Participation of Unwed Biological Fathers in Newborn Adoptions: Achieving Substantive and Procedural Fairness

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I. INTRODUCTION

Adoptions of children born in the United States to unwed parents typically prompt inquiries into legal maternity and paternity which, when established, necessitate participation rights for the recognized women and men. Recognized parents usually can veto proposed adoptions as long as they are deemed fit. One underlying premise is that marriage should not be the sole route to parental rights. Other premises are that the postbirth parental rights of biological mothers and fa-

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1 The paper addresses only children born as a result of consensual sexual intercourse between unwed mothers and fathers. American adoption laws often distinguish settings where mothers are married. Where there are marriages, presumptions of paternity for the husbands typically arise.

2 The paper distinguishes between legal paternity, legal fatherhood, and actual fatherhood. "Paternity" means there is a man with legally-recognized rights, responsibilities, or both, as the father of a newborn. It can arise from varying acts, including paternity registrations and birth acknowledgments, as well as from presumptions, as with husbands of women who bear children. By contrast, "legal fatherhood" means there is a man with comparable, if not the same, rights and responsibilities who is recognized under law some time after a child is born for reasons unrelated to genetic ties. "Actual fatherhood" means there is a man who assumes childcare in the absence of any legal recognition or responsibility.

3 Participation rights are occasionally not accorded to all recognized in legal paternity. For example, when two men are presumed under paternity law to be the father of a single child, one usually is excluded from participation in an adoption proceeding. See, e.g., In re Kiana A., 113 Cal. Rptr. 2d 669, 675 (Cal. App. 2d 2001) ("Although more than one individual may fulfill the criteria that give rise to a presumption of paternity, there can be only one presumed father.") and In re NDB, 35 P.3d 1224 (Wyo. 2001) (presumption of biological ties for two different husbands; legal father is determined by genetic testing).

4 Recognition of maternity and paternity need not follow a hearing on actual fitness since fitness often is presumed under law. Thus, those opposing veto powers over adoptions for certain biological parents need to show parental unfitness of those parents in order to eliminate participation rights.

5 Where the biological mother is married at the time of conception and birth, it remains unclear whether American states can deem membership in an intact marriage a prerequisite to parental rights, thus denying any federal constitutional child-rearing rights for an unwed biological father even where he established a substantial parent-child relationship. Michael H. v. Gerald D., 491 U.S. 110, 129-130 (1989) [hereinafter "Michael H."] (speaking for four Justices, Justice Scalia says "categorical preference" could be given to the wife and husband as "an adulterous natural father" should not be protected). Compare C.C. v. A.B., 550 N.E.2d 365 (Mass. 1990) (putative unwed biological father could sue in paternity regarding a child born into an intact marriage as long as a substantial parent-child relationship was shown by clear and convincing evidence) and Strausser v.
and fathers should be similar and that it is preferable for children to be raised by at least one biological parent. Thus, when children are born to the unwed, the biological parents frequently are accorded in adoption proceedings the same (or at least similar) participation rights as are accorded married and divorced biological parents whose children might be adopted.

Yet unwed biological parents are not always themselves treated comparably. Biological mothers and fathers typically have distinct ways to secure parental rights warranting participation. Only mothers automatically achieve maternity, thereby acquiring parental rights solely based on biological ties. Parental rights for fathers may only arise if there are both biological ties and actual parent-child relationships. Unfortunately, while some distinctions between mothers and fathers are needed, too often the parental opportunity interests and child-rearing rights of unwed biological fathers are not fully respected. After reviewing maternity and paternity laws, this paper will focus on the unfair legal treatment accorded many unwed biological fathers during adoptions of their newborn children. Frequently, unwed biological fathers have little or uncertain information about their offspring around the time of birth. Even when aware, these fathers may have had little opportunity to develop parent-child relationships or to overcome obstacles to legal paternity, such as prebirth abandonment, for which they are blameless. The paper will demonstrate how some schemes for paternity recognition in newborn adoptions are substantively unfair to unwed biological fathers. It will also show how in many newborn adoptions governmental inquiries into paternity, as well as available methods of proving biological ties or necessary parent-child relationships, are procedurally flawed. The paper will conclude with suggestions on how fairer

Stahr, 726 A.2d 1052, 1055-1056 (Pa. 1999) (legal paternity presumption favoring husband is irrebuttable where marriage is intact and married couple objects to paternity challenge by alleged unwed biological father), though the latter is undercut somewhat in B.S. and R.S. v. T.M., 782 A.2d 1031 (Pa. Super. 2001) (presumption did not apply to child born to married couple where couple was separated for over a year during which time wife bore child; wife and unwed biological father looked for a home; and, unwed father was present at child's birth, acknowledged paternity, and provided child health care coverage).

6 See, e.g., N.Y. SOC. SERV. LAW § 384-b(1)(ii) (McKinney 2002) ("it is generally desirable for the child to remain or be returned to the birth parent because the child's need for a normal family life will usually best be met in the home of its birth parent, and that parents are entitled to bring up their own children unless the best interests of the child would be endangered").

7 See, e.g., Stanley v. Illinois, 405 U.S. 645, 657-658 (1972) (requiring similar treatment in child custody settings for "unmarried fathers" and for "married parents, divorced parents and unmarried mothers" as differing treatment "explicitly disdains present realities in deference to past formalities").

8 Actual parent-child relationships seemingly can override earlier obstacles to legal paternity at the time of birth, thus reviving parental rights. Too date there has been little talk of revived parental rights for unwed biological fathers. Yet in many later age adoption settings, participation rights are afforded unwed biological fathers only because they developed parent-child relationships after birth, though at the time of birth their parental rights had not yet vested and the newborn or early age adoptions could have proceeded without their participation. See, e.g., MINN. STAT. ANN. § 259.49(1)(b)(2) (notice of adoption petition given to the "parent" who has "substantially supported the child" or who has openly lived with the child and natural mother).
treatment can be afforded unwed biological fathers during newborn adoptions.9

II. MATERNITY AND PATERNITY IN ADOPTIONS

The standards for recognizing legal paternity and legal maternity in adoptions, as elsewhere,10 usually differ. Paternity designation often requires more than biological connection and presence at birth though they suffice for maternity designation. Differing standards on paternity and maternity have been permitted by the United States Supreme Court. For federal constitutional child-rearing rights, the Court has recognized that state laws can differentiate between the biological mothers and the biological fathers of children conceived through consensual sexual intercourse. In a dissent in 1979, which has since been widely used,11 Justice Stewart wrote:

Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring. The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures. By tradition, the primary measure has been the legitimate familial relationship he creates with the child by marriage with the mother... In some circumstances the actual relationship between father and child may suffice to create in the... father parental interests...12

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9 The paper assumes that state laws, rather than federal laws, will continue to guide legal paternity designations in American adoptions. Elsewhere I have suggested that federal lawmakers should consider the nationalization of birth certificate practices for all children born in the United States. Old-Fashioned Pregnancy, Newly-Fashioned Paternity, 53 SYRACUSE LAW REVIEW 59 (2003). Another commentator has suggested the establishment of a national database that will “enhance and connect” state and local putative father registries and thus unify, in some way at least, paternity designations in the United States. Mary Beck, Toward A National Putative Father Registry Database, 25 HARVARD JOURNAL OF LAW & PUBLIC POLICY 1031, 1033 (2002). I leave for another day issues involving the nationalization, or further standardization, of legal paternity norms for children born in the United States.

10 Often, but not always, legal and maternity paternity in adoption settings follow the standards applicable in birth certificate settings. In both there are usually alternative routes to paternity designation, but not maternity designation and the standards guiding paternity differ from the standards guiding maternity.

11 See, e.g., Lehr v. Robertson, 463 U.S. 248, 260 (1983) (J. Stevens, speaking for himself and five other justices, deems J. Stewart's observations correct) [hereinafter "Lehr"].

12 Caban v. Mohammed, 441 U.S. 380, 397 (1979) (J. Stewart, dissenting) [hereinafter "Caban"]. The paper will not explore any equal protection difficulties with federal or state laws automatically conferring parental rights at birth only upon a biological mother where there is proof at birth as to the identity of both the unwed biological mother and the unwed biological father. See, e.g., Nguyen v. INS, 533 U.S. 53, 68-69 (2001) [hereinafter "Nguyen"] (such comparable treatment of unwed biological mothers and fathers arguably would both obviate “the subjectivity, intrusiveness, and difficulties of proof that... attend an inquiry into any particular” actual relationship between father and child and foster “an easily administered scheme;” as well, it would avoid a “stereotype” based on “irrational or uncritical analysis” indicating that biological mothers are somehow more deserving of parenting newborns than biological fathers); id. at 76 (“...overbroad sex-based
Where biological fathers must show actual parent-child relationships in order to secure paternity designations in adoption proceedings, the applicable standards will be unfair if they are not well known and informative. Further, should the substantive measures for necessary relationships be too onerous, there is the likelihood of much unfairness.

Differing treatment at birth of biological mothers and fathers extends beyond substantive guidelines. In 2001, Justice Kennedy approved different procedures for women and men seeking to secure parental rights through proof of genetic ties. He declared:

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

In the case of the father, the uncontestable fact is that he need not be present at the birth. If he is present, furthermore, that circumstance is not incontrovertible proof of fatherhood. Fathers and mothers are not similarly situated with regard to the proof of biological parenthood. The imposition of a different set of rules for making that legal determination with respect to fathers and mothers is neither surprising nor troublesome from a constitutional perspective.\(^\text{14}\)

Thus, even where the legal import of biological connections to parenthood is quite similar for men and women,\(^\text{15}\) methods of proof vary.\(^\text{16}\) Should the procedures be generalizations are impermissible even when they enjoy empirical support") (J. Breyer dissenting); \(\text{and id. at 89}\) (one impermissible stereotype is the generalization that mothers are significantly more likely than fathers to develop caring relationships with their children) (J. Breyer, dissenting). Seemingly there are fewer difficulties with unequal treatment when the mothers are wed to other men since governmental interests in preserving intact marriages may be considered.

\(^{13}\) Of course, where male and female parental interests normally arise at birth, biological fathers and mothers may be similarly treated after birth. For example, they both may be foreclosed from parenthood because their unfitness is shown through prebirth maternal ingestion of illegal drugs. \(\text{See also In re R.B. S., 36 P.3d 300}\) (Kan. Ct. App. 2001) (violent and abusive conduct and neglect of older son prior to his death allowed court to find a newborn to be a child in need of governmental care). \(\text{Compare In re Termination of Parental Rights to Quianna M.M., 2001 WL 1046974, 635 N.W.2d 907}\) (Wis. App. Sept. 13, 2001) (statute barring parenthood for those committing sexual assaults leading to births applied only to biological fathers and thus not to biological mothers whose pregnancies resulted from their criminal sexual assaults of minors).

\(^{14}\) Nguyen, 533 U.S. at 62-63.

\(^{15}\) The legal significance of biological ties of men and women to children under state law need not, but often does, follow the federal constitutional analysis set forth by Justice Stewart in 1979. \(\text{In the Interest of J.W.T., 872 S.W.2d 189}\) (Tex. 1994) (natural fathers not always guaranteed legal relationships with illegitimate offspring).

\(^{16}\) Besides methods of proving maternity and paternity, there are other procedural law differences between unwed biological mothers and fathers. For example, in some American states only
unduly difficult or costly for men, there is the likelihood for much unfairness.

The substantive differences between maternity and paternity often mean that some fit biological fathers, but not fit biological mothers, are involuntarily foreclosed from legal parenthood and thus from participation in adoptions. This occurs, for example, when the biological father fails to step up toparenthood in legally specified ways by establishing an “enduring” parental relationship. The parental opportunity interests for biological fathers can be lost even where the fathers were unaware of the births of their biological offspring through no fault of their own and due to the deceit of biological mothers; even when the fathers clearly would have actually parented had they known; and, even when they parented, in fact, as soon as they became aware. Such losses are unfair. Laws should try to minimize them. In contrast, a biological mother acquires parental rights automatically, even when she fails to step up affirmatively in any way before or after birth, as her “enduring” parental relationship is established solely because she “carries and bears the

biological fathers may waive any child-rearing rights prior to birth in order to facilitate adoptions. See, e.g., Del. Code Ann. tit. 13, § 1106(c) (1999) (“A mother whose consent to the termination of parental rights is required may execute a consent only after the child is born. Consent by the father or presumed father may be executed either before or after the child is born.”); Nev. Rev. Stat. 127.070 (1998) (“All . . . consents to adoption executed . . . by the mother before the birth of a child or within 72 hours after the birth . . . are invalid . . . A . . . consent to adoption may be executed by the father before the birth . . . if the father is not married to the mother.”); and, N.C. Gen. Stat. § 48-3-604 (1998) (man can consent to adoption before or after birth, but mother may consent “at any time after the child is born but not sooner”).

17 While participation rights may be lost, parental responsibilities for child support continue for the biological fathers. See, e.g., In re T.M.C., 52 P.3d 934 (Nev. 2002) (no termination of financial responsibilities for biological father where the child was a teen and where the father had long ago abandoned the child, as it was not in the child’s best interests as the child could benefit in the future from the father’s financial support, which included father’s reimbursement of a state welfare agency for assistance it had provided the child). See also State v. Hall, 48 P.3d 350 (Wash. Ct. App. 2002) (biological ties to an adopted child continue to be important in some legal settings; earlier relinquishment of parental rights is no defense to criminal second degree incest charge involving a child the defendant knew to be his biological offspring).

18 See, e.g., In re Paternity of Baby Doe, 734 N.E.2d 281, 285 and 287 (Ind. Ct. App. 2000) [hereinafter “Baby Doe”] (stating in an adoption setting: “Although we have found no Indiana cases addressing this issue, other courts from sister states considering cases similar to this one have placed the responsibility for promptly asserting parental rights on the putative father, even when the mother of the child has attempted to prevent the father’s knowledge of or contact with the child . . . we further agree . . . that a child should not be made to suffer when a putative father is ignorant of his parenthood due to his fleeting relationship with the mother and her unwillingness to notify him about the pregnancy. The child should also not be made to suffer when a putative father makes no inquiry regarding the possibility of a pregnancy.”). Compare Doe v. Queen, 552 S.E.2d 761 (S.C. 2001) (biological dad’s consent to adoption is needed as his “strict” compliance with prebirth support duty is excused when caused by “the whim” of the biological mom and as the dad acted sufficiently and promptly upon learning of birth).

19 Caban, 441 U.S. at 397 (J. Stewart, dissenting). Of course, the parental rights of a biological mother may be terminated shortly after birth if she takes negative steps during her pregnancy (as by repeatedly and voluntarily ingesting illegal and dangerous drugs) or if she has been found unfit as to an earlier-born child, with that finding also indicating she is unfit with respect to rearing her newborn.
The procedural differences for establishing genetic ties by men and women at times mean that, as a practical matter, a biological father, but not a biological mother, can lose legal parent status in an adoption through a technical failure of "proof of biological parenthood." In extreme cases, losses of parental opportunity interests can arise for a man even when he established at birth and thereafter an intimate relationship with his child and when he took significant steps to secure parental rights, as long as he failed to prove biological ties in the precise manner demanded by state law. Too often, the requirements of proof of paternity are both stringent and unknown.

Finally, in many newborn adoptions involving unwed parents, state procedures, as a practical matter, require only the actual consent to adoption of the fit biological mother. While an unwed fit biological father may be facially afforded the "unique opportunity" to parent and thus to gain a veto over any adoption, such a father is often thwarted by inadequate governmental inquiries into biological ties and any actual parenting. Too frequently state procedures fail to require significant efforts to identify, locate and notify fit (or fit and committed) unwed biological fathers before their children are adopted.

Further exploration of substantive legal paternity standards, methods of proving paternity, and governmental inquiries into male genetic ties and parenting, together with suggested reforms, follow.

III. SUBSTANTIVE PATERNITY STANDARDS FOR UNWED BIOLOGICAL FATHERS

In adoptions of children born to unwed parents as a result of consensual sexual intercourse, legal maternity and paternity standards usually differ. For unwed mothers, maternity is established by proof of biology alone, usually noted on birth certificates. Maternity may then be relinquished voluntarily or terminated involuntarily due to prebirth and postbirth misconduct. For unwed fathers, paternity standards often require that proof of biological ties be accompanied by some conduct prior to birth or around the time of birth that evinces "a settled purpose to assume parental duties." Relevant conduct has been described statutorily in adoption settings as involving "a concerned natural father... who has demonstrated a reasonable degree of interest, concern, or responsibility as to the welfare of a child and an opportunity interest to develop a relationship with their children which is constitutionally protected").
of the child"23 or a "father who has provided, or has attempted to provide, the child or the mother during pregnancy with support in a repetitive, customary manner."24 Sometimes, prebirth or at birth conduct germane to legal paternity is described in the negative, as when adoption laws recognize paternity for biological fathers who have avoided abandonment or neglect.25 Such negative male conduct prior to or at birth often is insufficient to cause the involuntary termination of preexisting parental rights of unwed biological mothers, though it suffices to bar the initial vesting of parental rights for unwed biological fathers.26

The substantive standards for legal paternity in newborn adoptions are often unfair. Some statutes define too narrowly how unwed fathers may undertake parental duties. So, paternity may be lost for biological fathers who took significant positive steps in actual fatherhood, but who stepped in ways unrecognized in written laws. As well, unwed fathers who step up at birth to raise their children can be too late, as they may have failed to provide adequate prebirth support, at times even through their attempts were thwarted by unwed mothers.27

Failures of unwed biological fathers to meet statutory paternity norms also can result from poor legislative drafting where the necessary steps to parenthood remain unclear.28 For example, one law that simply says an unwed biological father must avoid "neglect of, or misconduct toward the child" in order to participate in any later adoption proceeding.29 Other laws say that to participate, unwed fa-

24 Fla. Stat. Ann. § 63.062(1)(f) (West 1997) (consent of father required after birth as long as mother has consented). The application of this statute on the issue of abandonment was criticized in Jeffrey A. Parness, Prospective Fathers and Their Unborn Children, 13 U. Ark. at Little Rock L. Rev. 165, 171-172 (1990) [hereinafter "Prospective Fathers"] (under Florida law "unmarried natural fathers ... have few clues on what prebirth paternal conduct will give rise to the right to notice and a chance to be heard on their child's adoption").
25 See, e.g., 750 ILCS 50/1 D, P and Q (Illinois Adoption Act has definitions for "unfit person," "abused child," and "neglected child," but no definitions for fit parents or adequately-reared children).
26 Compare Doe, 543 So. 2d at 746 (biological father has no participation rights in adoption as he failed, as required by statute, to provide sufficient prebirth support though he did provide some support and was thwarted in his efforts to provide further support by the biological mother), criticized in "Prospective Fathers," supra note 24, at 171-172, with Roger D.R. v. Dina L.M., 54 P.3d 56 (Nev. 2002) (voluntary conduct by an existing legal parent resulting in a 5-15 year prison term did not alone establish an intent to abandon a minor child, prompting involuntary termination of parental rights).
27 Doe, 543 So. 2d at 746.
28 Such poor drafting in the criminal law setting can involve several "venerable due process principles - variously framed as the 'void for vagueness doctrine,' the 'rule of lenity,' and the 'fair notice requirement.'" Healthscript, Inc. v. State, 770 N.E.2d 810, 815 (Ind. 2002). In the noncriminal law setting, the void for vagueness doctrine also operates, though there is more tolerance for imprecision as the consequences of uncertainty are qualitatively less severe. Greenville Women's Clinic v. Commissioner, S.C. Dept. of Health and Environmental Control, 306 F.3d 141, 151 (4th Cir. 2002) [hereinafter "Greenville"].
29 750 ILCS 50/1 D(h)(grounds of unfitness). But see In re D.F., 748 N.E. 2d 271 (Ill. App. 4th 2001) [hereinafter "In re D.F."] (Adoption Act declared void for vagueness as it fails to describe adequately "neglect" or "misconduct" that can lead to the elimination of parental rights in adoption proceedings; because the child-rearing right is "fundamental" and its termination "so devastating",

thers must provide "reasonable and consistent payments" amounting to "tangible means of support" or make "reasonable efforts" toward "parental commitment" although "thwarted" by the mother or her agents. Here, the statutory requirements are so vague that they promote unfettered judicial discretion. They invite courts to consider irrelevant (in the evidentiary sense) circumstances such as the bonding between the child and the prospective adopting couple or the comparative fitness of the biological father and the prospective adopting couple. Beyond biological fathers, others also suffer from statutory uncertainties. For example, children and prospective parents who have strongly bonded can be devastated when separated by appellate courts that override trial court decisions rendered difficult by vague paternity norms.

Even when more certain, some statutes are still troubling because of overbreadth. For example, in Mississippi a statute embodies far too much when it requires an alleged father's "full commitment to the responsibilities of parenthood," defined to mean proof of "financial support" during pregnancy and after birth; visits with the child after birth "frequently and consistently" made; and, a willingness and ability "to assume legal and physical care of the child." Even when statutes are more certain and reasonable in scope, unfairness to unwed biological fathers arises where there is no actual notice and little awareness of relevant written laws. Many men (and women) incorrectly assume that biological ties alone suffice for legal paternity, at least where mothers and fathers are unmarried and where pregnancy and birth result from consensual sexual intercourse. They wrongfully equate paternity standards with maternity standards. While we are all usually presumed to know applicable laws and thus may not plead ignorance when charged with breaches, educational outreaches by government seem especially important in areas of significant personal rights, including parenthood, when there is the likelihood of broad public misunderstanding of basic legal principles. Informed decisionmaking by unwed biological parents regarding any later adoptions would be promoted if governments required that known expectant mothers and known prospective fathers receive (e.g., from health care providers) information on in-state paternity laws, including descriptions of legal adoption statute must not be void-for-vagueness as that doctrine is applied in criminal trials). On review this declaration was vacated as unnecessary to the final resolution. 777 N.E.2d 930 (Ill. 2002).

31 MISS. CODE. ANN. 93-17-6(4)(b).
32 See, e.g., In re D.F., 748 N.E. 2d at 282 (finding Adoption Code term "misconduct" to be "utterly standardless," leaving the government with "unfettered latitude" and inviting "arbitrary prosecution"), finding vacated as unnecessary to final resolution, 777 N.E.2d 930, 946 (Ill. 2002).
33 See, e.g., Moran v. Weldon, 57 P.3d 898, 900 (Or. 2002) (federal constitutional child-rearing right prevents a court from awarding child custody in an adoption proceeding to a non-biological parent rather than a biological parent simply because the court believes such an award is in the best interests of the child).
34 MISS. CODE ANN. 93-17-6(4)(a) (not required where no "means" or no "knowledge of the mother's pregnancy or the child's birth").
standards in lay terms and contact points in government should questions arise. The dissemination of such information would also help to reduce the confusion arising out of the wide variations in contemporary American state paternity statutes.

IV. PROOF OF MALE GENETIC TIES OR ACTUAL MALE PARENTING

In adoptions involving children born to unwed parents as a result of consensual sexual intercourse, the techniques for establishing maternity and paternity also differ, as they should. For mothers evidence of the birth alone is sufficient and evidence collection is greatly facilitated by birth certificate laws. For fathers, even when biology alone prompts parental rights, as Justice Kennedy noted the methods of proof involve “a different set of rules” because male presence at birth “is not incontrovertible proof of fatherhood.” In the case before Justice Kennedy, the possible rules on proof by men included “legitimation, paternity oath, and court order of paternity.” In other settings a birth certificate suffices as long as there is “an affidavit of paternity signed by the mother.”

Too many techniques for proving legal paternity in newborn adoptions are unfair to unwed biological fathers. The methods of “proof of biological parenthood,” as well as of actual parenting that is sometimes required in order to prompt recognition of an “enduring relationship,” should not unduly burden “many responsible” fathers seeking parental rights. Yet today many prospective fathers currently face very short time periods within which to act. Many of these men

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35 Compare, e.g., ALA. ADMIN. CODE 420-5-13-.05(2) (2002) (regarding patient orientation and preparation for childbirth, during the course of “prenatal care,” to the extent necessary, “the patient and family . . . shall be counseled or instructed to prepare them for childbirth”; at a minimum “the educational topics include not only nutrition and other health matters, but also “care of the newborn”); ARK DEPT OF HEALTH r. 007-05-002, § 28(F) (critical access hospitals must develop educational programs “for the care of the obstetrical patient and infant,” including many health matters, “Car seat safety”, “referral services”, and “Infant care”); and, CODE ME. R.10-146, § 3C(1) (where births occur at institutions, the institutions must provide to unmarried mothers and alleged fathers, if, present, “pamphlets or other written information provided by the Department of Human Services about paternity establishment and the form used to voluntarily acknowledge paternity”).

36 Heidbreder v. Carton, 645 N.W.2d 355, 367 (Minn. 2002) [hereinafter "Heidbreder"] (biological father told by an Iowa attorney that an adoption of a child conceived in Iowa by two Iowa residents needed the father’s consent; in Minnesota, where pregnant woman moved, though the move was concealed from the father, a father’s consent was unnecessary if he did not file with the paternity registry within 30 days of birth; father who filed in Minnesota 31 days after birth, on the day he first learned of the child’s birth in Minnesota, found to be too late).

37 Nguyen, 533 U.S. at 63. While differing methods of proof are distinguished by the sex of the biological parent, such differences are deemed “sensible . . . given the unique relationship of the mother to the event of birth.” Id. at 64.

38 Id. at 63. Compare, e.g., OR. ADMIN. R. 333-011-0048 (1995) (voluntary acknowledgment of paternity via either “witnessed” paternity affidavit or paternity affidavit containing “notarized signatures for the parents”).

39 MONT. CODE ANN. § 50-15-221(7)(b) (2002) (where mother does sign, affidavit of paternity also must be “signed by . . . the person to be named as the father”).

40 Lehr, 463 U.S. at 264.
remain unaware of the immediate need for proof because no information was presented to them as they awaited the births of their children. Prospective fathers frequently assume, incorrectly, that later proof of biological ties will suffice to establish legal paternity. Many believe that time is not of the essence, perhaps because they incorrectly equate legal paternity in two settings, one involving parental rights and the other involving parental responsibilities. In the latter, child support actions seeking to establish paternity through biological ties long after birth are not uncommon.

Further, the methods of "proof of biological parenthood" or of actual parenting by males in many adoption proceedings often are limited. As with timing, American states do little to insure that prospective or actual biological fathers are truly informed of the appropriate methods, even where the fathers, and even their ignorance, are known to government officers. For example, when many males step up to parenthood by utilizing certain governmental methods, left unmentioned by governmental officers are the different, and perhaps solely appropriate, methods for establishing paternity in order to secure participation rights in adoptions. Thus, a biological father can lose participation rights because he unknowingly employed the wrong method of proof and was never counseled as to legal consequences. In one case, a putative father who failed to file the required prebirth paternity action within thirty days of learning of the mother's intent to place the child for adoption was found to have given "irrevocable implied consent" under statute to an adoption even though he registered with the putative father registry twenty-three days after birth, long before any adoption petition was filed.41

V. INQUIRIES INTO BIOLOGICAL FATHERS AND ACTUAL MALE PARENTING

In adoptions involving children born to unwed parents as a result of consensual sexual intercourse, state officials typically must inquire into genetic ties. We are all too familiar with the stories of children in loving and nurturing adoptive homes being removed long after adoptions seemingly were finalized because the parental opportunity interests of the biological fathers were not adequately investigated or considered. The investigative procedures employed for inquiries into genetic ties, of course, must differ for biological mothers and fathers. For mothers inquiries usually begin and end with birth certificates. Practically speaking, all biological mothers are named on birth certificates; there are few instances of fraud

41 In re Paternity of M.G.S., 756 N.E.2d 990, 997 (Ind. Ct.App. 2001) (applying Ind. Code 31-19-9-15). See also In re Adoption of Baby Girl H., 635 N.W.2d 256, 264 (Neb. 2001) (father failed to challenge proposed adoption properly as his attorney filed a timely lawsuit, but in the wrong court) and Rosero v. Blake, 563 S.E.2d 248 (N.C. 2002) (unwed biological father had few child custody interests even though he had developed an actual relationship with the child because he acknowledged, rather legitimated, paternity; common law presumption of custody to unwed mother is not overcome by his paternity acknowledgement, though it would be overcome by his legitimating paternity), rev. gr., 568 S.E.2d 610 (N.C. 2002).
or mistake. Where men are named on birth certificates, inquiries often do not end because, as Justice Kennedy noted, the certificates are not "incontrovertible proof of fatherhood." Where biological fathers are unnamed on the birth certificates, any real inquiries may only then begin. Especially where biological fathers are unnamed, at least some state laws seemingly demand that governmental officers search for those fathers with due diligence prior to any termination of male parental rights or any finding of no available parental opportunity interests.

Unfortunately, such inquiries into male biological ties and parental opportunity interests often are unfair. When a man is listed on a birth certificate, additional inquiries frequently are not undertaken where biology matters, as when both parents are unwed, even though for governmental officers credible evidence or reasonable suspicion suggests that the man named is not, in fact, the biological father. More importantly, where a birth certificates fails to name any male par-

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42 But see In re Karen C., 124 Cal. Rptr. 2d 677 (Cal. Ct.App.2d 2002) (allegedly, married birth mother named another woman on the birth certificate so that the other woman could raise the child because the child was "unwanted" by the biological parents; the other woman is presumed by statute to be the birth mother ten years later if she had received the child into her home and held her out as her own).

43 But see IND. CODE §§ 31-19-4-6 and 31-19-4-3 (1997) (for children conceived and born in Indiana, often there is no search as putative father has no right to notice of adoption if he has not registered with putative father registry, even in a setting where the mother consents to adoption but does not disclose the identity of putative father).

44 See, e.g., CAL. FAM. CODE § 7663 (1994) (where there may be a termination of parental rights in an adoption proceeding, "court shall cause inquiry to be made of the mother and any other appropriate persons" in "an effort to identify the natural father"). Compare FLA. STAT. ch. 39.803 (1997) (when there is a petition for termination of parental rights where the "identity" of a parent is unknown," the court shall conduct an "inquiry of the parent who is available, or, if no parent is available, of any relative... of the child who is present at the hearing and likely to have information; if the inquiry "fails to identify any person as parent or prospective parent," the court shall so find and "may proceed without further notice").

45 Of course, at a minimum due diligence search standards must satisfy federal procedural due process when termination of parental rights is undertaken. See, e.g., In re Megan P., 125 Cal. Rptr. 2d 425, 431 (Cal. Ct.App.2d 2002) (constitutional obligation to undertake "thorough, systematic investigation and... inquiry... in good faith").

46 The paper addresses how better governmental inquiries into male parentage in newborn adoptions would benefit the male parents. It does not examine how inquiry duties might benefit (or harm) those looking to adopt. See, e.g., Price v. State, 57 P.3d 639 (Wash. Ct.App., Oct. 18, 2002) (recognizing for a state social services agency some duty on behalf of adoptive parents of inquiring into a child's background).

47 Because birth certificates are "not incontrovertible proof of fatherhood" through biology, Nguyen, 533 U.S. at 64, at times they may be modified for some time after birth to reflect male biological (as well as other, such as marriage) connections to children born alive. See, e.g., B.E.B.v. R.L.B., 979 P.2d 514 (Alaska 1999) (reviewing cases on paternity by estoppel, which bars adjudicated fathers from disestablishing legal paternity through proof of no biological ties; standards vary depending upon the types of harm (financial or emotional) which will not be tolerated for the children who may lose their fathers under law). And see Arkansas Office of Child Support Enforcement Manual 006-25-001, "Effect of Signing the Paternity Acknowledgment Affidavit" ("A man who signs the Affidavit (Acknowledging Paternity)... is the father of the child for all intents and purposes if he and the mother execute an acknowledgment of paternity of the child or similar acknowledgment during the child's minority... Any signatory may rescind the voluntary acknowledgment
ent, often inquiries are not made at all or, when made, are undertaken with minimal effort. Too often there are scant or no inquiries into incomplete birth certificates even where state laws facially demand\(^4^8\) that biological fathers usually be named on birth certificates.\(^4^9\) Inadequate investigations are especially troublesome because a parental opportunity interest involves "one of mankind's most important rights,"\(^5^0\) an interest that at times has been accorded federal constitutional protection\(^5^1\) from arbitrary deprivations and unfair procedures.\(^5^2\)

American states typically do little to encourage unwed mothers to name on birth certificates known biological fathers.\(^5^3\) States should do more. They can act of paternity within the earlier of 60 days from the date of signing, or prior to the date that an administrative or judicial proceeding, including a proceeding to establish a support order, is held relating to the child and the person executing the voluntary acknowledgment of paternity . . . Beyond the sixty (60) day period a motion to set aside a paternity establishment pursuant to a voluntary acknowledgment of paternity may only be based on allegations of whether the acknowledgment was obtained by fraud, duress, or material mistake of fact. The court may, after making such finding, direct the mother, the child, and the presumed father to submit to scientific testing for paternity. The burden of proof shall be upon the person challenging the establishment of paternity . . . In no event shall the adjudication or voluntary acknowledgment of paternity be modified later than three (3) years after entry of the order or execution of the Affidavit Acknowledging Paternity.

\(^4^8\) See, e.g., CAL. FAM. CODE § 7570(a) (1994) ("There is a compelling state interest in establishing paternity for all children. Establishing paternity is the first step toward a child support award, which, in turn, provides children with equal rights and access to benefits, including, but not limited to, social security, health insurance, survivors' benefits, military benefits, and inheritance rights. Knowledge of family medical history is often necessary for correct medical diagnosis and treatment. Additionally, knowing one's father is important to a child's development.").

\(^4^9\) Jeffrey A. Parness, Designating Male Parents at Birth, 26 U. MICH. J.L. REF. 573, 577-578 n. 20 and 21 (1993) (reviewing Illinois statutes and a 1991 survey by the author of "all Illinois medical facilities believed to provide obstetrical services").

\(^5^0\) Paul v. Steele, 461 N.E.2d 983, 987 (111. 1984) (forfeiture of parental rights, is "one of the most devastating of judicial decisions"). And see In re Hoffman, 776 N.E.2d 485, 487 (Ohio 2002) (loss of parental rights is the family law equivalent of the death penalty in a criminal case; thus, when such loss is possible, natural parent must be afforded every procedural and substantive protection the law allows).

\(^5^1\) While male parental opportunity interests, as well as distinct procreational interests, Skinner v. Oklahoma, 316 U.S. 535, 41 (1942), may be constitutionally protected, the paper does not examine any such protections. The paper is grounded solely on the longstanding, and quite desirable, presumptive public policy promoting healthy family relationships between those who are biologically connected.

\(^5^2\) See, e.g., Friehe v. Schaad, 545 N.W.2d 740 (Neb. 1996) [hereinafter Friehe] (procedural due process protects "liberty" interest of "a putative father to potentially form a familial bond with his child," though this interest is less protected than the liberty interest in "established custodial rights" or in the "upbringing of children"); Baby Girl Eason, 358 S.E.2d at 459 ("unwed fathers gain from their biological connection with a child an opportunity interest . . . which is constitutionally protected"); and In re Baby Boy W., 968 P.2d 1270, 1272-1274 (Okla. 1999) (procedural due process claim recognized in private adoption involving an unwed biological father's right to "notice" of child's birth and chance to grasp "parental opportunity interest" in child).

\(^5^3\) Encouragement of unwed mothers participating in welfare or other state governmental financial assistance programs that are federally-supported is, however, quite strong because federal subsidies are tied to state paternity establishment rates. See, e.g., 42 USC 658(a)(b)(4)(A) ("paternity establishment performance level" helps establish "incentive base amount" for federal grant to state for child welfare services). In some states, strong statutory or regulatory encouragement of
without excessive expense or unreasonable intrusion into maternal privacy interests. For example, if an initial birth certificate for a child fails to name a father, state laws should usually require followup questions both around the time of birth and thereafter. Such initiatives should occur only after the mother is generally informed of the legal consequences of disclosure as well as of any legal circumstances that compel paternity omissions (like sexual assault).

In adoption settings where biological fathers were unknown to unwed mothers at birth, American states do little to encourage unwed mothers to modify birth papers later when fathers become known, or to indicate at birth, in confidence, the names of the potential fathers so that government officers may discretely inquire into biological ties and actual male parenting. Again, expense need not be excessive and privacy concerns can be accommodated. And, states should ask mothers about potential fathers only after explaining the consequences of paternity as well as available governmental services. Surely states should and could maintain confidentiality during and after inquiries.

For many anticipated newborn adoptions, additional and significant governmental inquiries into paternity, as well as other related governmental conduct (as the distribution of information on paternity laws), should precede birth. Early action affords a prospective biological father a real opportunity to step up to parenthood. Prebirth inquiries by government are especially necessary where participation in adoptions by biological fathers is absolutely foreclosed under law by their failures to claim paternity or to step up to parenthood before the parental rights of biological mothers are ended. Minimally, where governmental officers know

paternity designations is seemingly reserved exclusively for financially needy mothers. See, e.g., IDAHO ADMIN. CODE §§ 16.03.08.148, 16.03.03.200(01), 16.03.04.278 and 16.03.08.151 (welfare assistance beneficiaries must help locate biological fathers and establish paternity).

By contrast, where government officers seek recoveries from biological fathers of welfare benefits paid earlier to their children, inquiries involving government identifications of unwed biological fathers often are quite thorough and must include cooperation from unwed biological mothers during investigations. See, e.g., Paternity of Cheryl, 746 N.E.2d 488, 491 (Mass. 2001) (reviewing Massachusetts and federal laws on mothers' cooperation and good faith efforts).

See, e.g., Greenville, 306 F.3d at 152-156 (privacy rights of patients are not violated when abortion clinic records are subject to state health department review as regulation requires records to be treated as confidential and there is no reason to think confidentiality measures will be administered improperly); Livesay v. Salt Lake County, 275 F.3d 952, 955-956 (10th Cir. 2001) (federal constitutional privacy right, encompassing individual interests in avoiding governmental disclosure of personal matters, requires a compelling governmental interest for disclosure of intimate marital matters even though there is a legitimate governmental need to investigate); and, Planned Parenthood of Southern Arizona v. Lawall, 307 F.3d 783 (9th Cir. 2002) (judicial by-pass law involving minors' abortions without parental consent sufficiently prevents unauthorized disclosures of personal information). It is true that occasionally inquiries have been authorized without adequate regard for maternal privacy interests. Consider, e.g., the controversy in Florida over the 2001 statutory requirements on newspaper notices to the potential biological fathers of children placed for adoption, dubbed the Scarlet Letter Law, where the Florida Attorney General refused to argue for the statute's constitutionality. The requirements were repealed after they were invalidated in G.P. v. Florida, 842 So.2d 1059 (Fla. App. 4th 2003).

See, e.g., N.H. REV. STAT. ANN. § 170-B:5-a(l)(c) (2001) (mother's rights end with voluntary relinquishment, consent to adoption, or involuntary termination; person claiming paternity only
that future live births will prompt immediate maternal initiatives on adoptions, they should make sure that unwed expectant women fully understand the legal consequences of adoptions for others, including biological fathers, as well as any "unique opportunity" under law afforded unwed fit biological fathers to establish paternity. Unwed biological fathers would be better positioned to step up to parenthood if unwed biological mothers were ordinarily encouraged, if not required, to notify them, or at least to identify them to government officers after the mothers have decided to pursue adoption. Not only is notice or identification often not required, but the concealment by an unwed biological mother of her location or of the circumstance of birth from an inquiring prospective unwed biological father at times does not relieve the man of his obligation to step up to fatherhood or else lose the chance for parental rights. Unwed men should not be left to their own devices after engaging in sexual intercourse with unwed women. They should not be barred from legal paternity where their failures to step up to parenthood earlier were caused by the deceit of others, particularly when their biological offspring have not yet been permanently placed or have not yet strongly bonded with prospective adoptive parents.

receives notice and chance to veto proposed adoption if he files a form with the state agency before the mother’s rights end); MONT. CODE ANN. § 42-2-2-06(1) (2002) (paternity registration, prompting a right to notice to a putative father of an adoption proceeding, must be received within 72 hours of birth); and, In re Adoption of Byrd, 552 S.E.2d 142, 148 (N.C. 2001) (adoption initiated by mother one day after birth, with participation rights of unwed father dependent upon his providing child “support” within his “financial means” before an adoption proceeding has begun).

57 Exceptions could include settings where such a notice likely would prompt health and safety concerns for a woman or where it was determined that notice would cause significant dangers to the child.

58 Today, there is not only the absence of any such general affirmative notice or identification requirement, but at times no forgiveness for unwed biological fathers who fail to take initiatives involving pregnancy or birth due to maternal deceit or obstruction. See, e.g., Baby Doe, 734 N.E.2d at 285 and 287 (Ind. Ct.App. 2000) (putative father ignorant of birth should have made “inquiry regarding... pregnancy” even when the biological mother tried “to prevent the father’s knowledge of or contact with the child”). Compare W.VA. CODE § 48-22-306(c) (2001) (abandonment of a child under six months old presumed only “when the unknown father fails, prior to the... final adoption order, to make reasonable efforts to discover that a pregnancy and birth have occurred as a result of his sexual intercourse with the birth mother”).

59 But see IDAHO CODE § 16-1505(2) (“An unmarried biological father, by virtue of the fact that he has engaged in a sexual relationship with a woman, is deemed to be on notice that a pregnancy and an adoption proceeding... may occur, and has a duty to protect his own rights and interests. He is therefore, entitled to actual notice of a birth or an adoption proceeding... only as provided in this section” (i.e., by “publication, posting or by any other manner of service,” under § 16-1505[6][b]).

60 Heidbreder, 645 N.W.2d at 367 (mother’s concealment of location of birth from father and her failure to correct earlier statements that no adoption would be pursued by her does not excuse father’s failure to register in 30 days, even though he registered in 31 days, because mother had no “fiduciary duty” to tell the father of the birth and thus did not engage in fraud).
VI. CONCLUSION

In newborn adoptions in the United States, the participation rights of too many unwed, fit biological fathers are unfairly considered. Some fathers have little or uncertain information about their children prior to or at birth through no fault of their own, yet are denied participation rights. Other fathers have little guidance on the steps necessary under law to prompt an opportunity to participate. Governments do little truly to inform and guide, though the parental opportunity interest involves "one of mankind's most important rights," often accorded federal constitutional protection.\(^6\) As a matter of public policy, American state governments should treat unwed biological fathers more fairly by reforming their laws on participation rights in newborn adoptions.\(^6\)

\(^{61}\) Friehe, 545 N.W.2d at 748 (federal due process liberty interest includes both "an established familial relationship" resulting in "custodial rights" and the interest "of a putative father to potentially form a familial bond with his child").

\(^{62}\) This paper does not argue that the noted failures in state adoption laws are all illegal under federal or state constitutions because they unduly burden exercises of fatherhood opportunity interests or procreational rights of unwed biological fathers. It concedes that such analyses of certain failures are difficult under Lehr. See, e.g., Heidbreder, 645 N.W. 2d at 374 n.13. Rather, the paper finds that constitutional analyses are unnecessary to effectuate legal change affording fairer treatment to unwed biological fathers in newborn adoptions since reform is supported by legitimate social policies.