights "long recognized at common law as essential to the orderly pursuit of happiness by free men").

23. See, e.g., *May v. Anderson*, 345 U.S. 528, 533 (1953) (noting that rights to raise children are "[r]ights far more precious . . . than property rights"); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (holding that state intercession in the parent and child bond must receive constitutional oversight); *Meyer*, 262 U.S. at 399 (holding that the family may find protection in the due process clause of the Fourteenth Amendment).

the notion of a traditional family of mother, father, and children, on which much early law is based, will always fit neatly into the law's definitions,²⁴ a formal marriage is the greatest protection a man can have for his relationship with his children.²⁵ Where the parents are unwed, however, the scope of the relationship between father and child is often indistinct, thus subjecting the putative father's parental claim to question²⁶ more often than that of the unwed mother.²⁷ Despite the non-traditional role of the unwed father and the presumed difficulty of dealing with his claim of fatherhood, the United States Supreme Court eventually recognized that states could not presumptively treat unwed fathers differently than married fathers.²⁸

A. Overcoming the Presumption of Unfitness

In 1972, the United States Supreme Court established the first procedural guarantees for unwed fathers in *Stanley v. Illinois*.²⁹ Peter and Joan Stanley

24. See RUBIN, *supra* note 10, at 8-9. Rubin finds that a certain ideology of the family has been endlessly portrayed in Supreme Court opinions. *Id.* at 8. Rubin states that "[u]nlike political and economic biases that can be identified and discounted, preferences for particular family forms touch very deep psychological currents and do not easily lend themselves to inspection." *Id.*; see also *Lehr v. Robertson*, 463 U.S. 248, 257 (1983). The *Lehr* Court acknowledged that "[t]he institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society." *Id.* at 256-57. The Court added that "as part of their general overarching concern for serving the best interests of children, state laws almost universally express an appropriate preference for the formal family." *Id.* at 257.

25. *Lehr*, 463 U.S. at 263. The *Lehr* Court stated that "[t]he most effective protection of the putative father's opportunity to develop a relationship with his child is provided by the laws that authorize formal marriage and govern its consequences. But the availability of that protection is, of course, dependent on the will of both parents of the child." *Id.*

26. While perhaps less obvious than the relationship between mother and child, the unwed father's relationship to the child can be determined with reasonable certainty. If the man's paternity of the child is in question, any custody decision will be contingent on a determination of paternity. See, e.g., *In re M.N.M.*, 605 A.2d 921, 922 n.1 (D.C.), *cert. denied*, 113 S. Ct. 636 (1992). In *M.N.M.*, the mother disputed the putative father's paternity and the results of the proceedings were conditioned on the determination of paternity. *Id.*; see also *In re B.G.C.*, 496 N.W.2d 239, 246 (Iowa 1992) (see *supra* note 6, outlining related proceedings in the *B.G.C.* case). In *B.G.C.*, following the lower court's award of custody to the unwed father, the adoptive parents obtained a stay to keep the child until his paternity was established. *Id.*; see also *Caban v. Mohammed*, 441 U.S. 380, 392 (1979). The *Caban* Court held that while the difficulties associated with "locating and identifying unwed fathers at birth might justify a legislative distinction between mothers and fathers of newborns, these difficulties need not persist past infancy." *Id.* (footnote omitted). The challenge that lies in considering the unwed father's claim does not justify ignoring the unwed father's rights. *Id.* at 393.

27. *Caban*, 441 U.S. at 397 (noting that "[t]he mother carries and bears the child, and in this sense her parental relationship is clear") (Stewart, J., dissenting).

28. See *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (holding that unwed fathers are entitled to the same procedural protections afforded other parents).

29. 405 U.S. 645 (1972).

lived together for eighteen years³⁰ and had three children, but never married.³¹ Upon Joan Stanley's death, the State immediately removed the children from Peter Stanley's custody and placed them in State guardianship.³² Under Illinois law, once the State made a showing that the father was not married to the mother, he was presumed to be an unfit parent, and the State could remove the children without a hearing on fitness.³³ In contrast, the State presumed married or divorced fathers, as well as both wed and unwed mothers to be fit parents, and the State could not take the children of these parents without notice, a hearing, and proof of unfitness.³⁴ The State suggested that Peter Stanley petition to adopt his children,³⁵ or petition for custody,³⁶ neither of which the Supreme Court considered to be appropriate options.

The Court held that Illinois' "procedure by presumption" could not continue.³⁷ While the Court acknowledged the State's interest in protecting the children,³⁸ the Court held that Illinois could not apply an independent, repugnant standard for an unwed father that essentially ignored his parental role.³⁹ The *Stanley* Court acknowledged that no sociological reason existed to justify a disregard of the unwed father's interest.⁴⁰ In its bold acknowl-

30. *Id.* at 646. Stanley was a custodial father as opposed to a non-custodial father. See *supra* note 9 and accompanying text.

31. *Stanley*, 405 U.S. at 646-47.

32. *Id.* at 646.

33. *Id.* at 650.

34. *Id.* at 658.

35. *Id.* at 648. The Supreme Court recognized the futility of this option when it stated that under the Illinois law, "[i]t would be his burden to establish not only that he would be a suitable parent but also that he would be the most suitable of all who might want custody of the children." *Id.*

36. *Id.* The Court asserted that "[p]assing the obvious issue whether it would be futile or burdensome for an unmarried father—without funds and already once presumed unfit—to petition for custody, this suggestion overlooks the fact that legal custody is not parenthood or adoption." *Id.*

37. *Id.* at 647, 658.

38. *Id.* at 652. The Court recognized that the State's goal in enacting the law effecting the removal of the children from their father was legitimate: "[T]o protect 'the moral, emotional, mental, and physical welfare of the minor and the best interests of the community' and to 'strengthen the minor's family ties whenever possible.'" *Id.* (quoting ILL. REV. STAT. ch. 37, § 701-2 (1967)). The Court found that removing children from their fathers without a hearing to determine whether the father was unfit did not further these otherwise legitimate state goals. *Id.*

39. *Id.* at 653-55. The Court pointed out that "the State spites its own articulated goals when it needlessly separates [the unwed father] from his family." *Id.* at 653. The Court added that "nothing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children." *Id.* at 655.

40. *Id.* at 654 n.7 (quoting *In re Mark T.*, 154 N.W.2d 27, 39 (Mich. App. 1967), overruled by *In re Hole*, 301 N.W.2d 507 (Mich. App. 1980)). The *Stanley* Court was persuaded by the *In re Mark T.* case, in which the Michigan Court of Appeals held that there was no

edgment of the father's legitimate interest in his children, based in the Equal Protection⁴¹ and Due Process⁴² Clauses of the Fourteenth Amendment, the *Stanley* Court ensured that in the future, the State could not deprive unwed fathers of their children without equivocal procedural protections as provided to other parents.⁴³

Stanley is interpreted as giving protection to unwed fathers who have developed "custodial relationships" with their children, as it was the fact that Stanley's established relationship with his children was being destroyed that made his case compelling enough to reveal the law's inadequacy.⁴⁴ Cases subsequent to *Stanley* demonstrated that *Stanley* was not intended to give all putative fathers the ability to block an adoption—rather, the father must have a sincere interest in a relationship with his children.⁴⁵

B. The Importance of Demonstrating Commitment

Recognizing that not all unwed fathers would be situated like Peter Stanley with an eighteen-year custodial relationship that demonstrated their significance in their children's lives, the Supreme Court established in *Quilloin*

sociological data justifying the assumption that an illegitimate child reared by his natural father is less likely to receive a proper upbringing than one reared by his natural father who was at one time married to his mother, or that the stigma of illegitimacy is so pervasive it requires adoption by strangers and permanent termination of a subsisting relationship with the child's father.

In re Mark T., 154 N.W.2d at 39.

41. *Stanley*, 405 U.S. at 649. The *Stanley* Court held that by denying Stanley a hearing and extending it to all other parents, the "State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment." *Id.*

42. *Id.* at 657. The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Supreme Court found that a presumption that discriminates against and imposes difficulty all unwed fathers affronted the Constitution, and concluded that due process considerations commanded that Stanley receive a hearing on his fitness as a parent before the State took his children from him. *Stanley*, 405 U.S. at 657.

43. *Stanley*, 405 U.S. at 658; see also RUBIN, *supra* note 10, at 39. Rubin asserts that *Stanley* was a "confusing decision that could have been grounded in either the Due Process or Equal Protection clauses." *Id.* at 38-39. Rubin goes on to explain that "in holding as it did, the Court obscured the basis of the decision, combining due process and equal protection; by giving unmarried fathers fewer procedural rights than other parents would have had, the state, the Court held, had denied them equal protection." *Id.* at 39.

44. Buchanan, *supra* note 3, at 327. Buchanan states that the Court was clearly aware that Stanley was not a stranger to his children. *Id.* The Court also rejected the notion "that all men are somehow different from women in childrearing abilities and that unwed fathers are different from married fathers." *Id.*; see also RUBIN, *supra* note 10, at 38. Rubin states that "*Stanley* . . . marked the end of constitutional indifference to unwed fathers. The decision shifted the emphasis from the equal treatment of children to the rights of unmarried parents" *Id.*

45. See *infra* notes 46-96.

v. *Walcott*⁴⁶ that an unwed, non-custodial father could protect his rights by participating in the development of the child and supporting the mother during her pregnancy and thereafter.⁴⁷ In *Quilloin*, Georgia law provided that while both living parents' consent to an adoption was required for a child born of married parents, only the unwed mother's consent was necessary to accomplish an adoption of a child born to unwed parents.⁴⁸ Georgia's policy was based on a preference to have children raised in a traditional family setting.⁴⁹

The child in *Quilloin* was born in 1964, and lived in the custody of the mother, Ardell Walcott, for his entire life.⁵⁰ Ardell Walcott and the child's natural father, Leon Quilloin, never married or lived together, and in September 1967, she married Randall Walcott.⁵¹ In March 1976, with Ardell's consent, Randall petitioned to adopt the child, and Quilloin's parental rights were thus terminated under the State's "best interests of the child standard."⁵²

The Supreme Court found it significant that for eleven years, Quilloin failed to seek actual or legal custody of his child.⁵³ In granting the adoption by the child's stepfather, the State acknowledged a family unit already in existence.⁵⁴ The non-custodial unwed father's claim was not recognized because he failed to demonstrate a commitment to his child, thus, the unwed father's right was balanced against the best interests of the child.⁵⁵ *Quilloin* placed non-custodial fathers on notice that they must do more than merely

46. 434 U.S. 246 (1978).

47. *Id.* at 256. The Court held that "the State was not foreclosed from recognizing . . . [the lacking] extent of commitment to the welfare of the child" in rejecting the unwed father's claim. *Id.*

48. *Id.* at 248.

49. *Id.* at 252. In *Quilloin*, Georgia asserted that "the strong state policy of rearing children in a family setting . . . might be thwarted if unwed fathers were required to consent to adoptions." *Id.* Georgia's stance was similar to that litigated by Illinois in *Stanley v. Illinois*, 405 U.S. 645 (1972). The *Quilloin* Court stated that "*Stanley* left unresolved the degree of protection a State must afford to the rights of an unwed father in a situation . . . in which the countervailing interests are more substantial." *Id.* at 248; see *supra* notes 29-45.

50. *Quilloin*, 434 U.S. at 247.

51. *Id.*

52. *Id.* at 247, 251. A mother's or father's new spouse will frequently desire to adopt the children of the first marriage. "[T]he increased divorce and remarriage rate has . . . produced an increased number of children being adopted by their stepparents." Nathan, *supra* note 14, at 635 n.19.

53. *Quilloin*, 434 U.S. at 249, 255.

54. *Id.* at 255. The Court held that "[w]hatever [procedures] might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the 'best interests of the child.'" *Id.*

55. *Id.* The Court held that "the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant." *Id.*

object to an adoption—they must hold themselves out to be the father and make an effort to contribute to the child's welfare.

C. Further Definition of the Right

In *Caban v. Mohammed*,⁵⁶ the Supreme Court addressed the rights of the unwed father under New York's adoption statute, which did not require the unwed father's consent to an adoption.⁵⁷ Caban lived with his two children and their mother for several years before the mother left with the children and married Mohammed, after which Caban visited and corresponded with the children regularly.⁵⁸ When the mother's new husband filed to adopt the children, Caban received notice,⁵⁹ but the petition was subsequently granted over Caban's objection, severing Caban's parental rights in his children.⁶⁰

New York's statute was based on the withering presumption that unwed fathers complicated and delayed the adoption process.⁶¹ Although the unwed father could participate in the hearings, the consent of the mother alone was adequate to grant an adoption, even against the unwed father's will.⁶² Caban asserted that New York State's distinction between unwed fathers and other categories of parents in the adoption context offended the Equal Protection Clause of the Fourteenth Amendment.⁶³ He also claimed that under *Quilloin v. Walcott*,⁶⁴ he was entitled to carry on a parental relationship with his child absent a finding that he was unfit, and thus he desired a fitness hearing.⁶⁵

Consistent with prior holdings, the Supreme Court held that to grant an adoption without the unwed father's consent was gender-based discrimina-

56. 441 U.S. 380 (1979).

57. *Id.* at 385 (setting out the provisions of N.Y. DOM. REL. LAW § 111 (McKinney 1977)).

58. *Id.* at 382-83.

59. *Id.* at 385 n.3. Caban's claim was not founded in a *Stanley* context, because he was allowed "to participate as a party in the adoption proceedings" and thus was not denied procedural due process. *Id.*

60. *Id.* at 383-84.

61. *Id.* at 391. The New York statute was designed to provide for "the well-being of illegitimate children." *Id.* New York asserted "that if unwed fathers' consent were required before adoption could take place, in many instances the adoption would have to be delayed or eliminated altogether, because of the unavailability of the natural father," *id.* at 391, and that adoptions could "be discouraged if the natural father could prevent the adoption by the mere withholding of his consent." *Id.* at 390.

62. *Id.* at 385-87.

63. *Id.* at 385.

64. *Id.* (referring to *Quilloin v. Walcott*, 434 U.S. 246 (1978)); see *supra* notes 46-55 and accompanying text.

65. *Caban*, 441 U.S. at 385.

tion that violated the Equal Protection Clause.⁶⁶ While the Court agreed that states could enact legislation to prevent non-custodial unwed fathers from blocking adoptions,⁶⁷ the Court emphasized that the State could not discriminate against fathers who had openly acknowledged their parental role.⁶⁸

Caban emphasized the significance of a putative father's efforts to hold himself out as the father and defined the state's interest in adoption proceedings.⁶⁹ Following *Caban*, it was clear that a state could legislate to protect the best interests of the child, but it could not discriminate against unwed fathers who acknowledged their paternity and took an active part in their children's lives.⁷⁰

D. *The Beginnings of a Legislative Remedy*

In reaction to the new Supreme Court opinions requiring equal treatment of unwed fathers, many states began amending their adoption laws to provide for putative father notification or consent in adoption proceedings.⁷¹

66. *Id.* at 393-94 & n.16. The Court held that "no showing ha[d] been made that the different treatment afforded unmarried fathers and unmarried mothers under [the statute] b[ore] a substantial relationship to the proclaimed interest of the State in promoting the adoption of illegitimate children." *Id.* at 393.

67. *Id.* at 392-93 n.13. The Court did not "question a State's right to do what New York has done in [the statute]: provide that fathers who have abandoned their children have no right to block adoption of those children." *Id.* at 393 n.13. However, the Court distinguished those cases from ones such as *Caban's*, "where the father has established a substantial relationship with the child and has admitted his paternity." *Id.* at 393.

68. *Id.* at 393-94. In sum, the Court recognized that "[t]he effect of New York's classification is to discriminate against unwed fathers even when their identity is known and they have manifested a significant paternal interest in the child." *Id.* at 394.

69. *Id.* at 392. The Court held that "the State's interest in proceeding with adoption cases can be protected by means that do not draw such an inflexible gender-based distinction as that made in [the New York statute]." *Id.*

70. *Id.* at 394. The Court, in closing, stated that the statute "both excludes some loving fathers from full participation in the decision whether their children will be adopted and, at the same time, enables some alienated mothers arbitrarily to cut off the paternal rights of fathers." *Id.*

71. RUBIN, *supra* note 10, at 40. Rubin states that the new recognition of unwed fathers created a number of new problems, especially where adoption was concerned. If unwed fathers have rights of any kind, they must be identified and notified of proceedings in which their rights are in jeopardy. This meant that the states would have to develop procedures for informing them of impending custody and adoption hearings. . . . The immediate legislative response to this . . . was to limit the notice requirement to fathers who had acknowledged their children, filed notice of intent to claim paternity, lived with the mother after the birth of the child, or helped support the child.

Id. Today, almost every state's adoption law provides for some type of participation by the putative father in the adoption scheme. Some states have a putative father registry. *See infra* notes 258-85 and accompanying text. Other states merely require the consent of the putative father if he can be located or if he has made the court aware of his interest. *See* ALA. CODE

The notification method selected by the New York State legislature was a

§ 26-10A-10(6) (1992) (natural father's consent not required if mother reports his whereabouts unknown, unless the natural father is otherwise made known to the court); ALASKA STAT. § 25.23.040 (1991) (consent of unwed father required if father has legitimated minor under the laws of the state); ARIZ. REV. STAT. ANN. § 8-105(O) (1992) (central adoption registry to provide notice to those who voluntarily enter); *id.* § 8-106(A)(1) (both natural parents must consent); *id.* § 8-106(C) (court may waive consent requirement if in interest of child); ARK. CODE ANN. § 9-9-210 (Michie 1987) (putative father registry); CAL. CIV. CODE § 221.20 (West Supp. 1993) (consent of presumed father required unless one parent has been granted custody and other parent for one year has willfully failed to communicate with and support child); COLO. REV. STAT. § 19-6-105 (1986 & Supp. 1992) (providing for a determination of paternity); CONN. GEN. STAT. ANN. § 45(a)-716 (West Supp. 1992) (notice to putative father if he is known to court); DEL. CODE ANN. tit. 13, § 908 (Supp. 1992) (providing for consent of putative father; court may dispense with it if in child's best interest); *id.* §§ 801-05 (Supp. 1990) (Uniform Parentage Act—allows father to establish paternity); D.C. CODE ANN. § 16-304 (1989) (requiring consent of putative father); FLA. STAT. ANN. § 63.062 (West 1985 & Supp. 1993) (requiring consent of natural father and diligent effort to notify him and obtain his consent); GA. CODE ANN. § 19-8-2 (Michie 1991 & Supp. 1992) (notice to biological father); *id.* § 19-11-9 (putative fathers registry, can be used to enforce obligations of support); HAW. REV. STAT. § 578-2(d) (1993) (providing for notice to presumed fathers); IDAHO CODE § 16-1513 (Supp. 1992) (creating registry for claims of paternity); ILL. ANN. STAT. ch. 40, para. 1515 (Smith-Hurd Supp. 1992) (notice to putative father); IND. CODE ANN. § 31-3-1-6.1 (Burns 1987 & Supp. 1992) (notice of adoption proceedings to named and unnamed putative fathers); IOWA CODE ANN. § 600.11 (West 1981 & Supp. 1992) (no clear provision providing notice to putative father); KAN. STAT. ANN. § 59-2136 (1983 & Supp. 1992) (providing for notice to presumed/alleged fathers); KY. REV. STAT. ANN. § 199.500 (Michie/Bobbs-Merrill 1991) (requiring sworn consent of unwed father); LA. CH. CODE ANN. art. 1193 (1993) (requiring consent of biological father); LA. REV. STAT. ANN. § 9:400 (West 1992) (putative fathers registry); ME. REV. STAT. ANN. tit. 19, § 532-C (West Supp. 1992) (notice to putative father); MD. FAM. LAW. CODE ANN. § 5-311 (1984 & Supp. 1991) (requiring consent of natural father); MASS. GEN. LAWS ANN. ch. 210, § 4A (West 1987) (providing for consent of fathers of illegitimate children); MICH. COMP. LAWS ANN. § 710.31 (West 1993) (requiring consent of natural father); *id.* § 710.33 (father can file a notice of intent to claim paternity); MINN. STAT. ANN. § 259.261 (West 1992) (illegitimate parent may file notice of intent to retain parental rights); MISS. CODE ANN. § 93-17-5 (1973) (no clear provision for notice to putative fathers); MO. ANN. STAT. § 453.040 (Vernon 1986) (consent of unknown, abandoning parent not required); MONT. CODE ANN. § 40-6-126 (1991 & Supp. 1992) (putative father may file notice of intent to claim paternity, timely filing guarantees notice); *id.* § 40-6-105 (governing presumptions of paternity); NEB. REV. STAT. § 43-104.02 (1988) (consent of unwed mother alone enough, unless father files notice of intent to claim paternity within five days of birth); NEV. REV. STAT. ANN. § 127.070 (Michie 1986) (providing for unwed father to sign release for adoption); N.H. REV. STAT. ANN. § 170-B:5 (1990) (providing for consent of unwed father); *id.* § 170-B:5(a) (providing for notice to fathers claiming paternity who have filed claims of paternity); N.J. STAT. ANN. § 9:3-45 (West 1993) (notice to putative father should be attempted); N.M. STAT. ANN. § 32A-5-17 (Michie Supp. 1993) (providing for notification to putative father); N.Y. DOM. REL. LAW. § 111(d) (McKinney 1988) (putative father registry); N.C. GEN. STAT. § 48-6(a)(3) (1981) (providing for notice to putative father of hearing to determine whether his consent is necessary); N.D. CENT. CODE § 14-15-05 (1991) (no clear provision providing for notice to putative father); OHIO REV. CODE ANN. § 3107.06 (Anderson 1989) (providing for consent of putative father, proceedings must be brought prior to placement of child); OKLA. STAT. ANN. tit. 10, § 55.1 (West 1987) (providing for notice of intent to claim paternity, paternity registry); OR. REV. STAT. § 109.312 (1991) (providing for consent of "parents"); PA. STAT. ANN. tit. 23, § 2503(d) (1991) (providing for putative father's

"putative father registry."⁷² The registry, which provided automatic notice of adoption proceedings to seven categories of fathers, as well as notice to all other men who registered, was designed to accommodate both the rights of putative fathers and the best interest of the children.⁷³ In *Lehr v. Robertson*,⁷⁴ the Supreme Court addressed for the first time the problem of putative fathers in the context of a state notification scheme.⁷⁵

In *Lehr*, the natural mother and her new husband petitioned to adopt the child that she had with Lehr.⁷⁶ The adoption was granted, considering the child's best interests, and Lehr's parental rights were terminated.⁷⁷ Although Lehr never had a custodial relationship with his child, he brought suit, asserting that his interest in developing a relationship with his child required due process protection before it could be destroyed, and that the New York procedures offended the Equal Protection Clause because they failed to protect his parental interest while protecting those of the mother.⁷⁸

participation in adoption proceeding); R.I. GEN. LAWS § 15-7-26 (1988) (providing for notice to the natural father); S.C. CODE ANN. § 20-7-1734 (Law. Co-op 1985 & Supp. 1992) (right of unwed father to notice and participation in adoption proceedings); S.D. CODIFIED LAWS ANN. § 25-6-1, 6-1.1 (1992) (father of illegitimate child may participate to legitimize child); TENN. CODE ANN. § 36-1-111 (1991) (notice to putative fathers); *id.* § 2-209 (putative father registry); TEX. FAM. CODE ANN. § 16.03 (West 1986) (both living parents must consent); UTAH CODE ANN. § 78-30-4.6 (1992) (consent of unwed father not required where he does not establish his right to consent); *id.* § 30-4.8 (putative father must file notice of paternity); VT. STAT. ANN. tit. 15, § 435 (1989) (consent of natural father so long as he has acknowledged paternity); VA. CODE ANN. § 63-1-225 (Michie 1991) (consent of unwed father); WASH. REV. CODE ANN. § 26.33.160 (West 1986) (provides for consent of alleged father); W. VA. CODE § 48-4-3 (1992) (consent of legally-determined father); WIS. STAT. ANN. § 48.025 (West 1987) (putative fathers may file declaration of interest in paternal matters affecting children); WYO. STAT. § 1-22-109 (1988) (notice to putative father if known).

72. *Lehr v. Robertson*, 463 U.S. 248, 250-52 n.4 (1983); *see infra* note 73 (discussing New York's putative father registry).

73. *Id.* at 251-52 n.5. The seven categories of fathers entitled to notification under the New York statute were: 1) those who have been adjudicated to be the father in a New York court; 2) those who have been adjudicated to be the father in another court; 3) those who file a notice of intent to claim paternity of the child; 4) those identified as the father on the child's birth certificate; 5) those who live openly with the child and the child's mother and who hold themselves out to be the father; 6) those who have been identified as the father by the mother in a sworn written statement; and 7) those who were married to the child's mother before the child was six months old. *Id.*

74. 463 U.S. 248 (1983).

75. *Id.* at 250-51; *see also* RUBIN, *supra* note 10, at 46 (noting that "[t]he factual situation in the *Lehr* decision lay somewhere between that in *Quilloin* and that in *Caban v. Mohammed*").

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

77. *Id.* at 252-55. Lehr never developed a relationship with his child, who was two years old when the adoption was granted. *Id.* at 250. Lehr had lived with the mother prior to the child's birth, and visited her in the hospital, but he was not listed on the child's birth certificate as the father, and had never provided financial support for the child or her mother. *Id.* at 252.

78. *Id.* at 255; *see also* RUBIN, *supra* note 10, at 46; Buchanan, *supra* note 3, at 314 (discussing the background facts of *Lehr*). Rubin states although the facts in *Lehr* were con-

Under earlier Supreme Court decisions, Lehr had a strong claim for a violation of due process, but for one complication: he had failed to register in New York's "putative father registry."⁷⁹ Since Lehr was not one of the "fathers" entitled to automatic notice under the registry, he was responsible for his own registration—had he so registered, he was guaranteed to receive notice of any action to terminate his parental rights.⁸⁰

The Supreme Court upheld the New York statute as a legitimate measure that balanced the putative father's desire to accept responsibility in his child's future with the State's desired finality in adoption proceedings.⁸¹ The legislature's intent was to provide unwed fathers with a means to demonstrate their interest and commitment to their children.⁸² If an unwed father was willing to take the steps necessary to register, his right to develop a relationship with his child would receive protection under the Due Process Clause.⁸³

Because Lehr did not maintain a custodial, personal, or financial relationship with his child,⁸⁴ and because he failed to take advantage of his statutory right to establish a legal tie,⁸⁵ the Court concluded that Lehr's due process rights were not violated when the state terminated his parental rights pursu-

tested, it "seem[ed] likely that [Lehr] had tried to make contact with his daughter but had been rejected by the mother." RUBIN, *supra* note 10, at 46. Although Lehr had lived with the mother before the child's birth and was recognized as the father, he met none of the statutory requirements for fathers entitled to automatic notification under New York's registry. *Id.*

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

80. *Id.* at 251-52; *supra* notes 73 & 78 (describing New York's putative father registry). In addition to notifying seven categories of fathers, the scheme provided that all other men who voluntarily registered would also be entitled to receive notice of an adoption proceeding. *Lehr*, 463 U.S. at 251.

81. *Id.* at 263-64 & n.20. The Court deferred to the judgment of the State in holding that "[t]he New York Legislature concluded that a more open-ended notice requirement would merely complicate the adoption process, threaten the privacy interests of unwed mothers, create the risk of unnecessary controversy, and impair the desired finality of adoption decrees." *Id.* at 264 (footnote omitted). The Court added that "[r]egardless of whether we would have done likewise if we were legislators instead of judges, we surely cannot characterize the State's conclusion as arbitrary." *Id.*

82. *Id.* at 263-64 n.20. The Court asserted that through the registry, "the right to receive notice was completely within [Lehr's] control." *Id.* at 264. The Court also referred to *Caban v. Mohammed*, 441 U.S. 380, 392 (1979), which emphasized the importance of a father coming forth to rear his child. *Lehr*, 463 U.S. at 267. Under the holding of *Caban*, where the father does not come forth, the Equal Protection Clause will not prevent "the State from withholding from him the privilege of vetoing the adoption." *Id.* (quoting *Caban*, 441 U.S. at 392).

83. *Lehr*, 463 U.S. at 261; *see also id.* at 261 n.17 (referring to several law review articles emphasizing that a putative father who fails to make use of methods provided by the state to preserve his parental rights will sacrifice constitutional protection).

84. *Id.* at 262.

85. *Id.* at 264 ("By mailing a postcard to the putative father registry, he could have guaranteed that he would receive notice of any proceedings to adopt [his daughter].").

ant to the state statutory framework.⁸⁶ The *Lehr* decision focused on the fact that a biological link between father and child does not alone guarantee constitutional protection—the putative father must demonstrate a commitment.⁸⁷

The unwed father's unique ability to establish a relationship with his child through actual support, contact, or by participation in a state legislative scheme is termed his "opportunity interest."⁸⁸ When the biological link between a fit putative father and his child is paired with the father's demonstrated commitment to the child, in certain situations the putative father will gain a preference to custody over non-blood relatives.⁸⁹ The *Lehr* Court emphasized that it is essential that a non-custodial unwed father with an untapped interest in cultivating a relationship with his child⁹⁰ grasp that interest in a timely manner to protect his rights.⁹¹ *Lehr* failed to grasp his

86. *Id.* at 265. The Court held that "[t]he Constitution does not require either a trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights." *Id.* (footnote omitted).

87. *Id.* at 261. The *Lehr* Court recognized that "the mere existence of a biological link" between father and child, without custodial responsibilities, would not warrant constitutional protection. *Id.* Cases both before and after *Lehr* have established this view. These cases illustrate that courts recognize that more than a biological tie is needed to establish a constitutionally-protected relationship with a child. See *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972) (holding that the importance of the familial relationship stems not only from the blood relationship, but from emotional connections, the experience of daily association, and the way of life fostered by the family arrangement); *Adoption of Kelsey S.*, 823 P.2d 1216, 1236 (Cal. 1992) (holding that "[o]nce [a father] knows or reasonably should know of the pregnancy, he must promptly attempt to assume his parental responsibilities."); *In re Raquel Marie X.*, 559 N.E.2d 418, 424 (N.Y.) (holding that a father's "interest requires both a biological connection and full parental responsibility; he must both be . . . and behave like" a father), *cert. denied*, 498 U.S. 984 (1990); see also GOLDSTEIN, *supra* note 14, at 16-20 (examining the differences between biological and psychological parent-child relationships).

88. *Lehr*, 463 U.S. at 262. The *Lehr* Court held that the biological link "offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring." *Id.* (emphasis added). Following the *Lehr* decision, courts and scholars began to refer to the father's right as his "opportunity interest." See, e.g., *Appeal of H.R.*, 581 A.2d 1141, 1172-80 (D.C. 1990) (discussing the "opportunity interest"); *In re Baby Girl Eason*, 358 S.E.2d 459, 462 (Ga. 1987) (noting that "[u]nwed fathers gain from their biological connection with a child an opportunity interest to develop a relationship with their children which is constitutionally protected"). For an expansive discussion of the opportunity interest, see Buchanan, *supra* note 3, at 351-53.

89. Buchanan, *supra* note 3, at 373. Buchanan explains that "[i]f the adoption sought is an adoption by strangers, the father's opportunity to establish a protected relationship must prevail in the absence of his unfitness." *Id.*

90. *Lehr*, 463 U.S. at 262; see *supra* note 88 (discussing the opportunity interest).

91. *Lehr*, 463 U.S. at 262. The *Lehr* Court held that if the unwed father grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.

opportunity interest.⁹² Accordingly, the Court held that Lehr's parental rights were properly terminated.⁹³

The *Lehr* decision significantly limits the number of situations in which the state must cooperate with a father who has an opportunity interest and nothing greater, thus promoting the best interests of the child.⁹⁴ An unwed father must promptly assert his opportunity interest and develop a relationship with his child or face the loss of his parental rights.⁹⁵ The unwed father's interest receives the benefits of constitutional protection only when he displays an awareness of his obligation to his child and makes an effort to build a relationship.⁹⁶

Id. (footnote omitted).

92. *Id.*

93. *Id.* at 267-68.

94. *Id.* at 262. The best interests of the child standard is often an important factor in resolving disputes involving putative fathers. See Buchanan, *supra* note 3, at 365. Buchanan states that "[t]he father's opportunity interest is of limited duration as a constitutionally significant interest because of the child's need for early permanence and stability in parental relationships. That need is a part of the constitutional values to be taken into account in defining a constitutionally significant interest." *Id.*; see also *In re B.G.C.*, 496 N.W.2d 239, 245 (Iowa 1992) ("The argument that the best interests of the baby are best served by allowing her to stay with [the potential adoptive parents] is a very alluring argument.") (see *supra* note 6, outlining related proceedings in the *B.G.C.* case); GOLDSTEIN, *supra* note 14, at 35-37 (emphasizing the need for children to develop secure and stable attachments at an early age); RUBIN, *supra* note 10, at 47; see *infra* note 96 (noting Rubin's comment that stable family relationships are a significant factor).

95. See, e.g., Appeal of H.R., 581 A.2d 1141, 1161 (D.C. 1990) (noting that if an unwed father's eventual assertion of his opportunity interest is "too late [he will not be] entitled to the constitutional protection available to a custodial father"); *In re Baby Girl Eason*, 358 S.E.2d 459, 462 (Ga. 1987) (concluding that the opportunity interest is not indestructible); Buchanan, *supra* note 3, at 364. Buchanan asserts that "[t]he basis for constitutional protection is missing if the parent seeking it does not take on the parental responsibilities timely. The opportunity is fleeting. If it is not, or cannot, be grasped in time, it will be lost." *Id.*

96. Buchanan, *supra* note 3, at 368. Buchanan elaborates by saying that:

it is only the combination of biology and custodial responsibility that the Constitution ultimately protects. . . . If it is officially established that he merely has sought or is seeking to maintain his biological connection or to visit the child occasionally or to do anything else short of full assumption of the parental responsibilities that are open to him, the state may take official notice of his failure to grasp his opportunity . . . and need pay no more attention to his interests.

Id. (footnote omitted); see also RUBIN, *supra* note 10, at 47. Rubin states that "[t]here are a number of other interests involved in adoption proceedings, including the child's well-being and the state's interest in placing children in stable, formal families which outweigh the simple biological relationship." *Id.* Rubin asserts that the *Lehr* Court reflects the understanding that if the state accommodates "fathers who have not supported their children, legitimated them, married their mothers, . . . or even taken certain minimal steps to acknowledge the relationship, . . . the Court would uphold formal due process requirements at the expense of a number of more essential social values." *Id.*; see also *Adoption of Kelsey S.*, 823 P.2d 1216, 1236 (Cal. 1992) (holding that the "father's conduct before and after . . . birth must be considered"); *In re Raquel Marie X.*, 559 N.E.2d 418, 424 (N.Y. 1990) (recognizing that an "unwed father who has been physically unable to have a full custodial relationship with his child . . . [is] entitled to

II. TRAPPED IN A TANGLED WEB

Following the Supreme Court cases that outline a father's rights and responsibilities,⁹⁷ it would appear that subsequent disputes involving the rights of unwed fathers would be quickly resolved. In fact, quite the opposite is true. The following overview of four recent state cases involving the claims of unwed fathers demonstrates the myriad of difficulties courts encounter when considering the claims of putative fathers.

A. Adoption Agency Interference with the Opportunity Interest

In *Lehr*, the unwed father's own failure to act was fatal to his opportunity interest.⁹⁸ The District of Columbia Court of Appeals was confronted with the case of an unwed father whose opportunity interest was destroyed not by his own failure, but by that of an intermediary—an adoption agency.⁹⁹ In *Appeal of H.R.*,¹⁰⁰ an unwed father, H.R., was led to believe that the mother of his child had an abortion, when actually, she had the child and placed him for adoption.¹⁰¹ When H.R. received a letter from a District of Columbia adoption agency, which included consent to adoption forms and stated that the mother had been working with the agency to arrange an adoption, he contacted the mother to clarify what had happened.¹⁰² Shortly thereafter, the child was placed in an adoptive family,¹⁰³ and although the adoption agency knew H.R.'s address, it failed to follow up on the consent to adoption letter.¹⁰⁴ Additionally, because the adoption agency did not provide the court with H.R.'s address, H.R. remained unaware that his parental rights would be terminated if the adoptive family's adoption petition was granted.¹⁰⁵ Once he finally learned of the transpired events, however, H.R.

. . . maximum protection . . . so long as he [acts] promptly . . ."), *cert. denied*, 498 U.S. 984 (1990).

97. See *supra* notes 22-96 and accompanying text.

98. *Lehr v. Robertson*, 463 U.S. 248, 264 (1983).

99. *H.R.*, 581 A.2d at 1172. The *H.R.* court held that because state action—a District of Columbia adoption agency—violated H.R.'s rights to due process, H.R. did not abandon his opportunity interest. *Id.*

100. *Id.* at 1141.

101. *Id.* at 1143-46. The child's mother, L.C., was a United States citizen who conceived Baby Boy C. while serving in the Peace Corps in Zaire. *Id.* at 1143. The father, H.R., was a citizen of Zaire. *Id.* Upon learning that she was pregnant the mother returned to the United States, and the father was later informed by a mutual friend that the mother had an abortion in Washington, D.C. *Id.* at 1143-44. Actually, the mother gave birth to a baby boy and relinquished her parental rights to a District of Columbia adoption agency. *Id.* at 1143.

102. *Id.* at 1145 & n.2.

103. *Id.* at 1145.

104. *Id.*

105. *Id.* at 1145 & n.4. District of Columbia law provided that "'due notice of pending adoption proceedings shall be given to each person whose consent is necessary thereto, immediately upon the filing of a petition [for adoption].'" *Id.* (quoting D.C. CODE ANN. § 16-

objected to the adoption and sought custody of the child, claiming that the adoption agency and the adoptive parents had denied him due process because they did not inform him of his right to seek custody of the child and failed to adequately determine his address to serve him with the adoption petition.¹⁰⁶ The *H.R.* trial court found that the adoption agency's efforts surpassed the procedural protections established in *Lehr*, and granted the adoptive family's petition for adoption.¹⁰⁷

The District of Columbia Court of Appeals reversed, however, holding that H.R. was deprived of the opportunity to assert his parenthood by the adoption agency,¹⁰⁸ and that H.R.'s fleeting opportunity interest was destroyed by the adoption agency's interference.¹⁰⁹ The court remanded the case for a hearing on H.R.'s fitness, and potential placement of the child with H.R.¹¹⁰ The court found H.R.'s case particularly persuasive due to the fact that the adoption agency was largely responsible for H.R.'s inability to establish a relationship with his child.¹¹¹

306(a) (1981)). The adoption agency did not provide the court with H.R.'s address, and subsequently failed to make diligent efforts to locate the father. *Id.* at 1146-50.

106. *Id.* at 1151.

107. *Id.* at 1151-52; see *Lehr v. Robertson*, 463 U.S. 248, 263-67 (1983) (discussing these procedural protections); see also *supra* notes 71-96 and accompanying text (discussing procedural protections established in *Lehr*). The trial court in *H.R.* held that "[e]ven accepting H.R.'s argument under *Lehr* that natural fathers possess a so-called 'opportunity interest,' " H.R. was partially responsible for some delay in developing a relationship with his child by failing to notify the adoption agency of his changes in address. *H.R.*, 581 A.2d at 1151. Using the best interests of the child standard, the trial court granted the adoptive family's petition and H.R. appealed the decision. *Id.* at 1151-52.

108. *Id.* at 1165-66. This interference was emphasized by the fact that the agency worker responsible for Baby Boy C.'s placement with the adoptive family "testified that if H.R. had come forward before the placement, the agency would have placed the child with him and not with adoptive parents." *Id.* at 1166 n.26. The appeals court found that:

by cutting off the possibility of a current parent-child relationship, and then failing to inform H.R. for more than eighteen months of the legal proceeding which offered him his only means of ensuring a future relationship with his son, the District of Columbia—primarily the Barker Foundation as a state actor—deprived H.R. of any greater opportunity than he asserted to become a parent to his child.

Id. at 1165-66.

109. *Id.* at 1164. The court held that "state intervention cut off H.R.'s ability to establish parent-child relations with Baby Boy C." *Id.*

110. *Id.* at 1180-82. Upon remand, the trial court was to determine H.R.'s fitness, whether the child's best interest required his continuing custody with the potential adoptive parents, and if so, whether H.R. should have visitation rights. *Id.* at 1192 (Rogers, C.J., concurring).

111. *Id.* at 1165. For the first time the impact of state action on the father's opportunity to establish a relationship with his child was weighed. *Id.* at 1165-66. The case was remanded for further proceedings. *Id.* at 1181. On remand the trial court affirmed the grant of the adoption petition to the O. family. *In re Baby Boy C.*, 1993 D.C. App. LEXIS 202, *2 (Aug. 19, 1993). On appeal the second trial court's decision was affirmed. *Id.* at *3.

A forceful dissent¹¹² agreed that the fitness test must be applied once it has been determined that an unwed father has grasped his opportunity interest.¹¹³ However, the dissent argued that following a determination of fitness, the best interests of the child standard should take precedence,¹¹⁴ and that H.R. did not demonstrate that placement of the child in his custody would be in the child's best interests.¹¹⁵

B. *Bending Over Backwards*

Two years after the *H.R.* case, the District of Columbia Court of Appeals faced another action brought by a biological father challenging a final decree of adoption.¹¹⁶ In *In re M.N.M.*,¹¹⁷ the child's unwed father and mother had a relationship while they were seniors at a St. Louis, Missouri high school.¹¹⁸ After discovering that she was pregnant, the mother contacted St. Louis Catholic Charities to discuss adoption.¹¹⁹ When the agency contacted the unwed father, he opposed the adoption and stated that he wanted to raise the child.¹²⁰ Following the birth, however, the mother arranged an adoption with Associated Catholic Charities in Washington, D.C.¹²¹ The baby was placed in a pre-adoptive home a few days later, and the mother signed an affidavit stating that she knew who the father was but that she did not know where he was and would not identify him.¹²²

112. *H.R.*, 581 A.2d at 1192 (Belson, J., dissenting). Judge Belson asserted that the "court commits a serious legal error that may have equally serious human consequences by failing to give effect to" the "finding that the child would be 'devastated' . . . [if] taken away from the adoptive parents and given to a natural parent." *Id.* at 1203.

113. *Id.* at 1204-05.

114. *Id.* at 1205. The dissent argued that

[a] fit father, including an unwed father who has come forward promptly and undertaken to act as a father, should presumptively be entitled to custody of his child when the mother has relinquished her rights and put the child up for adoption, unless it is demonstrated that the best interests of the child require otherwise.

Id. The dissent noted that the best interests standard "means that the child's interests are paramount, with a rebuttable presumption that placing the child in the custody of a fit natural father who has come forward and undertaken to act as a father will ordinarily be in the child's 'best interests.'" *Id.*

115. *Id.* Judge Belson argued that it was in Baby Boy C's best interests to remain with his adoptive family. *Id.* His wish was eventually granted nearly three years later, when the trial court, and subsequently the Court of Appeals, affirmed the original trial court's grant of the adoption petition. *In re Baby Boy C.*, 1993 D.C. App. LEXIS 202, *3 (Aug. 19, 1993).

116. *In re M.N.M.*, 605 A.2d 921 (D.C.), *cert. denied*, 113 S. Ct. 636 (1992).

117. *Id.*

118. *Id.* at 922.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

Although the putative father filed a paternity and custody action in St. Louis, the adoption process continued in Washington, D.C., where the baby was placed with adoptive parents, who filed a petition for adoption.¹²³ The adoption agency filed a report in furtherance of the petition, stating that it had attempted to learn the name of the natural father from the mother, who would not provide it, and that the adoption should go forward.¹²⁴ No further effort was made by the adoption agency to identify or locate the father and the adoption was finalized several months later.¹²⁵

The District of Columbia, like many jurisdictions, requires that finalized adoptions be challenged within one year.¹²⁶ The putative father first wrote

123. *Id.* at 922-23.

124. *Id.* at 923.

125. *Id.*

126. D.C. CODE ANN. § 16-310 (1989) (requiring that any attempt to challenge a final adoption decree based on a procedural or jurisdictional defect must be done so within one year of the decree becoming effective). A large number of states have some type of limitation on challenges to an adoption. Many provide that after one or two years a final adoption may not be attacked. Some states provide that an adoption is considered final on entry and will only allow challenges in cases of fraud or misrepresentation. See ALA. CODE § 26-10A-25(d) (1992) (one year); ALASKA STAT. § 25.23.140 (1991) (one year); ARIZ. REV. STAT. ANN. § 8-116 (1992) (order of adoption final on entry); ARK. CODE ANN. § 9-9-216 (Michie 1991) (one year); CAL. CIV. CODE § 228.15 (West Supp. 1993) (five years); COLO. REV. STAT. § 19-5-214 (Supp. 1992) (two years); CONN. GEN. STAT. ANN. § 45(a)-727(c)(4) (West Supp. 1992) (providing for final decree, but not a statute of limitations); DEL. CODE ANN. tit. 13, § 918 (1981) (two years); D.C. CODE ANN. § 16-310 (Supp. 1992) (one year); FLA. STAT. ANN. § 63.182 (West 1985 & Supp. 1993) (one year); GA. CODE ANN. § 19-8-1 (Michie 1991 & Supp. 1992) (general adoption statute, no statute of limitations); HAW. REV. STAT. § 578-12 (1992) (one year); IDAHO CODE § 16-1512 (Supp. 1992) (no statute of limitations, provides for appeals); ILL. ANN. STAT. ch. 40, para. 1517 (Smith-Hurd Supp. 1992) (no statute of limitations, provides for entry of order of adoption); IND. CODE ANN. § 31-3-1-2 (Burns 1987 & Supp. 1992) (no statute of limitations, general adoption procedures); IOWA CODE ANN. § 600.14 (West 1981) (no statute of limitations, provides for appeals); KAN. STAT. ANN. § 59-2134 (1983 & Supp. 1992) (no statute of limitations, provides for hearing and entry of final decree); KY. REV. STAT. ANN. § 199.540 (Michie/Bobbs-Merrill 1991) (two years); LA. CH. CODE ANN. art. 1259 (1993) (thirty days to appeal); *id.* art. 1262 (no annulment except for fraud or duress); *id.* art. 1263 (action for annulment for fraud or duress must be brought within six months); ME. REV. STAT. ANN. tit. 19, § 536 (West 1981 & Supp. 1992) (provides for appeal); MD. FAM. LAW CODE ANN. § 5-325 (1984 & Supp. 1991) (one year); MASS. GEN. LAWS ANN. ch. 210, § 11 (West 1987) (one year); MICH. COMP. LAWS ANN. § 710.64-65 (West 1993) (twenty days to appeal); MINN. STAT. ANN. § 259.32 (West 1992) (provides for appeal, no statute of limitations); MISS. CODE ANN. § 93-17-15 (1973) (six months); MO. ANN. STAT. § 453.140 (Vernon 1986) (one year); MONT. CODE ANN. § 40-8-127 (1991 & Supp. 1992) (provides for appeals, no statute of limitations); NEB. REV. STAT. § 43-116 (1988) (two year statute of limitations); NEV. REV. STAT. ANN. § 127.180 (Michie 1986) (provides for appeal, no statute of limitations); N.H. REV. STAT. ANN. § 170-B:17 (1990) (one year); N.J. STAT. ANN. § 9:3-50 (West 1993) (effect of adoption, no statute of limitations); N.M. STAT. ANN. § 32A-5-36(K) (Michie Supp. 1993) (one year); N.Y. DOM. REL. LAW. § 114 (McKinney 1988) (order of adoption final); N.C. GEN. STAT. § 48-21 (1991) (provides for final order within three years of proceeding); N.D. CENT. CODE § 14-15-15 (1991) (one year); OHIO REV. CODE ANN. § 3107.16 (Anderson 1989) (one year); OKLA. STAT. ANN. tit. 10, § 58 (West 1987) (one year);

letters to the District of Columbia Superior Court in an effort to intervene in the adoption proceeding, and eventually filed a *pro se* motion after the statute of limitations had expired.¹²⁷ Subsequently, the trial judge concluded that the putative father's motion to intervene was barred by the statute of limitations.¹²⁸ The court of appeals reversed, holding that the unwed father had a constitutionally protected right to fair notice of, and opportunity to participate in, the adoption proceedings because he grasped his opportunity interest in a timely manner.¹²⁹ The court also held that because the father was denied his constitutional right to notice and opportunity to be heard, the adoption would not become final until he was given those rights.¹³⁰ The court was troubled, however, recognizing that by the end of the proceedings, the child had lived with her adoptive family for over four years.¹³¹ The court's narrow holding was that once paternity was established, the unwed father must have the opportunity to offer his opinion of what he believed was in the child's best interests, despite the passing of the one year statute of limitations.¹³² Once again, a zealous dissent vehemently opposed the decision, arguing that the purpose of the strict one-year statute of limitations and other procedural requirements surrounding adoption is to ensure the finality

OR. REV. STAT. § 109.381 (1991) (one year); PA. STAT. ANN. tit. 23, § 2902 (1991) (vacation of adoption proceeding); R.I. GEN. LAWS § 15-7-14 (1988) (provides for final decree, no statute of limitations); S.C. CODE ANN. § 20-7-1800 (Law. Co-op. 1985 & Supp. 1992) (one year); S.D. CODIFIED LAWS ANN. § 25-6-13 (1992) (provides for adoption decree, no statute of limitations); TENN. CODE ANN. § 36-1-124 (1991) (provides for adoption decree, no statute of limitations); TEX. FAM. CODE ANN. § 16.12 (West 1986) (two years); UTAH CODE ANN. § 78-30-9 (1992) (provides for adoption decree, no statute of limitations); VT. STAT. ANN. tit. 15, § 447 (1989) (provides for final adoption, no statute of limitations); VA. CODE ANN. § 63-1-237 (Michie 1991) (six month statute of limitations); WASH. REV. CODE ANN. § 26.33.260 (West 1986) (provides for adoption decree, no statute of limitations); W. VA. CODE § 48-4-12 (1992) (provides for adoption decree, no statute of limitations); WIS. STAT. ANN. § 48.911 (West 1987) (21 days to appeal adoption); WYO. STAT. § 1-22-112 (1988) (provides for final decree, no statute of limitations). These statutes of limitations embody the need for certainty and finality in adoption proceedings. Amicus Brief for the National Council for Adoption at 1, *In re M.N.M.*, 605 A.2d 921 (D.C.) 90-1395, *cert. denied*, 113 S. Ct. 636 (1992).

127. *M.N.M.*, 605 A.2d at 923-24.

128. *Id.* at 924.

129. *Id.* at 927-30.

130. *Id.* at 930. The unwed father's paternity was in question, however, and the court noted that his paternity would have to be established prior to his being granted due process rights. *Id.*

131. *Id.* The court cautioned that "many factors must be evaluated in deciding what disposition is best for this child, including the fact that he [sic] has lived with the adoptive parents for more than four years." *Id.*

132. *Id.* The *M.N.M.* court ruled that "[w]e hold only that, assuming paternity, appellant must be accorded the opportunity to voice 'his opinion of where the child's best interest lie . . .'" (quoting *Lehr v. Robertson*, 463 U.S. 248, 262 (1983)).

of adoptions and the best interests of the child, neither of which should be compromised by the untimely objection of an unwed father.¹³³

The *M.N.M.* decision demonstrates how courts will bend over backwards to accommodate the claim of the unwed father, even going so far as to make an exception to a "hard and fast" one-year statute of limitations, violating "an unequivocal public policy."¹³⁴ The *M.N.M.* decision, however, was not the last instance in which a court extended itself to avoid closing off an unwed father's claim.

C. *The Unbridled Discretion of a Solomon*

One of the most controversial adoption cases to date recently reached the high court of two states and of the United States. In *In re B.G.C.*,¹³⁵ an unwed mother, Cara, placed her child for adoption immediately after birth.¹³⁶ Cara signed the release of parental rights form, named the father of the baby as her current boyfriend, Scott, and obtained Scott's signature on the release.¹³⁷ Scott and Cara then waived notice of the termination hearing, releasing custody of the child to the potential adoptive parents, Jan and Roberta DeBoer.¹³⁸ A few weeks later, Cara moved to set aside the termina-

133. *Id.* at 933 (Gallagher, J., dissenting). Judge Gallagher argued that the statute of limitations exists "because after a final decree of adoption, one would be seeking to remove a child from an established family." *Id.* Judge Gallagher asserted that "the child has been in the family since she was two or three weeks old and is now nearing five. It is entirely reasonable that this statute of limitations, which comes into play only after a final decree, would be tightly written. And I suggest the plain language should be construed the same way." *Id.*

134. *Id.* Judge Gallagher asserts that:

"[a]s a matter of public policy, in the interest of the stability of human affairs in relation to a permanent parent-child relationship, the legislature specifically provided for a hard and fast cut-off date of one year after the *final decree* of adoption. A statute of limitations is 'a public policy about the privilege to litigate.' "

Id. (emphasis in original) (quoting *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945)).

135. *In re B.G.C.*, 496 N.W.2d 239 (Iowa 1992) (see *supra* note 6, outlining related proceedings in the *B.G.C.* case).

136. *Id.* at 240-41; see also Isabel Wilkerson, *Adoption Battle Pits Couple Versus Couple*, HOUSTON CHRONICLE, Jan. 3, 1993, at A2 (explaining that Cara's maiden name was Clausen, and that she later married Daniel Schmidt, the infant's actual father). The child was referred to in court papers as Baby Girl Clausen, or "B.G.C."

137. *In re B.G.C.*, 496 N.W.2d at 241.

138. *Id.* The prospective adoptive parents, the DeBoers, were from Michigan, and eventually returned to Michigan with the child. Mona Charen, *When the Courts Work to Split Up a Happy Family*, ATLANTA J. & CONST., Dec. 15, 1992, at A23; see also Nancy Gibbs, *In Whose Best Interest?*, TIME, July 19, 1993, at 45 [hereinafter *Whose Best Interest?*] (outlining the lengthy history of the DeBoer case in the courts). The adoption of a child born in one state by parents from another state is called an "interstate adoption." MICHELMAN & SCHNEIDER, *supra* note 2, at 21. Michelman and Schneider explain that although adoptions within the same state are simpler, an "Interstate Compact" governs adoptions between states. *Id.* Interstate adoptions often require the adoptive parents to spend time in the state where the child

tion, claiming her release was defective because another man, Daniel, was the real father.¹³⁹ Cara's motion was denied, but as the DeBoer's adoption petition moved forward, Daniel intervened in the adoption proceeding to assert his parental rights, which had never been terminated.¹⁴⁰ Daniel and Cara subsequently married and began pursuing the child's return together.¹⁴¹

The Iowa District Court for Linn County found that Daniel was the child's father, that he had not released his parental rights or abandoned the child, and thus it denied the adoption and ordered that the DeBoer's surrender the child to Daniel.¹⁴² Subsequently, the DeBoers obtained a stay allowing them to keep the child pending their appeal to the Court of Appeals and the Iowa Supreme Court.¹⁴³ The Supreme Court of Iowa affirmed the district court and ordered that custody of the baby be transferred to Daniel, also finding that Daniel was the father, that he had not abandoned the baby, and that the adoption proceeding was therefore flawed.¹⁴⁴ The court recognized that while both sides presented a sympathetic case, it did not have the "unbridled discretion of a Solomon"¹⁴⁵ to determine which home and which set of parents might be better for the child.¹⁴⁶

A strong dissent faulted the majority's decision, contending that it allowed the unwed father the opportunity to jeopardize an established relation-

was born until a period during which parental consent can be revoked has passed. *Id.* at 21-22. Interstate adoptions are also governed by the laws of the state in which the adoptive family lives and by those of the state in which the child is born. *Id.*

139. *B.G.C.*, 496 N.W.2d at 241.

140. *Id.*

141. *Whose Best Interest?*, *supra* note 138, at 47.

142. *B.G.C.*, 496 N.W.2d at 241.

143. *Id.*

144. *Id.* The child was 17 months old at the time of the order, and the only parents she had ever known were her potential adoptive parents, the DeBoers. In its decision, the Iowa Supreme Court cited the district court which noted that "[w]hile cognizant of the heartache which this decision will ultimately cause, this court is presented with no other option than that dictated by the law in this state. Purely equitable principles cannot be substituted for well-established principles of law." *Id.* at 246 (quoting the district court's opinion).

145. *Id.* at 241. The court went on to say that "[o]urs is a system of law, and adoptions are solely creatures of statute." *Id.* The court did not fault Daniel for his delayed involvement in the proceeding, and found it "totally unrealistic" to expect that Daniel could have protected his parental rights as soon as the pregnancy was known, as "it would require a potential father to become involved in the pregnancy on the mere speculation that he might be the father. . . ." *Id.* at n.1.

146. *Id.* at 241 (citing *In re Burney*, 259 N.W.2d 322, 324 (Iowa 1977)). The court pointed out that its resolution of the case did not invalidate a finalized adoption decree. *Id.* Part of the flaw in the potential adoption was that Cara was given the adoption papers prior to the 72-hour waiting period mandated by Iowa law. *Id.* at 242-43; see IOWA CODE § 600A.4(4), 600A.4(d) (1981) (mandating a 72-hour waiting period). The court added that "'courts are not free to take children from their parents simply by deciding that another home offers more advantages.'" *Id.* at 241 (quoting *Burney*, 259 N.W.2d at 324).

ship.¹⁴⁷ The dissent asserted that since the father knew of the situation and did nothing to protect his rights at the time of birth, he thereby forfeited his rights by his indifference to the fate of the mother and child.¹⁴⁸ In an almost unprecedented action, the DeBoers filed a petition in their home state of Michigan under the Uniform Child Custody Jurisdiction Act,¹⁴⁹ hoping that the Michigan courts would modify the Iowa decision and rule using the best interest of the child standard.¹⁵⁰ Although the Washtenaw County Circuit Court in Michigan ruled that it was in the child's best interest to remain with the DeBoers,¹⁵¹ the Schmidts appealed the circuit court ruling to the Michigan Court of Appeals,¹⁵² which ruled that the circuit court lacked jurisdiction to intervene in the case, and held that the Iowa order returning custody of the child to Daniel must be enforced.¹⁵³

On July 2, 1993, the Michigan Supreme Court confirmed that the child must be returned to the biological parents pursuant to the Iowa ruling.¹⁵⁴ An ardent dissent pointed out that the court had lost sight of the fact that it was ruling on the outcome of a child's life.¹⁵⁵

147. *Id.* at 247 (Snell, J., dissenting). The dissent stated that "[t]he specter of newly named genetic fathers, upsetting adoptions, perhaps years later, is an unconscionable result." *Id.* The dissent further stated that "[s]uch a consequence is 'not driven by the language of our statutes, due process concerns or the facts of this case.'" *Id.*

148. *Id.*

149. MICH. COMP. LAWS ANN. § 600.651-673 (1981 & Supp. 1993-94).

150. *In re Clausen*, 501 N.W.2d 193, 195 (Mich. App. 1993).

151. *Id.* at 196.

152. *Id.*

153. *Id.* at 198.

154. *In re Clausen*, 502 N.W.2d 649, 668 (Mich. 1993). The Michigan Supreme Court, although sensitive to the emotional implications of its decision, stated:

[t]hese cases have been litigated through fervent emotional appeals, with counsel and the adult parties pleading that their only interests are to do what is best for the child, who is herself blameless for this protracted litigation and the grief that it has caused. . . . It is now time for the adults to move beyond saying that their only concern is the welfare of the child and to put those words into action by assuring that the transfer of custody is accomplished promptly with minimum disruption of the life of the child.

Id. (footnote omitted); see also Edward Walsh, *Two Parents Too Many for a Little Girl*, WASH. POST, June 4, 1993, at C1 (describing the proceeding before the Michigan Supreme Court as "orderly" but in reality "a war of the most savage kind, a war for the body, mind and affections of a little girl"); *Whose Best Interest?*, *supra* note 138, at 47; Sam H. Verhovek, *Michigan Court Says Adopted Girl Must Be Sent to Biological Parents*, N.Y. TIMES, July 3, 1993, at A6.

155. *In re Clausen*, 502 N.W.2d at 668-69 (Levin, J., dissenting). Judge Levin asserted that he would agree with the majority

if the DeBoers had gone to Iowa, purchased a carload of hay from Cara Clausen, and then found themselves in litigation in Iowa with Daniel Schmidt, who also claimed an interest in the hay. . . . But this is not a lawsuit concerning the ownership, the legal title, to a bale of hay. . . . There is a C, the child, "a feeling, vulnerable, and [about to be] sorely put upon little human being"

Id. (quoting *Lemley v. Barr*, 343 S.E.2d 101, 104 (W. Va. 1986)).

The DeBoers applied to Justice Stevens, in his capacity as Circuit Justice for the Sixth Circuit, asking for a stay of the Iowa and Michigan court rulings requiring them to return the child to the Schmidts.¹⁵⁶ Justice Stevens found that the Michigan courts properly ruled that they had no jurisdiction over the case, and denied the application for a stay.¹⁵⁷ On August 2, 1993, the child was transported from the DeBoer's home in Michigan, to the Schmidts, who now retain custody of the child.¹⁵⁸ A forceful dissent from Justices Blackmun and O'Connor indicated that the Court's decision not to hear the case troubled the Justices.¹⁵⁹

The emotional *B.G.C.* case pitted biological parents against adoptive parents, and questioned the definition of "parent."¹⁶⁰ In doing so, the courts of two states compromised the interests of the child in an extraordinary accommodation of the biological father.¹⁶¹

156. DeBoer v. DeBoer, Nos. A-64, A-65, 1993 U.S. LEXIS 4662 (July 26, 1993).

157. *Id.* at *3; see also Joan Biskupic, *Child's Return Is Affirmed at High Court*, WASH. POST, July 27, 1993, at A1, A5.

158. Jerry Dubrowski, *Couple Returns Toddler to Biological Parents*, REUTERS, August 2, 1993, available in LEXIS, Nexis Library, WIRES File (noting that "Jan and Roberta DeBoer turned their adopted child Jessica, screaming and kicking, over to her biological parents . . . ending an agonising [sic], two-year legal battle . . .").

159. DeBoer v. DeBoer, Nos. A-64, A-65, 1993 U.S. LEXIS 4665 (July 30, 1993) (Blackmun, J., dissenting). Justice Blackmun, joined by Justice O'Connor, noted that:

[w]hile I am not sure where the ultimate legalities or equities lie, I am sure that I am not willing to wash my hands of this case at this stage, with the personal vulnerability of the child so much at risk, and with the [state courts] in fundamental disagreement over the duty and authority of state courts to consider the best interests of a child when rendering a custody decree.

Id. at *2-*3.

160. Isabel Wilkerson, *Michigan Couple is Ordered to Return Girl, 2, to Biological Parents*, N.Y. TIMES, Mar. 31, 1993, at A17. The *B.G.C.* case received extensive media attention as it proceeded through the courts. See, e.g., Charen, *supra* note 138, at A23 ("This amounts to a legal kidnapping."); Anna Quindlen, *Whose Best Interests?*, N.Y. TIMES, Dec. 9, 1992, at A23 (adoptive parents "hope to find a judge willing to combine humanity, discretion and statute" to keep the child in her adoptive home); Wilkerson, *supra* note 136, at A2 (highlighting the tension between biological and adoptive parents).

161. This tension between the biological connection and the concept of "family" was revealed even in *Stanley v. Illinois*, 405 U.S. 645 (1972). See *supra* notes 29-45 and accompanying text; see also RUBIN, *supra* note 10, at 43. Rubin points out that:

Stanley . . . revealed a conflict between two tenets of the family ideology. The family ideology recognizes the importance of blood ties and accepts the proposition that parents should be held responsible for their reproductive activities. . . . However, conflict can arise between this proposition and the principle that children should be raised in a family environment and that the integration of a child into a working family unit is the proper goal of public policy.

Id.

D. A Demand For Prompt Action

While the Supreme Courts of Iowa and Michigan emphasized fathers' rights over the best interest of the child standard, the New York Court of Appeals used the same standard to hold that a man who did not know he had fathered a son until 18 months after the child's birth could not overturn the child's adoption.¹⁶² In *Robert O. v. Russell K.*, the court unanimously ruled that the unwed father lost his right to consent to the adoption of his child where he failed to establish a relationship with his child, even though he was unaware of the child's existence.¹⁶³ The *Robert O.* case involved one of the most significant and difficult issues in accommodating the putative father in adoptions—how the father can protect his opportunity interest when he does not know that he is a parent.¹⁶⁴

Robert O. and Carol A.'s engagement ended following difficulties; although Carol was pregnant at the time, she did not tell Robert.¹⁶⁵ Instead, Carol arranged for her friends, Russell K. and his wife, to adopt the baby.¹⁶⁶ Following the child's birth and placement Robert and Carol married, Carol told Robert of the child, and Robert sought to vacate the adoption.¹⁶⁷

The New York Court of Appeals ruled that the child's welfare, the rights of the adoptive parents, the attachments developed in that family, and the state's interest in maintaining the integrity of adoptions must take precedence over the biological father's interest in his child.¹⁶⁸ The court found that Robert O.'s only connection to his child during the first months of his child's life was biological, and rejected his assertion that had he known of the child's existence, he would have accepted more responsibility.¹⁶⁹ In the court's view, Robert O. failed to assert his rights in a timely manner, and

162. *Robert O. v. Russell K.*, 604 N.E.2d 99, 105 (N.Y. 1992) (holding that the "opportunity becomes protected only if grasped").

163. *Id.* at 100-01.

164. *Id.* at 101. Carol, the mother, was never asked by the adoption court to name the father, and she signed a statement that indicated that there was no one entitled to notice under the state's domestic relations law. *Id.*

165. *Id.* at 100.

166. *Id.* The adoption was finalized seven months after the birth. *Id.* at 100-01.

167. *Id.* at 101. Robert immediately filed with New York's Putative Father Registry, reimbursed Carol for her medical expenses, and initiated a proceeding to vacate the adoption. *Id.* This was nearly 18 months after the birth and placement. *Id.*

168. *Id.* at 103-04. The court held that

[t]he competing interests at stake in an adoption—and the complications presented by petitioner's position—are clearly illustrated here: nearly a year and a half after the baby went to live with the adoptive parents, and more than 10 months after they were told by the court that the baby was legally theirs, petitioner sought to rearrange those lives by initiating his present legal action.

Id. at 104 (footnote omitted).

169. *Id.* at 103-04. The court held that "[t]o conclude that petitioner acted promptly once he became aware of the child is to fundamentally misconstrue whose timetable is relevant.

thus the state could deny his right to consent to the adoption of his child.¹⁷⁰ Unlike the decision in *B.G.C.*, the *Robert O.* case illustrates that the competing interests in adoption must not be jeopardized by an unwed father who attempts to belatedly assert his parental rights.¹⁷¹

III. WHAT IS A FATHER TO DO?

The dilemma that exists in the state courts centers on how to handle appropriately an unwed father's claim, particularly if the claim is delayed,¹⁷² interfered with,¹⁷³ or masked by misrepresentation.¹⁷⁴ Adoption agencies are placed in a difficult position when they are obligated to serve as intermediaries.¹⁷⁵ While the Supreme Court has established due process rights for the putative father,¹⁷⁶ it is generally accepted that those rights are fleeting.¹⁷⁷ If the unwed father does not act immediately to protect his right, many courts will rule against a transfer of custody once a child has been placed with an adoptive family.¹⁷⁸ Once a final decree of adoption is en-

Promptness is measured in terms of the baby's life not by the onset of the father's awareness." *Id.* at 103.

170. *Id.* at 103-04. The court held that "[t]he 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." *Id.* (emphasis added).

171. *Id.* at 103. The court struck a balance, noting that "[s]tates have a legitimate concern for prompt and certain adoption procedures and their determination of the rights of unwed fathers need not be blind" to the importance of creating adoption procedures which ensure the best interests of the child and "protect[] the rights of interested third parties like adoptive parents." *Id.*; see also Dennis Hevesi, *Court Denies Father's Late Request to Overturn Adoption*, N.Y. TIMES, Oct. 28, 1992, at B6 (reporting that the decision will "avoid creating havoc" in adoptions).

172. See *In re M.N.M.*, 605 A.2d 921, 924 (D.C.), cert. denied, 113 S. Ct. 636 (1992) (paternity claim filed one month and twenty-four days after statute of limitations expired); *Robert O.*, 604 N.E.2d at 103 (paternity claim filed eighteen months after birth and placement).

173. Appeal of H.R., 581 A.2d 1141, 1166 (D.C. 1990) (adoption agency violated unwed father's procedural rights).

174. *In re B.G.C.*, 496 N.W.2d 239, 241 (Iowa 1992) (unwed mother intentionally listed wrong father on consent to adoption forms) (see *supra* note 6, outlining related proceedings in the *B.G.C.* case).

175. See *H.R.*, 581 A.2d at 1169 (noting that an agency supporting adoption is in a difficult position when it must notify the putative father of the proposed adoption, recognizing that he may object to the adoption).

176. See *supra* notes 29-96 and accompanying text.

177. See *supra* notes 88-96 and accompanying text.

178. See, e.g., *H.R.*, 581 A.2d at 1180. Although H.R.'s "fitness" as a parent was discussed, the best interests of the child standard eventually prevented a transfer of custody. *In re Baby Boy C.*, 1993 D.C. App. LEXIS 202, *3 (Aug. 19, 1993). See also *Robert O. v. Russell K.*, 604 N.E.2d 99, 103 (N.Y. 1992) (precluding a transfer of custody in the child's interest); *contra In re B.G.C.*, 496 N.W.2d at 241-46 (rejecting the best interest of the child standard); see *supra* note 14 and accompanying text (discussing the best interests of the child standard).

tered, despite a father's efforts to preserve his opportunity interest,¹⁷⁹ it is nearly certain that he will not be given custody.¹⁸⁰

If custody is not a viable option in most cases, what is a father, deprived of his right, to do? In *H.R.*, the court alludes to the possibility of bringing a damages claim against the adoption agency where the agency causes the loss of the father's opportunity interest.¹⁸¹ While few states have directly addressed the validity of such a cause of action against an adoption agency, some state courts have attempted to analogize the action to existing causes of action against the state and its social workers.¹⁸² Although several options are available that permit an unwed father to take action against an adoption agency to protect his rights, such actions often fail.¹⁸³

A. Possible Causes of Action Against an Adoption Agency

1. Violation of Due Process

The termination of parental rights procedure merits constitutional protection.¹⁸⁴ An unwed father may bring an action under 42 U.S.C.

179. See, e.g., *H.R.*, 581 A.2d at 1145-51 (letters, calls, petitions filed by putative father); *In re M.N.M.*, 605 A.2d 921, 923-24 (D.C.) (letters to court, petitions filed by putative father), *cert. denied*, 113 S. Ct. 636 (1992); *Robert O.*, 604 N.E.2d at 101 (immediate payment of mother's expenses and registration with putative fathers' registry).

180. See, e.g., *H.R.*, 581 A.2d at 1181 (best interests of the child will likely preclude transfer); *Robert O.*, 604 N.E.2d at 103-04 (best interests of the child standard prevailed). Even after an award of custody, the adoptive parents will not be quick to give up their child. See, e.g., *In re Clausen*, 502 N.W.2d 649, 652-54 (Mich. 1993) (adoptive parents obtained stays following orders granting custody to biological father for nearly two years).

Visitation rights by the putative father are not generally considered, although it has been suggested that "the courts' failure to consider post-adoption visitation is contrary to the best interests requirement in adoption laws." Nathan, *supra*, note 14, at 648.

181. *H.R.*, 581 A.2d at 1180. The court stated that it "should not foreclose the possibility of a damages remedy, however inadequate, for violations of the father's statutory and constitutional rights that may have caused prejudicial delay." *Id.*

182. See, e.g., *Petrowsky v. Family Serv. of Decatur*, 518 N.E.2d 664, 665-66 (Ill. App. Ct. 1987) (refusing to recognize the tort of adoption agency malpractice, despite recognition of the tort of social work malpractice); *Horak v. Biris*, 474 N.E.2d 13, 17 (Ill. App. Ct. 1985) (recognizing social work malpractice); *Dunn v. Catholic Home Bureau for Dependent Children*, 537 N.Y.S. 2d 742, 743 (N.Y. Sup. Ct. 1989) (recognizing social work malpractice); see also *infra* notes 220-40 and accompanying text (discussing adoption agency and social work malpractice).

183. See *Buchanan*, *supra* note 3, at 378 n.486 (alluding to a 42 U.S.C. § 1983 cause of action against an adoption agency by an unwed father); *H.R.*, 581 A.2d at 1167, 1180 (alluding to a 42 U.S.C. § 1983 cause of action for procedural due process violations).

184. *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (holding that a father has a constitutionally-protected liberty interest in a hearing before he is deprived of the custody of his illegitimate children); *Ellis v. Hamilton*, 669 F.2d 510, 512 (7th Cir.) (holding that the liberty protected by the Due Process Clause of the Fourteenth Amendment includes a parent's right to the custody of their children), *cert. denied*, 459 U.S. 1069 (1982); *Swayne v. L.D.S. Soc. Servs.*, 670 F. Supp. 1537, 1540 (D. Utah 1987) (holding that the termination of parental rights

§ 1983,¹⁸⁵ against state adoption agency officials who fail to notify him of a pending adoption action, alleging a violation of due process under the Fourteenth Amendment.¹⁸⁶ To bring a § 1983 claim, a plaintiff must first “allege the violation of a right secured by the Constitution and laws of the United States,” and second, show that the deprivation of this right was caused by a person acting “under color of state law.”¹⁸⁷ An unwed father is able to meet the first prong of the test as a result of the Supreme Court’s holdings in *Stanley*, *Caban*, *Quilloin*, and *Lehr*, establishing a putative father’s due process right to participate in the adoption proceeding.¹⁸⁸

The second prong requires a showing that the person or entity that caused the alleged deprivation acted “under color of state law.”¹⁸⁹ Traditionally, an

is the deprivation of a liberty interest “worthy of constitutional protection”), citing *Stanley v. Illinois*, 405 U.S. 645 (1972).

185. 42 U.S.C. § 1983 (1988). This section provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

186. U.S. CONST. amend. XIV, § 2; see *Swayne*, 670 F. Supp. at 1541-44. In *Swayne*, a putative father brought an action pursuant to 42 U.S.C. § 1983 in which he attempted to gain custody of his infant child who was surrendered to a private adoption agency by the mother. *Id.* The father had not married, supported, or provided for the mother, and failed to register in the Utah putative father registry. *Id.* at 1538-39.

187. *West v. Atkins*, 487 U.S. 42, 48 (1988). In order for there to be a violation of due process under the Fourteenth Amendment the state must be involved, as provided in the Constitution. U.S. CONST. amend. XIV, § 2. The Fourteenth Amendment provides that “[n]o State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law.” *Id.* In a typical § 1983 action, the plaintiff alleges that his or her rights were violated by the conduct of state officials without due process of law. Jack M. Beermann, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 B.U. L. REV. 277, 284 (1988). Beermann points out that “[t]he due process allegation directs the court’s focus to the procedures surrounding the deprivation” and that “[c]ourts addressing due process claims under § 1983 . . . have turned on . . . technical applications of the due process clause.” *Id.* at 284-85. According to Beermann, cases in this area “are united by an undercurrent of concern over the appropriate federal response to state conduct that causes injury to private parties.” *Id.* at 285; see also *STONE*, *supra* note 17, at 1594; Daniel Steiner, Note, *Due Process and Section 1983: Limiting Parratt v. Taylor to Negligent Conduct*, 71 CAL. L. REV. 253, 261 (1983) (explaining that § 1983 actions generally involve challenges to established state procedures). Stone explains that the Fourteenth Amendment is based on the theory that an extension of federal law is necessary to preserve individual rights. *STONE*, *supra* note 17, at 1594. There has always been a conflict between a state deprivation, which is bestowed with Fourteenth Amendment protection, and deprivations by private behavior, which receives no such protection. *Id.* at 1597 (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974)).

188. See *supra* notes 29-96 and accompanying text (discussing the development of putative fathers’ rights).

189. See *supra* note 187.

entity is said to act "under color of state law" when its authority and power are conferred by state law and it acts on behalf of the state.¹⁹⁰ Thus, the deprivation must be caused by the state or by a person for whom the state is responsible.¹⁹¹ State employment renders a person a state actor.¹⁹² If an adoption agency fails to notify a putative father of an adoption proceeding involving his child,¹⁹³ resulting in the destruction of the unwed father's opportunity interest, then he is deprived of a recognized right or privilege.¹⁹⁴ The party charged with the deprivation—the adoption agency—is often state-run, and thus clearly a state actor.¹⁹⁵ Similarly, the conduct of private adoption agencies can be characterized as state-action because parental rights may only be terminated through the power of the state.¹⁹⁶ Thus, private parties facilitating a mother's relinquishment of her child become state

190. *United States v. Classic*, 313 U.S. 299, 326 (1941). In *Classic*, the Court held that a misuse of power made possible "because the wrongdoer is clothed with the authority of state law," is action taken "under color of state law." *Id.*

191. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 n.18 (1982); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 18-4, at 1703-05 (2d. ed. 1988). Tribe explains that the existence of unconstitutional state action depends upon the factors relevant to the specific constitutional guarantee at issue. *Id.* at 1705.

192. *Id.*; see also STONE, *supra* note 17, at 1659. The authors explain that the state action doctrine is a "natural outgrowth of th[e] assumption" that much of our "personal freedom is linked to the absence of governmental power." *Id.* The state action doctrine limits government power by applying "constitutional limits when the government acts to restrict individual liberty," and requiring "freedom from . . . constitutional constraints when individuals act without government assistance or support." *Id.* Thus, private actors do not need to make sure that due process rights are not violated, however, state actors must take measures to protect due process. *Id.* This distinction is obviously crucial and would need to be overcome by any putative father charging a § 1983 deprivation of due process in an adoption carried out by a private agency. See *infra* notes 196-98 and accompanying text.

193. See *supra* notes 98-115 and accompanying text (describing *Appeal of H.R.*).

194. *Swayne v. L.D.S. Soc. Servs.*, 795 P.2d 637, 640 (Utah 1990) (holding that the termination of parental rights triggers state action for Fourteenth Amendment purposes).

195. See *Swayne v. L.D.S. Soc. Servs.*, 670 F. Supp. 1537, 1543 (D. Utah 1987) (holding that a state has a duty to act as guardian for adoptees; some of that duty is delegated to private adoption agencies).

196. See *id.* at 1541. In *Swayne*, the United States District Court for the District of Utah found that "[t]he State of Utah, not a private party, made an official policy decision that anytime custody of an illegitimate child is relinquished by the mother, the father's parental rights are automatically cut off unless a notice of paternity was previously filed by the biological father." *Id.* The state's decision "is implemented through the actor or actors who accept the child for placement, whether a state entity, a private licensed adoption agency, or any other person, for example an attorney." *Id.* at 1541-42. The court held that "[i]t would be a total fiction to allow the state to remove itself from its decision to cut off parental rights simply because a private party triggers operation of the statute." *Id.* at 1542 (emphasis in original). Thus the court held that a private party becomes a state actor when his or her actions involve the statute terminating parental rights. *Id.*

actors¹⁹⁷ and as such, can be held responsible for violations of a putative father's due process rights.¹⁹⁸

A deprivation under § 1983 does not have to be intentional.¹⁹⁹ Negligence on the part of state officials, such as adoption agencies, can result in a deprivation of a putative father's rights.²⁰⁰ A mere showing of negligence, however, is not enough—the deprivation must also occur as a result of an established state procedure that is inherently inadequate.²⁰¹ Therefore, an essential element of an unwed father's claim under 42 U.S.C. § 1983 is a showing that the state procedures are inadequate, even when correctly followed.²⁰²

197. *Id.* In *Swayne*, the plaintiffs relied on a Utah statute that provided that when an illegitimate child is relinquished by its mother, the rights of the father are automatically terminated unless he has previously filed an acknowledgement of paternity. *Id.* at 1544. Parental rights may only be terminated through the power of the State, thus, the *Swayne* court held that when a party facilitated a mother's relinquishment, the party became a state actor. *Id.* at 1542-44.

198. *Id.* There are several ways to determine whether private adoption agencies are actually engaged in state action. *See, e.g.,* *Roe v. Catholic Charities*, 588 N.E.2d 354, 359 (Ill. App. Ct. 1992). In *Roe*, the court held that private adoption agencies are bound by the law of the State. *Id.* The court recognized the established principle that a corporation may be sued for the common law torts it commits. *Id.* The court used the principle of negligence for airlines, railroads, hospitals and other corporations to hold an adoption agency liable. *Id.* Still, courts do not want a finding of state action regarding private adoption agencies to "chill" the actions of those agencies. *See, e.g., Swayne*, 670 F. Supp. at 1544. The *Swayne* court, in finding that a private adoption agency was engaged in state action, held that "[t]his court does not rule that all actions and decisions by private adoption agencies will be subject to review under the constitution." *Id.*

199. *Parratt v. Taylor*, 451 U.S. 527, 534 (1981), *overruled on other grounds by* *Daniels v. Williams*, 474 U.S. 327 (1986). The *Parratt* Court held that "[n]othing in the language of § 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights." *Id.* In *Parratt*, a prisoner brought a § 1983 claim when a hobby kit he ordered was lost by prison officials when the officials did not follow the proper procedures for receiving packages. *Id.*

200. *See supra* notes 100-15 and accompanying text (discussing inadequate and improperly followed adoption agency notification procedures).

201. *Parratt*, 451 U.S. at 543. *Parratt's* claim eventually failed because although he was deprived of property under color of state law, "the deprivation did not occur as a result of some established state procedure." *Id.* The deprivation occurred as a result of the failure of prison officials to follow the procedures, but the procedures themselves were adequate. *Id.*; *see also* *Steiner, supra* note 187, at 261 (discussing a § 1983 challenge on the basis of inadequate state procedures).

202. *See Ellis v. Hamilton*, 669 F.2d 510, 514 (7th Cir.), *cert. denied*, 459 U.S. 1069 (1982). In *Ellis*, the United States Court of Appeals for the Seventh Circuit rejected the plaintiffs' § 1983 claim for injunctive relief and damages against state welfare officers, where the plaintiffs' grandchildren were removed from the plaintiffs' homes and were adopted by a new family. *Id.* at 510-12. The plaintiffs did not challenge the lack of notice under the state adoption law, but rather, claimed that the state officers unreasonably deprived them of the companionship of their children and then interfered with their ability to adopt them. *Id.* at 514. The court held that "[d]ue process is denied . . . only if the state fails to provide adequate machinery for the correction of the inevitable errors that occur in legal proceedings." *Id.*

The federal courts show great deference to state courts in family law cases because of the "peculiarly local nature" of the law.²⁰³ Courts of federal jurisdiction have found that due process is not denied if the state provides reasonable remedies for preventing the wrong.²⁰⁴ Federal courts recognize that state courts are as equally determined to prevent due process violations as the federal courts.²⁰⁵ More significantly, to be successful with a federal claim, a biological father must show that he has not done something to jeopardize his opportunity interest.²⁰⁶ Even if an unwed father could hurdle the many obstacles in the way of a § 1983 cause of action, federal courts are hesitant to recognize due process violations at every turn.²⁰⁷

Additionally, governmental immunity may bar a cause of action against a state-run agency.²⁰⁸ The Eleventh Amendment is interpreted as barring suits in federal court against a state by citizens of that state.²⁰⁹ A suit

203. *Id.* at 515.

204. *Id.* The *Ellis* court held "that there is no denial of due process if the state provides reasonable remedies for preventing families from being arbitrarily broken up by local domestic relations officers." *Id.* A putative fathers' registry could be viewed as one of the reasonable remedies provided by the state to prevent family breakup. See *infra* notes 258-85 (discussing the putative fathers' registry).

205. *Ellis*, 669 F.2d at 515. The *Ellis* court found that "the courts of Indiana seem every bit as determined to prevent such wrongs [due process violations] as the federal courts would be." *Id.*

206. See *supra* notes 71-96 (discussing the fleeting nature of the opportunity interest).

207. *Ellis*, 669 F.2d at 514. In *Ellis*, the court hypothesized that

[i]f due process were denied every time local officials blundered, then any plaintiff in state court who was asserting a right within the broadly defined categories of liberty or property and who lost his case because the judge made an error could attack the judgment indirectly by suing the judge under section 1983.

Id. In light of this, some commentators suggest that the notion of due process must be combined with an understanding of society. See, e.g., RUBIN, *supra* note 10, at 4-5. Rubin points out that "[d]ue process means procedure that is either fair or not fair in a particular context. . . . Proper application of both constitutional standards depends, therefore, on a realistic understanding of social facts rather than a picture of society that is biased and distorted by being viewed through outmoded stereotypes." *Id.*; see also *infra* notes 213-19 (discussing the reluctance of federal courts to become involved if an adequate remedy lies at the state court level).

208. See *Engstrom v. Iowa*, 461 N.W.2d 309, 312 (Iowa 1990). In *Engstrom*, an adoption agency misrepresented facts about an adoptee's background and then claimed it was immune from suit for misrepresentation. *Id.*; see also ANDREA SALTZMAN & KATHLEEN PROCH, LAW IN SOCIAL WORK PRACTICE 417-18 (1990) (discussing immunity from malpractice suits for social workers); Buchanan, *supra* note 3, at 378 n.486 (asserting that although a remedy for unwed fathers would "presumably arise under 42 U.S.C. § 1983" this does not account for "the multitude of problems associated with such a claim," including state action and immunity problems).

209. *Hans v. Louisiana*, 134 U.S. 1, 15-18 (1890) (interpreting the Eleventh Amendment). But see *Rubacha v. Coler*, 607 F. Supp. 477, 480 (N.D. Ill. 1985) (stating that the Eleventh Amendment may historically have been misinterpreted "to bar suits against a state by citizens of that state"). The Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against

against a state official is considered to be a suit against the state for Eleventh Amendment purposes.²¹⁰ A putative father, therefore, must sue state adoption officials in their individual capacities to avoid Eleventh Amendment problems.²¹¹ In contrast to states, local governments are not immune from suit in federal court under 42 U.S.C. § 1983.²¹² In most cases the putative father's claim will be against a local government agency; however, even with the more lenient approach toward suits in federal court against local governments, federal courts are reluctant to extend the arm of federal law into the state forum.²¹³ Furthermore, many states have provisions that indemnify state officials and state employees from damages resulting from unintentional conduct.²¹⁴ Thus, even if a putative father is successful in obtaining a

one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

210. *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (stating that suits against state officials impinge on the public treasury and domain, and interfere with public administration, similar to suits against the state).

211. *Rubacha*, 607 F. Supp. at 480. The *Rubacha* court pointed out that suits against defendants in their official capacities are suits against the state. *Id.* However, the plaintiff's claim was successful because "each defendant [was] sued in his or her *individual* capacity as well." *Id.* (emphasis in original). This avoids Eleventh Amendment problems. *Id.*

212. *Beermann*, *supra* note 187, at 277 n.1 (citing *Owen v. City of Independence*, 445 U.S. 622, 635-58 (1980) (rejecting a lower court award of immunity to a municipality that was sued under § 1983 for a Fourteenth Amendment violation)).

A number of states have largely abolished governmental immunity. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131, at 1045 (5th ed. 1984). Many procedural limitations also have been imposed on suits against the government. *Id.* Often "the claimant must attempt an administrative settlement" before turning to the courts, and a jury trial is generally not available. *Id.* Recoveries may be limited to specific dollar amounts, and claims must be filed soon after the injury. *Id.* at 1045-46. All of these considerations add to the difficulty of an unwed father bringing a successful action against a state or local adoption agency.

213. *See Beermann*, *supra* note 187, at 279 (asserting that federal courts are hesitant to interfere with state sovereignty due to a "contemporary conservative federalism ideology, which embraces a fundamental revulsion against federal control over state official conduct"); *see also Swayne v. L.D.S. Soc. Servs.*, 670 F. Supp. 1537, 1548-49 (D. Utah 1987) (abstaining from hearing a putative father's § 1983 action on the grounds that the father would have an adequate opportunity for review in state court).

214. *See, e.g., ILL. REV. STAT. ch. 127, para. 1302(c)* (1992) (stating that unless there is intentional misconduct, a judge will be indemnified against all damages resulting from his judicial and administrative duties); *see also Rubacha*, 607 F. Supp. at 481 n.9 (referring to *ILL. REV. STAT. ch. 127, para. 1302(c)*); *National Bank v. Leir*, 325 N.W.2d 845, 847 (S.D. 1982) (holding that sovereign immunity precluded a suit by minors against social workers in their individual capacity for alleged negligent placement and supervision in a sexually abusive foster home); KEETON, *supra* note 212, § 131 at 1047-48. Keeton explains that governmental immunity protects against suits for certain types of negligence in the administration of government programs. *Id.* As a matter of public policy, some immunity remains as a shield against municipal liability. *Id.* § 131 at 1052. Keeton states that because many municipal decisions "involve the dilemma of policy intended to be resolved by the legislative or executive branches, the courts will refuse to review them in tort actions." *Id.*

judgment against the adoption agency, he must seek to enforce the judgment over the state's indemnification of the employees.²¹⁵

Finally, there are several policy issues which could make an unwed father's § 1983 suit difficult. State law is seen as an articulation of the policies and values of the people of that state.²¹⁶ To allow federal courts to intervene too frequently in state matters may interfere with the values of the citizens of the state.²¹⁷ Additionally, because the federal courts are generally invoked to address the more pervasive problems of the states and their citizens, the issues that arise in family cases are often better resolved at the state court level.²¹⁸ Powerful principles of state autonomy may weigh heavily against the unwed father's claim in federal court.²¹⁹

2. Adoption Agency Malpractice

A second possible cause of action available to an unwed father is a malpractice claim against the adoption agency. A malpractice action involves an allegation that a professional person, who is expected to possess a minimum amount of experience and to have reached a certain level of competence, failed to exercise reasonable care²²⁰ and departed from the standard of care required of their profession.²²¹ By undertaking to render adoption serv-

215. *Rubacha*, 607 F. Supp. at 481. An indemnification statute, however, should not preclude the putative father's ability to bring the action against the employees as individuals. To do so "would give the State carte blanche to provide a meaningless kind of paper protection—granting an 'indemnification' that would, by its very existence, destroy the liability to which the indemnity purportedly extends." *Id.* The *Rubacha* court found that this would "unconscionably insulate State employees from all liability for their tortious and unconstitutional actions. After all, the Eleventh Amendment was designed to protect sovereign States, not individual citizens." *Id.*

216. Beermann, *supra* note 187, at 287 & n.34. Beermann points out that realistically, however, "state common law is often merely an aggregation of conflicting policy preferences established by various tribunals at various times." *Id.* Still, federal courts treat these "loosely aggregated decisions of state courts as authoritative pronouncements of state policy." *Id.*

217. See *Swayne*, 670 F. Supp. at 1548 (stating that federal courts should defer to the state courts to allow them to fulfill their duty to further state policies which "balanc[e] the competing interests in adoption cases consistent with federal constitutional principles").

218. *Daniels v. Williams*, 474 U.S. 327, 332 (1986) (stating that the United States Constitution is designed to allocate governing authority among the federal government branches and the states, and to secure certain rights); see *infra* note 219.

219. Often, the federal courts are reluctant to take on smaller, state oriented matters. Beermann, *supra* note 187, at 299. Beermann maintains that state autonomy should be preserved in many matters so that the federal courts are not overrun with smaller litigation matters. *Id.*

220. KEETON, *supra* note 212, § 32, at 185. Keeton explains that most of the decided professional malpractice cases deal with surgeons and other doctors, but that the same standard applies to "dentists, pharmacists, psychiatrists . . . and many other professions and skilled trades." *Id.* at 185-86.

221. See, e.g., *Dunn v. Catholic Home Bureau for Dependent Children*, 537 N.Y.S. 2d 742, 743 (N.Y. Sup. Ct. 1989). In *Dunn*, the plaintiff sought money damages for social work malpractice, where she had placed her child with the adoption agency, and where after the plaintiff

ices, the adoption agency holds itself out as possessing the requisite standard of professional skill and knowledge.²²² Applying this standard, an adoption agency is expected to know of the putative father's constitutionally protected right to notice of a pending adoption proceeding involving his child.²²³ An adoption agency's failure to attempt to locate the father, or failure to follow through on attempts to notify him, are factors that will be considered in determining negligence.²²⁴ Evidence demonstrating that it is common for an agency to be unsuccessful in its efforts to notify the putative father of an adoption proceeding would not relieve the agency of its duty to the father.²²⁵ Recent cases have held that adoption agencies are required to adhere to a higher standard of care,²²⁶ based on the premise that adoption agencies are responsible to society as a whole.²²⁷

revoked her consent to surrender for adoption, her child was not returned to her. *Id.* The court found that an adequate statutory framework existed within which to address whether or not the social worker departed from the standard of conduct of the profession. *Id.*; see also *Horak v. Biris*, 474 N.E.2d 13, 19 (Ill. App. Ct. 1985). In *Horak*, the court recognized "social work malpractice" as a cause of action because the legislature had provided social work licensing standards, and therefore a statutory framework existed to determine whether malpractice took place. *Id.* The court found that the legislature was so concerned with the quality of the social work profession that it provided procedures to eliminate incompetent social workers. *Id.*

222. KEETON, *supra* note 212, § 32, at 185-87. Keeton points out that this skill is expected to be the "knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing." *Id.* at 187 (footnote omitted).

223. An agency would be expected to know of the father's right because the standard that is applied is a general, national standard of conduct based on what is "customary and usual in the profession." *Id.* at 189.

It is important to note, however, that the putative father may be as much the cause of his failure to receive notice of the adoption proceeding as the agency. See SALTZMAN & PROCH, *supra* note 208, at 417. Saltzman and Proch point out that even if it can be established that the social worker owed a duty to a plaintiff in a malpractice action, it may be difficult to prove a breach of that duty. *Id.* Additionally, the plaintiff may be unable to show that an injury was foreseeable from the breach of duty. *Id.*

224. KEETON, *supra* note 212, § 33, at 195 (finding that "the failure to comply with customary precaution may . . . be negligence in itself").

225. *Id.* at 194. Keeton argues that the fact that an entire industry uses "slipshod methods cannot serve as absolution for the [entity] being sued." *Id.* at 194-95. Granting such absolution would provide no incentive to improve deficient practices. *Id.* at 195.

226. See, e.g., *Michael J. v. Los Angeles County Dep't of Adoptions*, 247 Cal. Rptr. 504 (Cal. Ct. App. 1988) (dealing with a suit by an adoptive parent and her adoptive child against a county department of adoptions for negligence and fraud due to agency misrepresentation of the child's health).

227. *Id.* at 513. The California court held that:

[w]e cannot countenance conduct which would allow persons who desire entrance into the emotional realm of parenting to be unprotected from schemes or tactics designed to discharge societal burdens onto the unsuspecting or unwary. As trustees of the child's destiny the agency was obligated to act with morals greater than those found in a purveyor's common marketplace.

Id.

A handful of jurisdictions have adopted a social worker malpractice cause of action,²²⁸ which has been analogized to an adoption agency malpractice cause of action.²²⁹ In accordance with this parallel, some states have extended common law principles of negligence to hold adoption agencies accountable for their actions.²³⁰ Negligence, much like malpractice, requires a showing of a duty, breach, causation, and damages to grant recovery.²³¹ The basis of negligence is not carelessness, but behavior on the part of one individual that presents an unreasonable risk of harm to other members of the community.²³² To determine whether a duty exists, the probability of

228. See, e.g., *Horak v. Biris*, 474 N.E.2d 13, 17 (Ill. App. Ct. 1985). In *Horak*, the Illinois Court recognized a cause of action for social worker malpractice where the defendant held himself out as a social worker, his duties placed him in a position of trust, and where he consequently breached his duty to the plaintiff when he had sexual relations with the plaintiff's wife during marital counseling. *Id.* The court found that the counselor had mishandled the transference phenomenon, a common psychological treatment, which amounted to malpractice. *Id.* at 18; cf. *Martino v. Family Serv. Agency*, 445 N.E.2d 6 (Ill. App. Ct. 1982). In *Martino*, the Illinois court did not recognize the tort of social worker malpractice where a marriage counselor engaged in sexual relations with the husband of the couple she was counseling. *Id.* at 8. The court found that the conduct, while improper, was not intended to harm. *Id.* at 9.

229. States have recognized this tort where a social worker functions as a counselor or psychotherapist. See *Horak*, 474 N.E.2d at 17; see also *Engstrom v. Iowa*, 461 N.W.2d 309, 316 (Iowa 1990) (noting the similarity between the "duties and discretion statutorily required of social workers in child removal situations and foster care placements" and the "responsibilities in termination proceedings and adoption placements").

When determining whether or not to extend a cause of action to a new area, courts will determine whether the legislature intended to create a cause of action when the particular law was drafted. *Engstrom*, 461 N.W.2d at 315-16. In *Engstrom*, the court concluded that the legislature did not intend to create a private cause of action for pre-adoptive parents where the adoption placement was not finalized due to complications. *Id.* at 316. In a jurisdiction that has not yet addressed the duty of an adoption agency to notify the unwed father regarding adoption proceedings, a court will likely look to see whether the legislature, in drafting the relevant statute, intended to create a cause of action for a putative father whose rights were violated.

230. It is a well-recognized principle that new reaches of law grow out of existing statutory requirements. *Roe v. Catholic Charities*, 588 N.E.2d 354, 357 (Ill. App. Ct.), *appeal denied*, 602 N.E.2d 475 (Ill. 1992). In *Roe*, adoptive parents brought a cause of action against an adoption agency for fraud, breach of contract, and negligence. *Id.* at 356. Although Illinois had not recognized this cause of action in the past, the court found that recognition of this cause of action was "not a dramatic, radical departure from the established common law of the State of Illinois." *Id.* at 357. The court held that "[i]t is rather an extension of the doctrine of common law fraud. This is how the common law traditionally grows; it responds to the needs of the society it serves." *Id.*; see also *Foster v. Bass*, 575 So. 2d 967 (Miss. 1990). In *Foster*, an adoptive father filed a complaint against an adoption agency for failing to assure that his adopted child was tested for phenylketonuria (PKU) at birth. *Id.* at 968-69. The father alleged that the adoption agency "owed a duty to exercise reasonable care in investigating the health of [the child] and in advising his prospective adoptive parents of any health problems." *Id.* at 972.

231. *Foster*, 575 So.2d at 972.

232. KEETON, *supra* note 212, § 31, at 169-70.

harm resulting from the breached duty must be foreseeable.²³³ In addition to the foreseeability of harm, many factors must be considered, including the degree of certainty of injury as a result of the conduct, the connection between the conduct and the injury, the moral blame associated with the conduct, and the prevention of future harm.²³⁴

Not every jurisdiction has confronted an adoption agency malpractice action, and of those that have, a number of states have refused to recognize it.²³⁵ Those that have faced the issue have struggled with the scope of the duty owed by the agency.²³⁶ In general, courts are reluctant to imply a cause of action or to impose tort liability upon a state and its employees in carrying out their statutory duties in the area of family law.²³⁷ In cases

233. *Id.* at 975. In *Foster*, both parties asserted that in order to succeed on a negligence-based action, it must be demonstrated that the actor should have foreseen the probability of harm from his conduct. *Id.* The *Foster* court, considering many factors, held that the agency "reasonably could not have foreseen . . . that the medical professionals would be negligent in performing their duties." *Id.* at 981. Although an unwed father might be successful in demonstrating that the harm to him was foreseeable, the courts would subject the facts and circumstances of each case to extensive analysis. See *supra* notes 99-171 (subjecting each father's case to critical analysis by the courts).

234. *Richard P. v. Vista Del Mar Child Care Serv.*, 165 Cal. Rptr. 370, 373 (Cal. Ct. App. 1980). In *Richard P.*, the court considered these factors in addition to "the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." *Id.*; see PHILIP E. DAVIS, MORAL DUTY AND LEGAL RESPONSIBILITY (1966) (discussing the development of duties and responsibilities within society and the problems associated with assigning liability for specific acts and justifying those decisions); see also SALTZMAN & PROCH, *supra* note 208, at 412-30 (discussing the nature of professional liability for social workers and their corresponding duties and responsibilities).

235. See, e.g., *Petrowsky v. Family Serv.*, 518 N.E.2d 664, 665-66 (Ill. App. Ct. 1987), *appeal denied*, 522 N.E.2d 1256 (Ill. 1988). In *Petrowsky*, the court specifically rejected such a claim where preadoptive parents sued a private adoption agency for deficient paperwork and investigation regarding the paternity of an adopted child. *Id.* at 665. The court held that "no precedent or policy compell[ed it] to recognize the tort of adoption agency malpractice." *Id.* at 666. See also *National Bank v. Leir*, 325 N.W.2d 845, 847 (S.D. 1982) (holding that the state had not expressly used the terms "social worker malpractice" or "adoption agency malpractice" in the past, and would not begin to do so); see also SALTZMAN & PROCH, *supra* note 208, at 413 (asserting that it may be difficult to impose malpractice liability against social workers). Saltzman and Proch argue that the tort of social work malpractice may not be recognized because in some jurisdictions, social work may not be viewed as a profession requiring special skills and training, and because the parameters of the social work profession may not be clearly defined, particularly where social workers are not licensed or credentialed. *Id.*

236. *Foster*, 575 So. 2d at 979-81. In *Foster*, the court found that the child's disease could not be known to the agency because the PKU test is normally performed by the hospital and the agency has no role in the process. *Id.* at 981. However, the court struggled with its decision because the case was one of first impression, and there was limited analogous authority from other jurisdictions. *Id.* at 979. The court held that "[w]e have been able to find only a limited number of analogous cases from other jurisdictions, which discuss the duty of care imposed upon adoption agencies in placing children." *Id.*

237. See *Engstrom v. Iowa*, 461 N.W.2d 309, 315 (Iowa 1990) (holding that the legislature did not intend a tort action against the state in some child care situations); see also *Smith v.*

involving adoption agencies, it is difficult to satisfy many of the conditions necessary to attach liability.²³⁸ Additionally, the remedy that an unwed father may be awarded is often difficult to determine.²³⁹ Finally, courts are sensitive to the principle that adoption agencies provide an unparalleled opportunity to couples who may be otherwise unable to raise a family.²⁴⁰

B. Public Policy Concerns

Some courts fear that imposing liability on adoption agencies will frustrate the agencies in their operations.²⁴¹ Other courts view the injuries inflicted upon persons involved in the adoption process as unavoidable, and see them as an ever-present factor in a complex society.²⁴² Adoption agencies have argued persuasively against the recognition of additional duties that may

Alameda County Soc. Servs. Agency, 153 Cal. Rptr. 712 (Cal. Ct. App. 1979) (rejecting a claim that a county adoption agency negligently failed to take reasonable action to prompt a child's adoption); *Leir*, 325 N.W.2d at 847 (holding that sovereign immunity precluded a suit by minors against social workers, in their individual capacity, for alleged negligent placement in a sexually abusive foster home); *supra* notes 214-15 (discussing governmental immunity).

238. See *supra* note 234 and accompanying text (listing the factors to be assessed when considering the imposition of liability).

239. Damage actions against social workers are a "relatively recent phenomenon, arising primarily in the past few decades." *Engstrom*, 461 N.W.2d at 316. Successful damages actions indicate that gross negligence will result in a successful claim. See, e.g., *Haselhorst v. Nebraska*, 485 N.W.2d 180, 189-90 (Neb. 1992) (awarding damages where a social service agency failed to discover a foster child's medical history of violent tendencies, and the foster child sexually abused the foster parent's children). In *Haselhorst*, damages of approximately \$600,000, awarded to the foster parents and their four minor children, were not deemed excessive to compensate for the state's negligence in failing to prevent the foster child from pursuing his conduct. *Id.* The court held that "to contend to the contrary is an attempt to further minimize the flagrant damages that the State and its agents allowed to be inflicted on the plaintiffs." *Id.* at 190.

240. *Richard P. v. Vista Del Mar Child Care Serv.*, 165 Cal. Rptr. 370, 374 (Cal. Ct. App. 1980). The *Richard P.* court recognized that proposed liability could "impede the proper functioning of adoption agencies." *Id.* (quoting *Smith v. Alameda County Soc. Servs. Agency*, 153 Cal. Rptr. 712, 716 (Cal. Ct. App. 1979)).

241. See, e.g., *Smith*, 153 Cal. Rptr. at 716-17 (holding that an agency does not have a duty to find a child an adoptive home). The *Smith* court rejected a 17-year-old boy's claim against a county adoption agency. *Id.* at 717. The boy had been in the agency's custody since the age of two, and he charged the agency with failure to find him a permanent home. *Id.*; see also *Richard P.*, 165 Cal. Rptr. at 374 (adopting the *Smith* court's stance that liability could impede the functioning of adoption agencies).

242. *Martino v. Family Serv. Agency*, 445 N.E.2d 6, 9 (Ill. App. Ct. 1982); see also *Engstrom*, 461 N.W.2d at 317. In *Engstrom*, the adoption agency failed to determine that the adopted child's father was still alive. *Id.* at 312. The court held this failure did not give rise to a tort of negligence grounded on professional malpractice stating that "social workers [do not] owe an actionable duty to preadoptive parents to determine whether a natural parent is alive or dead." *Id.* at 317.

While such cases are difficult, some courts view them as an opportunity to "grapple with the duties and responsibilities of a private adoption agency in placing children." *Foster v. Bass*, 575 So. 2d 967, 967 (Miss. 1990).

place unreasonable burdens on the agencies.²⁴³ The agencies assert that potential liability would discourage adoptions and render some children difficult to place.²⁴⁴ Although public policy recognizes some duties and obligations that adoption agencies must exercise,²⁴⁵ the limitations of adoption agencies are clearly understood.²⁴⁶

243. Successful actions have been brought against adoption agencies where the agency fails to disclose information about a child's genetic parents and medical background. *See, e.g., M.H. v. Caritas Family Servs.*, 488 N.W.2d 282, 288 (Minn. 1992). In *Caritas*, the court held that public policy does not preclude a negligent misrepresentation action against an adoption agency where the agency negligently withholds information and misleads the adoptive parents. *Id.* The adoption agency in *Caritas* informed the adoptive parents that there may have been incest in the child's background, which the parents accepted. *Id.* However, the agency never told the adoptive parents that the child's actual parents were a 17-year-old boy and his 13-year-old sister. *Id.* at 285. The agency argued that they should not be required to independently verify family histories given to them by genetic parents. *Id.* at 287. Similarly, agencies can argue that requiring them to verify information provided by an unwed mother regarding the paternity of a child places an unreasonable burden on their activity.

244. This is not an unlikely result of imposing liability. Already, adoption agencies "bend over backwards to accommodate the interests of biological fathers. Often this amounts to denying women the opportunity of adoption, if a biological father cannot be found because the risk of future litigation is a risk that few agencies or adoptive parents are willing to take." Letter from Mary Beth Seader, M.S.W., Vice President for Policy and Practice, National Council for Adoption to Alexandra R. Dapolito (Jan. 15, 1993) (on file with author).

245. Some courts have held that the recognition of additional duties in certain situations does not unduly burden adoption agencies. This concept stems from the fact that adoption agencies are not to be relieved of liability where the agency intentionally conceals or misrepresents the health of an adoptee. *See, e.g., Caritas*, 488 N.W.2d at 288 (holding that the imposition of a duty to provide accurate medical information "merely requires [the agencies] to use due care to ensure that when they undertake to disclose information about a child's genetic parents and medical history, they disclose that information fully and adequately so as not to mislead prospective adoptive parents"); *see also Michael J. v. Los Angeles County Dep't of Adoptions*, 247 Cal. Rptr. 504, 511-13 (Cal. Ct. App. 1988) (stating that public policy does not condone the concealment or intentional misrepresentation of information that misleads the adoptive parents); *Burr v. Board of County Comm'rs*, 491 N.E.2d 1101, 1109 (Ohio 1986) (withholding information about a child's health by an adoption agency deprives adoptive parents of the right to make their decision "in an intelligent manner"). The principle that adoption agencies should be held liable in health-related circumstances is long-established. *See, e.g., County Dep't of Public Welfare v. Morningstar*, 151 N.E.2d 150, 155 (Ind. App. Ct. 1958). In *Morningstar*, the court set aside an adoption where the Department of Public Welfare informed the adoptive parents that a child was in adequate physical and mental health, when in actuality, the Department was aware that the child had been sexually abused by her natural father. *Id.* The Indiana court held that it could not condone "such dishonest conduct of a public welfare agency." *Id.*

246. *See, e.g., Richard P. v. Vista Del Mar Child Care Serv.*, 165 Cal. Rptr. 370, 374 (Cal. Ct. App. 1980) (holding that adoptive parents could not bring a suit for fraudulent misrepresentation where a child later developed health problems, for to impose liability "would in effect make the adoption agency a guarantor of the infant's future good health"); *see also Foster v. Bass*, 575 So. 2d 967, 979-81 (Miss. 1990) (finding that an adoption agency cannot be held responsible for a doctor's failure to diagnose a child's health problems). *Contra Roe v. Catholic Charities*, 588 N.E.2d 354, 360 (Ill. App. Ct.) (finding that requiring an adoption agency to disclose a child's disability to the adoptive parents is consistent with the law, ensures against

Not surprisingly, the putative father's rights established by the Supreme Court collide with the powerful public policies that protect adoption agencies, the validity of adoption decrees, and the rights of adoptive parents.²⁴⁷ Thus, there is inherent tension between the acknowledged ability and potential of an unwed father to successfully fulfill his parental role,²⁴⁸ enhanced by the increasing acceptance of non-traditional families,²⁴⁹ and the state's interest in expediting and finalizing adoptions to create a family, which is in the child's best interest.²⁵⁰

The growing trend of taking extraordinary steps to grant natural fathers a hearing on fitness places many potential and some finalized adoptions in jeopardy.²⁵¹ There is grave dissatisfaction with the present accommodation of putative fathers in adoption proceedings.²⁵² Judges and adoptive families recognized that in many cases, putative fathers follow up on their supposed

fraud, and does not make the agency a guarantor of the child's "future health and happiness"), *appeal denied*, 602 N.E.2d 475 (Ill. 1992).

Often the statutes that govern family-service agencies recognize that they cannot be expected to make affirmative efforts to reunite families. *See In re A.C.*, 597 A.2d 920, 925 (D.C. 1991) (rejecting the duty of a social service agency to make reasonable efforts to foster the reunification of a family); *cf. In re Lori D.*, 510 A.2d 421, 424 (R.I. 1986) (commending a family-service agency for its efforts to bring a family together). Similarly, if adoption agencies were burdened with a statutory-charge to keep natural families together, their ability to function would be greatly obstructed.

247. *See, e.g., In re M.N.M.*, 605 A.2d 921, 932 (D.C. 1992) (Gallagher, J., dissenting) (asserting that "prospective adoptive parents could not reasonably be expected to pursue [adoption] if after the whole long process is ended, they may nevertheless sometime in the future lose their adopted child to one claiming a higher priority, *e.g.*, a putative natural parent"), *cert. denied*, 113 S. Ct. 636 (1992).

248. *See supra* notes 29-96 and accompanying text (discussing the development of the unwed father's rights); *see also* SALTZMAN & PROCH, *supra* note 208, at 214. The authors point out that "[d]espite *Lehr* and the provisions of any applicable State statutes, it is good practice to attempt to locate and involve fathers, not only when termination is being considered, but also early on in the process of intervention. The father and his family may be viable placement resources." *Id.*

249. *See* DONALD BRIELAND ET AL., *CONTEMPORARY SOCIAL WORK: AN INTRODUCTION TO SOCIAL WORK AND SOCIAL WELFARE* 253 (3d ed. 1985). Brieland asserts that "[t]he family form regarded as 'traditional' is composed of two married parents giving care to one or more of their own children." *Id.* Brieland points out that the current shape of many families has shifted away from the traditional form, due to the rise in the divorce rate and large numbers of births outside of marriage, among other factors. *Id.* The number of fathers serving as single parents increased 61 percent between 1970 and 1981. *Id.* at 254. Significantly, no state prohibits adoption by single adults. *Id.* at 253.

250. *See* RUBIN, *supra* note 10, at 47. Rubin asserts that "[u]nder the traditional family ideology, the biological, unmarried father is ignored; a protected status is accorded to the family, once established. . . . The family is protected in large part because its functions include not only reproduction, but also the support and education of the resulting children." *Id.*

251. *See supra* notes 100-71 and accompanying text.

252. *See* Adoption of Kelsey S., 823 P.2d 1216, 1237 (Cal. 1992) (stating that a father's actions once he discovers he is a father are crucial); Appeal of H.R., 581 A.2d 1141, 1201 (D.C. 1990) (Belson, J., dissenting) (listing the ways H.R. could have protected his interest); *In*

interest in their children in a highly untimely fashion.²⁵³ It is feared that if excessive deference is given to putative fathers, adoptive parents may lose confidence in the possibility of adoption as a parenting option.²⁵⁴

The lack of legal remedies and burdensome public policies weigh heavily against an unwed father in the courts, and accommodating his interests in a delayed manner threatens the institution of adoption.²⁵⁵ For this reason, a statutory solution is necessary to balance the rights and interests of the unwed father with those of the adoptive parents and the children. State legislatures are the appropriate venue for weighing the issues and tensions surrounding putative father's rights.²⁵⁶ An appropriate legislative solution will eliminate lengthy and difficult court battles, while simultaneously protecting the putative father's due process rights and preserving the institution of adoption. This legislative answer is the putative fathers' registry.²⁵⁷

re M.N.M., 605 A.2d 921, 931 (D.C. 1992) (Gallagher, J., dissenting) (failing to accept view that the putative father was "floundering in legal maze"), *cert. denied*, 113 S. Ct. 636 (1992).

253. See *DeBoer v. DeBoer*, Nos. A-64, A-65, 1993 U.S. LEXIS 4665, *2-*3 (July 30, 1993) (Blackmun, J., dissenting); *M.N.M.*, 605 A.2d at 931-32 (Gallagher, J., dissenting). Judge Gallagher expressed his concern when he wrote:

I am unable to view this record as portraying a young man floundering alone in a legal maze It is something of a mystery on this record as to why, having learned of the local adoption proceeding, he did not . . . pursue his parentage claim . . . during all those months, but instead waited until it was much too late and then filed the motion.

Id.; see also *H.R.*, 581 A.2d at 1199 (Belson, J., dissenting). Judge Belson noted:

The record strongly supports the trial judge's finding that the notice appellant received gave him sufficient information to enable him to come forward in timely fashion to establish a father-son relationship if he was then disposed to do so and to enable him to assert seasonably his legal rights as a natural father.

Id.; see also *Kelsey S.*, 823 P.2d at 1237 (holding that the father's conduct throughout the period since he learned he was the father must be considered).

254. *M.N.M.*, 605 A.2d at 932 (Gallagher, J., dissenting) (asserting that there is a "strong public interest in protecting the finality of adoption decrees" and that "[i]f adoptive parents are at risk of losing an adoptive child . . . this might chill locally the movement toward child adoption").

255. See *supra* notes 172-246 (discussing the lack of remedies and the public policies).

256. The state legislatures are where a population's preferences are debated and policy choices are made. See *supra* notes 203-07, 216-19 (discussing federal deference to state choices in many areas).

257. See *FACTBOOK*, *supra* note 1, at 151. The National Council for Adoption stresses the lack of clarity surrounding unwed fathers' rights and "urges states to pass laws similar to the constitutionally-sound New York putative fathers' registry. In addition, agencies are urged to involve biological fathers in counseling and adoption planning to the most appropriate and possible extent." *Id.*

IV. SOLUTION: THE STATUTORY FRAMEWORK

A putative father has a constitutionally-secured right to notice of an adoption proceeding.²⁵⁸ It is clear that once the deprivation of this right occurs, there are few legal remedies for the putative father to pursue.²⁵⁹ *Lehr v. Robertson*²⁶⁰ established that legislative schemes requiring a putative father to demonstrate his commitment to his child within a specific period of time are legitimate.²⁶¹ A putative fathers' registry is an ideal option for state legislatures, because it balances protection of an unwed father's interests with the state's interest in finalizing adoptions.²⁶²

In practice, a putative fathers' registry provides automatic notice of a pending adoption to all legal fathers.²⁶³ Any man not a legal father under the statutory scheme who desires to assert his paternity and parental rights must take the initiative to provide the registry with all necessary information.²⁶⁴ The registry records the name, address, and other relevant information about the putative father.²⁶⁵ The putative fathers' registry provides for

258. See *supra* notes 22-96 and accompanying text (outlining fathers' rights). It is undoubtedly recognized that "[s]ound, ethical, legal adoption practice in the U.S. requires that, with a few notable exceptions such as rape . . . efforts be made to reach putative fathers. . . ." *Fathers' Rights*, *supra* note 4, at 1.

259. See *supra* notes 172-250 and accompanying text (discussing legal rights and the public policies that weigh against the putative father).

260. 463 U.S. 248 (1983).

261. *Id.* at 266-68.

262. *Infra* notes 252-56 and accompanying text.

263. *Fathers' Rights*, *supra* note 4, at 3. For example, "legal" fathers entitled to notice under New York's scheme are men married to the mother at the time of the child's birth; men adjudicated to be the legal father; men named as the father on the birth certificate; men living with the mother at the time of the child's birth; and men named by the mother as the father. *Id.*

It should be noted that many states have established "voluntary adoption registries." These registries should not be confused with the putative fathers' registries. Voluntary adoption registries are designed to promote an exchange of biological information between adoptees and their biological parents. See, e.g., OR. REV. STAT. § 109 (1991). The information contained in such registries includes medical, health, ethnic, and religious information, which may be made available to adult adoptees interested in their genetic and social history, and to birth parents, who are interested in learning identifying information about the children they placed for adoption. *Id.* § 109.430. These registries serve different functions than putative fathers' registries, which are designed specifically to provide notice to unwed fathers regarding adoption proceedings involving their biological children.

264. The responsibility to register is on the putative father, and failure to do so can have disastrous consequences. See *Lehr*, 463 U.S. at 251 (finding that the father's claim went unprotected because he did not register); *In re Reeves*, 831 S.W.2d 607, 609 (Ark. 1992) (holding that a putative father would have been entitled to notice of the adoption of his son had he registered in putative fathers' registry).

265. See, e.g., ARK. CODE ANN. § 20-18-704 (Michie 1992). In some states, registry information can be used for various other purposes, such as locating fathers for child support. See GA. CODE ANN. § 19-11-9(e) (Michie Supp. 1992) (stating that a fathers' registry may be used to enforce support obligations). This is an obvious benefit of having such detailed information

the unwed father's right to notification of the adoption proceeding, but does not create a requirement that he approve of the proceeding.²⁶⁶ Further, lack of knowledge of the registry is not a valid defense should a putative father fail to register.²⁶⁷

Several states have already created putative fathers' registries.²⁶⁸ Particular elements of these registries make them successful. These factors should be considered by states developing their own registries.²⁶⁹

on file, however, this Comment does not address the use of the registry for such purposes, nor the implications of this practice.

266. *Fathers' Rights*, *supra* note 4, at 3.

267. *See, e.g., Reeves*, 831 S.W.2d at 608 (interpreting *Lehr v. Robertson*, 463 U.S. 248 (1983), as holding that "the possibility the father may have failed to register because of his ignorance of the law was not a sufficient reason for criticizing the law itself"); *Sanchez v. L.D.S. Soc. Servs.*, 680 P.2d 753, 756 (Utah 1984). The *Sanchez* court held that

[i]t is not too harsh to require that those responsible for bringing children into the world outside the established institution of marriage should be required either to comply with those statutes that accord them the opportunity to assert their parental rights or to yield to the method established by society to raise children in a manner best suited to promote their welfare.

Id. In *Sanchez*, the court rejected an unwed father's petition to obtain custody of his child where the putative father failed to follow the statutory procedures for protecting his parental rights. *Id.* at 754-55.

Some states have adopted procedures similar to a putative fathers' registry. The typical procedures allow a putative father to file a "[n]otice of intent to claim paternity." MONT. CODE ANN. § 40-6-126 (1991). The notice contains the putative father's address, and a copy is sent to the mother if her address is also listed. *Id.* The notice must be filed before the birth of the child. *Id.* Fathers who file timely notices are entitled to notice of any hearing to determine the identity of the child's father and a hearing to determine or terminate his parental rights. *Id.* These procedures are also adequate means of protecting the unwed father's rights.

268. *See, e.g., ARK. CODE ANN.* § 9-9-210 (Michie 1987); *GA. CODE ANN.* § 19-11-9 (1992); *IDAHO CODE* § 16-1513 (1992); *LA. REV. STAT. ANN.* § 9:400 (West 1992); *MO. ANN. STAT.* § 192.016 (Vernon Supp. 1993); *N.M. STAT. ANN.* § 32A-5-20 (Michie Supp. 1993); *N.Y. DOM. REL. LAW* § 111-a (McKinney 1992); *OKLA. STAT. ANN.* tit. 10, § 55.1 (West 1987); *TENN. CODE ANN.* § 35-1-111 (1992); *UTAH CODE ANN.* § 78-30-4.8 (1992).

269. States without putative fathers' registries often provide for some type of notice to the putative father. *See supra* note 71 (listing state statutory notification procedures for putative fathers). These provisions are not as effective as the registries. *See, e.g., N.J. STAT. ANN.* § 9:3-45 (West 1993). New Jersey's provision states that the notice requirement to a putative father is satisfied if notice has either been served on the putative father, or if service cannot be made, if notice has been sent by regular mail to the last address, discreet inquiries made among relations, friends or employers, and of the post office, the Division of Motor Vehicles, the county welfare office, the local police department and other similar agencies. *Id.* In any case where the identity of a parent cannot be determined, or where the known parent is unable or refuses to identify the other parent, service of notice on that parent shall be waived. *Id.* This type of statute does not adequately protect the putative father, whereas the registry allows the putative father to take control over his notification.

A. Strict Enforcement

First, a putative fathers' registry must be strictly enforced.²⁷⁰ An effective registry must require that unwed fathers register within the required time frame or face the forfeiture of their opportunity to participate in the adoption proceeding.²⁷¹ The sole purpose for the registry is to give the state the ability to finalize an adoption, which is essential for the mental health and emotional welfare of the children involved.²⁷² If the registry's established cutoff dates are not enforced, the registry loses its effectiveness.²⁷³ Although strict enforcement may appear harsh, rigid enforcement of the registry's requirements will avoid lengthy and destructive court battles.²⁷⁴ A putative fathers' registry effectively advances public policies favoring expeditious adoption proceedings only when all interested parties, including the

270. See, e.g., UTAH CODE ANN. § 78-30-4.8 (1992). Utah's statutory provision provides that putative fathers must register with the state Bureau of Vital Statistics prior to the placement of a child with an adoption service in order to be valid. *Id.*; see also *Sanchez*, 680 P.2d at 755. Utah enforces its registry requirement stringently. *Id.* In *Sanchez*, an unwed father who registered a day after the placement of his child with an adoption service was not permitted to have custody of his child. *Id.*

271. *Sanchez*, 680 P.2d at 755. In *Sanchez*, the unwed father contended that the state provision denied him liberty without due process, however, the court held that a reasonable cutoff date was appropriate. *Id.* The same strict approach is used in other states. Under Arkansas' putative fathers' registry, a father who fails to register denies himself the opportunity to notice of potential adoption proceedings. See *In re Reeves*, 831 S.W.2d 607, 608-09 (Ark. 1992) (holding that unwed father's failure to register in the registry caused his loss of notification of the adoption proceeding).

272. *Sanchez*, 680 P.2d at 755. New York also strictly construes its registry. See *supra* note 179 (noting that a father's eventual registration with the registry will not cure delay). Strict construction is absolutely necessary for the adoptee's emotional stability. See *supra* note 14 (discussing the best interests of the child standard).

273. The Utah Supreme Court held that a firm cutoff date for enrolling in the registry was essential. *Sanchez*, 680 P.2d at 755. Although some allusion was made to the fact that the social service agency might have had a duty to inform the unwed father of the registry's requirements, the court did not address the issue in a definitive manner. *Id.* at 755 n.2. The court stated: "Whether L.D.S. Social Services had some duty to inform is not established by this record. But if it did and breached that duty, that does not constitute state action or result in a violation of due process." *Id.*

274. See *Reeves*, 831 S.W.2d at 607-09. In *Reeves*, the mother, Lynn, reported to the adoption agency that the father of the child was unknown, although she knew who he was, and the father was aware she had given birth. *Id.* at 607. Lynn and father, Tom, were divorced, but during a reconciliation effort she became pregnant. *Id.* She then married another man, and although she and Tom acknowledged he was the father, when her new husband petitioned to adopt the child, she listed the father as unknown. *Id.* Tom had not registered in the putative father's registry. *Id.* Her new husband adopted the child, and when Tom petitioned to set the adoption aside, the Arkansas Supreme Court held that because he had failed to register in the putative fathers' registry, the adoption would remain final. *Id.* at 609. The court pointed out that because Tom's petition did not challenge the constitutionality of the notice provisions of the registry, thus, the court did not have cause to address it. *Id.* Without a constitutional challenge, his failure to register alone ended his claim. *Id.*

putative fathers, are required to adhere to the precise procedural requirements of the statute.²⁷⁵

B. Avoid Unnecessary Presumptions

In addition to strict enforcement of the statutory framework, states should avoid the inclusion of unnecessary presumptions when developing the registry.²⁷⁶ The registry should provide automatic notice of adoption proceedings to certain categories of fathers, while still allowing for any other man who claims to be the father of the child to register.²⁷⁷ Unnecessary presumptions as applied can result in an unconstitutional infringement on the biological father's due process rights.²⁷⁸ Therefore, a registry that avoids presumptions of legitimacy will also avoid constitutional challenge.²⁷⁹

275. See *supra* notes 241-54 (discussing public policies favoring final adoption proceedings).

276. The result of "procedure by presumption" is that it generally sours and proves unworkable. *Stanley v. Illinois*, 405 U.S. 645, 647-58 (1972) (holding that a presumption that unwed fathers are unfit parents is unconstitutional); *In re Raquel Marie X.*, 559 N.E.2d 418, 424-26 (N.Y.) (finding a New York statutory scheme that required an unwed father to live openly with the child's mother for six months before the child's adoption was unconstitutional), *cert. denied*, 498 U.S. 984 (1990).

277. For example, California enacted the Uniform Parentage Act (UPA) to provide a comprehensive scheme for determinations of paternity and enforcement of state support systems. CAL. CIV. CODE §§ 7000-21 (West 1993). An unnecessary presumption of the UPA is that if a child is born to a married woman, a presumed father exists—her husband—and "absent adoption proceedings the biological father has no standing to sue for a declaration of paternity." See *Michael M. v. Giovanna F.*, 7 Cal. Rptr. 2d 460, 463 (Cal. Ct. App. 1992). Thus, where Giovanna, while pregnant with the child of and engaged to one man, broke the engagement and subsequently married another man and delivered the child, the unwed father had no standing to establish his paternity. *Id.* at 462-63.

278. The unwed father brought suit because the UPA as applied did not allow him to rebut the presumption that the husband at the time of the birth is the presumed father. *Michael M.*, 7 Cal. Rptr. 2d at 467. The court, finding in favor of allowing the biological father to establish his paternity, noted that its holding was limited to the situation where unwed parents conceive, and the mother marries another man before the birth of the child. *Id.* at 468. In such a situation the biological father's due process right to a relationship with his child required that he be allowed standing under the UPA to establish paternity, so long as he had taken prompt steps to preserve his interest. *Id.*

279. The unwed father's suit prompted the California court to balance the biological father's interests with those of the other parties in the family. *Id.* at 465-66. The California court stated that "[t]he mother and her husband have, like Michael [the putative father], done everything in their power to establish a stable traditional family unit." *Id.* at 465. The court recognized that its consideration of the putative father's challenge to the statutory scheme that denied him standing "does not occur in a vacuum." *Id.* The court asserted that it "must balance his acknowledged due process interest . . . against the countervailing interests of . . . [the mother and her new husband], and those of the state, in preserving family integrity." *Id.* at 465-66.

C. The Burden To Register Must Be On The Putative Fathers

State legislatures that endeavor to create and adopt putative fathers' registries will achieve the necessary balance between the competing interests in adoption proceedings. Through the registry, the state will be able to efficiently and definitively protect the putative father's right without involving the courts.²⁸⁰ The burden to register must lie with the putative father, however, thereby removing the responsibility of notification from the adoption agency and respecting valid public policy that rejects the imposition of liability on the adoption agencies in most cases.²⁸¹ Additionally, the registry shields adoptive families from the threat that the adoption will be jeopardized at a later date.²⁸² Finally, adopted children will be given the opportunity to live in a stable environment, thereby satisfying the best interests of the child standard.²⁸³

D. Publicity

In order for a putative fathers' registry to be successful, its availability must be publicized. Some of the states that have registries provide for funding and statewide distribution of information as to the registry's existence, its purpose, procedures on how to register, and most importantly, the consequences of failure to register.²⁸⁴ Although lack of knowledge of the registry

280. See *supra* notes 270-75 and accompanying text (discussing the registry's enforcement).

281. See *supra* notes 241-54 and accompanying text (discussing public policies).

282. See *supra* notes 270-75 (discussing the effect of a strictly construed registry requirement).

283. The currently unsettled procedures in contested adoptions have detrimental effects on the children involved. See, e.g., *DeBoer v. DeBoer*, Nos. A-64, A-65, 1993 U.S. LEXIS 4665, *1 (July 30, 1993) (Blackmun, J., dissenting). Justice Blackmun's dissent emphasized the emotion aspects of adoption cases gone awry when he stated:

This is a case that touches the raw nerves of life's relationships. We have before us, in Jessica, a child of tender years who for her entire life has been nurtured by the DeBoers, a loving couple led to believe through the adoption process and the then-single biological mother's consent, that Jessica was theirs. Now, the biological father appears, marries the mother, and claims parental status towards Jessica.

Id. See also *In re M.N.M.*, 605 A.2d 921, 934 (D.C.), *cert. denied*, 113 S. Ct. 636 (1992). The *M.N.M.* court, reflecting on the result of the remand of the *H.R.* case, noted that the child "became anxious and bewildered" when it became clear that his environment was threatened. *Id.* (citing *In re Petition to Adopt Baby Boy C.*, No. A-249-83, Memorandum Opinion and Judgment (D.C. Super. Ct. Jan. 3, 1992)). The child asked "I'll always stay in this family won't I, even if I meet my father, my natural father?" *Id.* The child "developed a nervous tic in his eye," and felt "he was in the [adoptive] home on a provisional basis." *Id.* The court noted that the child "picked up the anxiety of [the adoptive parents] notwithstanding their best efforts to shield him from their feelings of being threatened by [the natural father's] action. . . . Unavoidably, this case is causing [the child] stress and emotional pain." *Id.*

284. See, e.g., OKLA. STAT. ANN. tit. 10, § 55.1(G)(1-2) (1987) (providing that the Department of Human Services shall establish a centralized paternity registry, make forms available

is not a valid defense to a putative father's failure to register, extensive publicity of a newly created registry would be appropriate to educate putative fathers about the registry and its function.²⁸⁵

V. CONCLUSION

The nature of the family and the protection to which it is entitled has changed dramatically in the past decades.²⁸⁶ Great deference remains with the states in the area of parent-child relations,²⁸⁷ thus, the responsibility remains with the states to establish appropriate means to protect all members of the modern family. In light of the fact that the current adoption situation at the state court level is one of uncertainty, and the status of many potential adoptions is at risk, the dilemma is ripe for remedy. Until the rights and responsibilities of putative fathers are effectively addressed, the institution of adoption will continue to slide into jeopardy as a viable parenting option.

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to any putative father, and provide for the publication and statewide distribution of information as to the existence of the registry, the procedures for entry, and the consequences of the failure to register).

285. *Fathers' Rights*, *supra* note 4, at 3.

286. *Lehr v. Robertson*, 463 U.S. 248, 256 (1983). The *Lehr* Court stated that the "intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases.")

287. *See Lehr*, 463 U.S. at 256 (holding that in the vast majority of cases involving the legal problems arising from the parent-child relationship, state law determines the final outcome).