DESERTING MOTHERS, ABANDONED BABIES, LOST FATHERS: DANGERS IN SAFE HAVENS

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I. INTRODUCTION

Safe Haven laws allow genetic mothers to abandon their newborns with no questions asked. Newborns are then protected from potential abuse or neglect, and they can be adopted at an early age into a loving and welcoming family. Mothers are free to go on with their lives knowing that the best interests of their children have been secured. So what is wrong? The problem lies with the law's neglect of the genetic fathers. Seemingly, the parenthood opportunities of men are lost without anyone asking the genetic fathers if they care. Furthermore, no matter how much better the children's lives, proper social policy demands that genetic fathers, who often have both the opportunity for paternity and childrearing interests, should not be so easily dismissed.

II. EQUALITY IN MATERNITY AND PATERNITY

Earlier American maternity and paternity laws for children born through old-fashioned pregnancies—that is, through sexual intercourse between consenting adults—were quite troublesome. There were odd notions about marriage and the capabilities, rights, and responsibilities of women and men as parents. Today, we mightily strive toward developing differing visions of marriage and toward greater equality for all genetic parents.

Currently, American maternity and paternity laws share certain traits. Laws for designating both maternity and paternity around the

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time of birth largely originate in American state statutes and are dependent upon the state of birth. All state statutes on genetic ties and legal parenthood attempt to promote early, accurate, informed, and conclusive designations. A 1992 federal study described the importance of these designations:

> Parentage determination does more than provide genealogical clues to a child's background; it establishes fundamental emotional, social, legal and economic ties between parent and child. It is a prerequisite to securing financial support for the child and to developing the heightened emotional support the child derives from enforceable custody and visitation rights. Parentage determination also unlocks the door to government-provided dependent's benefits, inheritance, and an accurate medical history for the child.[1]

Today, maternity and paternity lawmakers generally seek to treat women and men similarly. Equality is firmly grounded in both the Federal Constitution and the state constitutions. The U.S. Constitution mandates, in the Fourteenth Amendment, that "no State . . . deny to any person within its jurisdiction the equal protection of the laws."[2] Many states have more expansive constitutional dictates. The Illinois Constitution not only says that no person shall be denied "the equal protection of the laws,"[3] but it also expressly condemns equal protection denials or abridgements "on account of sex by the State or its units of local government and school districts."[4] In another provision, it states that "all persons shall have the right to be free from discrimination on the basis . . . of sex in the hiring and promotion practices of any employer or in the sale or rental of property,"[5] thus expressly recognizing that equality should extend beyond governmental agencies and officers. These latter mandates are "enforceable without action by the General Assembly," though the legislature may "establish reasonable exemptions" and "provide additional remedies."[6]

State legislators are often more explicit about the desired equality between female and male genetic parents. A Delaware Code provision, in the statutory title on Domestic Relations, states:

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1. U.S. COMMISSION ON INTERSTATE CHILD SUPPORT, SUPPORTING OUR CHILDREN: A BLUEPRINT FOR REFORM 120 (1992).
2. U.S. CONST. amend. XIV, § 1.
3. Ill. CONST. art. I, § 2.
4. *Id.* at § 18.
5. *Id.* at § 17.
6. *Id.*

> The father and mother are the joint natural guardians of their minor child and are equally charged with the child's support, care, nurture, welfare and education. Each has equal powers and duties with respect to such child, and neither has any right, or presumption of right or fitness, superior to the right of the other concerning such child's custody or any other matter affecting the child. If either parent should die, or abandon his or her family, or is incapable, for any reason, to act as guardian of such child, then, the custody of such child devolves upon the other parent. Where the parents live apart, the Court may award the custody of their minor child to either of them and neither shall benefit from any presumption of being better suited for such award.[7]

In parentage laws, however, absolute equality—meaning no differences whatsoever between women and men—certainly is not, and should not be, contemplated. Some differences are inevitable with old-fashioned pregnancies and births.

Differing treatment of the sexes in the governmental processes for determining adult-child genetic ties on the road to legal parenthood designations was condoned by the U.S. Supreme Court in *Nguyen v. INS*:

> 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.
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> In the case of the father, the uncontestable fact is that he need not be present at the birth. If he is present, furthermore, that circumstance is not incontrovertible proof of fatherhood . . . . Fathers and mothers are not similarly situated with regard to the proof of biological parenthood. The imposition of a different set of rules for making that legal determination with respect to fathers and mothers is neither surprising nor troublesome from a constitutional perspective.[8]

The Supreme Court thus sustained differing procedures for establishing parent-child genetic ties. The high court examined a statute governing the U.S. citizenship of a child born outside the country to a U.S. citizen parent and a noncitizen parent who were unmarried.[9] The statute not only differentiated between married and unmarried parents,

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7. DEL. CODE ANN. tit. 13, § 701(a) (2004).
8. Nguyen v. INS, 533 U.S. 53, 62-63 (2001) (citations omitted).
9. *Id.*

but also, for unmarried couples, between mothers and fathers.[10] For a child born to an unwed citizen mother, the child's citizenship arose if the mother, at the time of birth, had previously been physically present in the U.S. for a continuous period of one year.[11] For a child born to an unwed citizen father, the child's citizenship could only arise where "a blood relationship" was established, and where, before reaching 18 years of age, the child was "legitimated," legally acknowledged by the father, or the subject of a paternity court adjudication.[12] The "differential treatment" of unwed citizen fathers was upheld, as it was "designed to ensure an acceptable documentation of paternity."[13] Additional steps in the documentation of maternity, beyond proof of birth from the mother, were unnecessary, as proof of motherhood is "inherent in birth itself" and recognized in a birth certificate, which has "the benefit of witnesses."[14]

Interestingly, the U.S. Supreme Court has allowed some state paternity laws to operate where the acceptable documentation of genetic ties for paternity purposes did not necessarily involve proof of an actual "blood relationship."[15] Thus, certain state laws now presume genetic ties between a man and a child if certain acts are undertaken by the man before or shortly after birth; many acts, such as marriage to the genetic mother or holding the child out in the community as his own, do not assure, or even require, blood relations. Such presumptive dads can sometimes be displaced by actual genetic fathers, but not always. State laws can also prompt irrebuttable presumptions of blood relationships for men having no blood ties. Thus, there can be state laws posing barriers to actual genetic fathers who seek to override marital presumptions, even though others, including the presumed fathers, genetic mothers, or children, may be entitled to rebut the same presumptions.

Beyond the methods of proof of genetic ties, there is further inequality between the sexes in parentage laws. For example, there need not be absolute equality in the availability of parental rights for women and men, even where both have proven genetic ties. Differing childrearing interests were sanctioned by the U.S. Supreme Court in

10. *Id.* at 57-58.
11. *Id.* at 59-60.
12. *Nguyen*, 533 U.S. at 59.
13. *Id.* at 63.
14. *Id.* at 64.
15. *Id.* at 59.

Caban v. Mohammed:

> 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.[16]

The U.S. Supreme Court sustained differing childrearing interests for unwed citizen mothers and fathers in *Nguyen*. For an unmarried father who establishes "a biological parent-child relationship," he must also agree "in writing to provide financial support" to the child until the child is eighteen in order to secure U.S. citizenship for the child.[17] This requirement was said to ensure that there is "the opportunity for a meaningful relationship" between the citizen father and child, thus creating a greater likelihood of "real, everyday ties" connecting the citizen father, the child, and the United States.[18] No similar statutory requirement was appropriate for the unwed citizen mother, as the "opportunity" for a meaningful relationship between her and the child inheres "in the very event of birth."[19] Thus, for genetic mothers "real, everyday ties" sufficient to prompt general childrearing interests can arise solely from the genetic ties, while for genetic fathers (because they are less involved in the birthing process) the requisite "real, everyday ties" may not be demonstrated solely by genes alone and may require (usually under state law) parental-like conduct.[20] Even significant,

16. Caban v. Mohammed, 441 U.S. 380, 397 (1979).

17. *Nguyen*, 533 U.S. at 59.

18. *Id.* at 65.

19. *See id.* at 65. Besides methods of proving maternity and paternity, there are other legal procedural differences between unwed genetic mothers and fathers. For example, in some American states, only genetic fathers may waive any childrearing rights prior to birth in order to facilitate adoptions. *See, e.g.*, DEL. CODE ANN. tit. 13, § 1106(c) (2004) ("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 (2004) ("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."); N.C. GEN. STAT. § 48-3-604 (2005) (a man can "consent to an adoption before or after the child is born," but a mother may consent "at any time after the child is born but not sooner").

20. The nature of the necessary non-genetic ties under state laws often vary even within

actual parenting before and at the time of birth still may not result in childrearing interests for unwed genetic fathers; in some states, where children are born by women married to other men and their marriages are intact, there exist paternity presumptions founded on marriage.[21]

These differences between genetic mothers and genetic fathers effectively mean that at or shortly after birth, almost all children born in the United States as a result of consensual sexual intercourse between adults will have, at least initially, legal mothers who are genetically tied, but they may not have their genetic fathers legally recognized as parents. For legal parenthood, the genetic fathers may need to establish "relationships more enduring," as by marriage to the mothers, paternity acknowledgments, affidavits and the like, or actual parenting. In fact, a man with no genetic ties to a newborn may be recognized as the initial legal father of that newborn; this can occur where there are paternity presumptions based on marriage.[22]

Because biological connections alone are often insufficient to prompt "full-blown" parental rights for genetic fathers around the time of birth, the legal techniques available to these fathers to establish parent-child relationships that prompt parental rights must be reasonable. Thus, in *Lehr v. Robertson*, the U.S. Supreme Court validated state adoption procedures that granted all unwed genetic mothers, but not all unwed genetic fathers, "the right to veto an adoption and the right to prior notice of any adoption proceeding."[23] For genetic fathers, there would also be the need to show "custodial, personal or financial" relationships with the children in order to secure participation rights.[24] The court observed, however, that the statutory schemes for such

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a single state, depending upon the purpose for which the legal paternity is designated. Thus, legal fatherhood at the time of birth may depend upon genetic ties alone, as in child support settings, or may require, in addition, actual "real, every day [or at least regular] ties," as in notice and participation rights in adoption settings. *See Nguyen*, 533 U.S. at 65 (referring to "real, everyday regular ties").

21. *See, e.g.*, Strausser v. Stahr, 726 A.2d 1052, 1055-56 (Pa. 1999) (holding that there is an irrebuttable paternity presumption founded upon marriage provided that: the marriage is intact; there was an intact family at all times; and the married couple favors maintaining the presumption). Even where the paternity presumption is rebuttable, the genetic father may have no standing to seek to rebut, even in situations where he hopes to establish a parent-child relationship recognized under law, and where he, in some ways, has already parented his genetic offspring. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 123 (1989).

22. *See, e.g.*, 750 ILL. COMP. STAT. 45/5(a)(1) (1999) ("A man is presumed to be the natural father of a child if . . . he and the child's natural mother are or have been married to each other . . . and the child is born or conceived during such marriage.").

23. Lehr v. Robertson, 463 U.S. 248, 266 (1983).

24. *Id.* at 262.

showings were unlikely to "omit many responsible fathers" or to estop many fathers who failed to make the required showings for reasons beyond their control.[25]

Though there cannot be absolute equality in parental matters involving genetic mothers and genetic fathers, recently there has been a more vigorous pursuit of greater equality. Efforts involving nondiscrimination between the genetic parents of children born as a result of consensual sexual intercourse have been spurred by U.S. Supreme Court admonitions that equal treatment is usually preferred, whether or not parenthood was welcomed by one or each of the intercoursing couple. Lawmakers have also pursued equality between many wed and unwed genetic parents.

In 1972, in a situation where parenthood was not welcomed, there was a felony conviction for "handing over" vaginal foam to an unmarried woman seeking to prevent pregnancy under a statute which only allowed a married women access to vaginal foam.[26] In striking down the law, the Court, in *Eisenstadt v. Baird*, found that the "effect of the ban on distribution of contraceptives to unmarried persons has at best a marginal relation to the proffered objective" of discouraging premarital sexual intercourse.[27] It held that "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[28] Thus, the Court recognized that there was at least some equality in the privacy interests of married couples, a married person, unmarried couples, and an unmarried person in decisions regarding whether or not to have children.

Shortly after *Eisenstadt*, the U.S. Supreme Court explored the decisional interests of individuals and couples wishing to have children. In the 1972 case of *Stanley v. Illinois*, the Court found that significant social changes justified the expansion of the parental rights normally accorded marital families to nonmarital families.[29] In that case, a genetic father challenged the automatic termination of his parental rights of his three children upon the death of the genetic mother, with whom he had

25. *Id.* at 264.
26. Eisenstadt v. Baird, 405 U.S. 438 (1972).
27. *Id.* at 448.
28. *Id.* at 453.
29. Stanley v. Illinois, 405 U.S. 645 (1972).

lived on and off for eighteen years.[30] The children had become wards of the state upon their mother's death because a state statute deemed the children to have "no surviving parent or guardian."[31] The father did not receive a hearing on his fitness as a parent before losing custody;[32] he was presumed unfit because he had never been married to the mother.[33] On appeal, the father urged that there was an equal protection violation because he was denied the fitness hearing afforded men who were married.[34] After recognizing that the unwed father had a "cognizable and substantial" interest in the custody and upbringing of the children, the Court found equal protection infringements.[35] In doing so, the Court placed unwed natural fathers on the same plane as other natural parents; in *Stanley*, the father had been involved significantly in his children's lives over a long period of time, being both a genetic father and a social father.[36] Because he was a father within a family in every sense but formal marriage, the Court did not say whether his rights could have stemmed exclusively from his genetic ties, his relationships with his children, his quasi-marriage to their mother, or the mere presence, for an extended period of time, of an existing, though nontraditional, "family unit."

Caban v. Mohammed[37] was another equality case wherein parenthood was welcomed. In *Caban*, the Court found that an adoption statute exemplified "overbroad generalizations" in gender-based classifications.[38] The genetic father, Abdiel Caban, tried to block the adoption of his two children.[39] He was identified as the father on each child's birth certificate and had lived with the children and their genetic mother for two years.[40] He continued to see his children after their mother left him and married another man.[41] The mother's new husband petitioned to adopt, prompting Caban and his new wife to do the same.[42] Under a New York statute that allowed an unwed mother, but not an

30. *Id.* at 649.
31. *Id.*
32. *Id.* at 646.
33. *Stanley*, 405 U.S. at 647.
34. *Id.* at 646.
35. *Id.* at 652-53.
36. *Id.* at 646.
37. 441 U.S. 380 (1979).
38. *Id.* at 394.
39. *Id.* at 381-82.
40. *Id.* at 382.
41. *Caban*, 441 U.S at 382.
42. *Id.* at 383.

unwed father, to block an adoption simply by withholding consent, the trial court severed Caban's parental rights and granted the stepfather's adoption request.[43] The Supreme Court concluded that the statute created an unacceptable gender-based classification.[44] Specifically, the Court said that the distinction "invariably" made between unwed genetic mothers and fathers was not "substantially related to" the purported state interest of facilitating the adoption of illegitimate children.[45] The holding was limited, however, to cases where there was not a newborn adoption;[46] where the identity of the unwed genetic father was established early;[47] and where that genetic father had manifested "a significant paternal interest in the child,"[48] meaning that he had "established a substantial relationship with the child"[49] that had continued for some time. As for adoptions of newborns, the Court expressed "no view" on whether distinctions between unwed mothers and unwed fathers might pass muster.[50]

At times, legal distinctions between maternity and paternity are analyzed in terms of fundamental rights, rather than in terms of equality. Thus, lawmakers sometimes speak about the differing liberty interests in childrearing for genetic mothers and genetic fathers. The interface between equality and liberty presents challenges not only in parentage settings, but also in other settings, such as interracial marriages and homosexual acts. Lawmakers can speak to the privacy interests of only certain women and men (i.e., heterosexuals) in weddings and in sexual activities without mentioning the interests of others (i.e., homosexuals) as easily as they can speak to inequalities between two people. Thus, maternity and paternity laws, like marriage and sexual conduct laws, can be written to reflect differing rights for differing people founded on their varied claims to constitutionally-protected "liberty," rather than to reflect rationales relating to gender (or other forms of) discrimination. With regard to equality and liberty in the context of gay and lesbian sexual conduct, Justice Kennedy, in *Lawrence v. Texas*,[51] noted:

43. *Id.* at 383-84.
44. *Id.* at 394.
45. *Caban*, 441 U.S. at 382.
46. *Id.* at 392.
47. *Id.* at 394.
48. *Id.* at 394.
49. *Caban*, 441 U.S. at 393.
50. *Id.* at 393 n.11. As noted below, more recent U.S. Supreme Court decisions suggest that many distinctions between mothers and fathers in newborn adoptions are invalid.
51. 539 U.S. 558 (2003).

"Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects."[52] Of course, under U.S. Supreme Court precedents, while maternity and paternity distinctions founded on the varied liberty interests of genetic mothers and genetic fathers cannot perpetuate ancient norms that are no longer justified, they can respect, at least to some degree, "pedigree" and "traditional" notions of justice.[53]

III. DESERTION, ABANDONMENT AND LOSS

The pursuit of greater, and perhaps even constitutionally-compelled, equality between genetic mothers and genetic fathers continues. Unfortunately, equality principles have generally been ignored in constructing and implementing state statutes on the voluntary abandonment of newborns. If equality principles were applied, many of these laws would fail.

Though written in gender-neutral terms, many American states now effectively permit the abandonment of newborns to be undertaken solely by genetic mothers. These acts usually foreclose, without notice or a chance to be heard, any legal parenthood for genetic fathers who are fit and willing to parent and who may even have attained federal constitutional childrearing interests, as through, for example, marital presumptions. Genetic mothers can walk away from parental responsibilities early on in a child's life, whereas comparable desertions are usually forbidden for genetic fathers in cases where the genetic mothers maintain custody,[54] as well as for genetic mothers once their children are a little older.

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52. *Id.* at 575.

53. Burnham v. California, 495 U.S. 604, 621-22 (1990).

54. *See, e.g.*, N.E. v. Hedges, 391 F.3d 832 (6th Cir. 2004) (holding that a genetic father's "child support obligations occur without regard" to his "wishes or his emotional attachment to his offspring"; here, a man could not "escape" responsibility even though he alleged that the mother "fraudulently induced sexual intercourse (by lying about her use of birth control) and "then left the state, married another man, and delayed seeking child support for several years after birth."); *In re* T.M.C., 52 P.3d 934 (Nev. 2002) (finding that there is no termination of financial responsibilities for genetic father where the child was a teenager and the father long ago had abandoned her; the child's best interests are thus served because she might later benefit from financial aid, including her father's reimbursement, of a state welfare agency for money it had provided).

Enabling statutory provisions, chiefly enacted in the last decade following the 1999 "Baby Moses" law in Texas,[55] are frequently deemed "Safe Haven" (or "Safe Haven Infant Protection") laws. They typically are justified on child protection grounds. They often guarantee the caretakers of certain newborns both anonymity and immunity from prosecution for child abandonment. Safe Haven laws do vary widely from state to state. They differ on such issues as which children may be left (i.e., younger than three or thirty days? abused children?), where children may be left (i.e., hospitals only, or also at police or fire stations?), who may leave children (i.e., genetic parent only, or any person with lawful custody?), and the procedures for accepting children (i.e., anonymity always, or may questions be asked by the recipients?).

While there is much variation, most Safe Haven provisions effectively permit abandonment of very young children by genetic mothers without requiring the mothers to reveal much, if anything, about the genetic fathers. These lost fathers need not be alleged rapists, unwilling parents, or bad parents for the Safe Haven laws to operate. They can be married men with genetic ties and positive feelings about fatherhood. In most instances, the identities of genetic fathers will be undiscoverable later, as in adoption proceedings. For example, a Wisconsin statute says that when a genetic mother relinquishes child custody and there is no evidence of abuse or neglect, no person "may induce or coerce or attempt to induce or coerce a parent . . . who wishes to remain anonymous into revealing . . . her identity."[56] Less restrictive is a West Virginia statute which declares that a hospital taking possession of an abandoned child from a parent "may not require" the parent to identify himself or herself and shall "respect the person's desire to remain anonymous."[57] A New Mexico statute is even more sympathetic to lost fathers, but ultimately provides little practical help, as it states: "A hospital may ask the person leaving the infant for the name of the infant's biological father[,] . . . the infant's name and the infant's medical history, but the person leaving the infant is not required to provide that information to the hospital."[58] And in South Carolina, the statute states that a receiving hospital "must ask the person leaving the infant" for similar medical information, as indicated on a form

55. TEX. FAM. CODE ANN. § 262.301 (Vernon 2004).
56. WIS. STAT. ANN. § 48.195 (West 2003).
57. W. VA. CODE ANN. § 49-6E-1 (Michie 2004).
58. N.M. STAT. ANN. § 24-22-3 (Michie 2004).

provided by the Department of Social Services.[59] Yet, the South Carolina law also notes that the person leaving the infant "is not required to disclose his or her identity."[60]

A few Safe Haven laws initially appear quite sympathetic to lost fathers. In Florida, the statutory procedures regarding women who abandon newborns reasonably believed to be less than four days old include requirements on diligent searches for, and notices to, lost fathers.[61] They also grant to lost fathers opportunities to void earlier parental rights terminations or adoptions within one year if a court finds "that a person knowingly gave false information that prevented the birth parent from timely making known his or her desire to assume parental responsibilities toward the minor or from exercising his or her parental rights."[62] However, there is also a Florida Safe Haven provision which states that, except "where there is actual or suspected child abuse or neglect, any parent who leaves a newborn infant . . . and expresses an intent to leave . . . and not return, has the absolute right to remain anonymous and to leave at any time" and to "not be pursued or followed."[63] Thus, Florida law often provides no practical opportunities for diligent searches so that genetic fathers of very young newborns are not lost. When genetic mothers place for adoption children who are four days old, the proceedings to terminate all parental rights in anticipation of later adoptions require judicial inquiries and, perhaps, adoption entity searches for the fathers. These fathers include men who were or are married to the mothers, men declared by courts to be fathers or adopted fathers, men who acknowledged or claimed paternity, and men who cohabitated with the mothers at the times of conception.[64]

So what's wrong with Safe Haven laws, especially those recognizing newborn abandonment opportunities for all custodial parents?[65] Do they not promote child protection by allowing at-risk children to be placed in safety easily? While some children might be saved from abuse or neglect, or adopted quickly into loving families, thereby escaping much despair while growing up, Safe Haven laws also

59. S.C. CODE ANN. § 20-7-85 (Law. Co-op. 2004).
60. *Id.*
61. FLA. STAT. ANN. § 63.0423(4) (West 2004).
62. *Id.* at § 63.0423(9)(a).
63. FLA. STAT. ANN. § 383.50(5) (West 2004).
64. *See id.* at § 63.088(4)-(5).
65. There are further issues raised by Safe Haven laws (e.g., how the requisites regarding the infant's age or the custodial status are verified) that are not discussed herein, as they are unrelated to "lost fathers."

promote the social norm[66] that women can comparably terminate the actual or potential childrearing interests of men both before and after birth. Yet, notwithstanding their pre-birth abortion rights under *Roe v. Wade*,[67] women have never generally possessed veto powers over the childrearing interests of genetic fathers of children born alive, at least where the women are unwed genetic mothers whose pregnancies resulted from consensual sexual intercourse. Such maternal powers are "foreign to our legal tradition."[68] They have no "pedigree" and do not promote "traditional" notions of justice.[69] The result of a Safe Haven maternal desertion and child abandonment is the loss of a father for the child. It effectively forecloses the benefits, but not necessarily the financial obligations, of paternity, even for a man who, both prebirth[70] and postbirth,[71] established an "actual" parent-child relationship[72] or was subject to a marital paternity presumption.[73] Imagine a reversal of usual roles. What would hospital, police, or fire personnel likely do if a man, as a parent, sought to abandon a newborn and to walk away with no questions asked?

When mothers seek financial assistance for their children from the government, they have duties to help the state undertake diligent searches for genetic fathers so that the men can reimburse the government for any monetary aid rendered.[74] Comparably, genetic mothers wishing to desert their children should be required to cooperate in good faith in establishing paternity so that genetic fathers, assuming

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

67. 410 U.S. 113 (1973).

68. N.E. v. Hedges, 391 F.3d 832, 836 (6th Cir. 2004).

69. Burnham v. California, 495 U.S. 604, 621-22 (1990).

70. *See* Caban v. Mohammed, 441 U.S. 380, 383-94 (1979) (Some state laws recognize that parental interests for genetic fathers in adoption proceedings may be established prior to birth, as through rendering financial assistance to expectant mothers during their pregnancies, or though registering in a putative father registry).

71. *See id.* (Some state laws recognize that parental interests for genetic fathers in adoption proceedings may be established after birth, even without maternal knowledge or approval, as through registering in a putative father registry).

72. *See id.* (Some state laws recognize that parental interests for genetic fathers in adoption proceedings may arise upon proof of actual parenting).

73. *See id.* (Some state laws recognize that parental interests for men in adoption proceedings may arise, even without maternal knowledge or approval, as through a marital paternity presumption founded on marriage to the genetic mother at the time of conception or for some time during the pregnancy, even if not at the time of birth).

74. 42 U.S.C. § 654(29)(a) (2005).

that there was no earlier loss or lack of paternity (as due to rape), may be asked whether they, too, wish to desert. It is unfair to require judicial inquiries and diligent searches for certain genetic fathers and presumed fathers only when children placed for adoption by their genetic mothers are older than three or thirty days and thus outside the Safe Haven laws.[75] And, under *Lehr*, state adoption schemes can neither likely "omit many responsible fathers"[76] nor estop many genetic fathers who failed to establish, under *Caban*, "enduring" parent-child relationships[77] for reasons beyond their control.[78]

IV. CONCLUSION

While a genetic mother having child custody may employ Safe Haven laws to escape parental responsibilities, genetic fathers without custody typically may not walk away in the same fashion. They cannot escape child support obligations, even if they never attained childrearing rights. They cannot desert their genetic offspring, even if they were fooled into conception and were forgotten (or avoided) during the pregnancy and at the birth.

Safe Haven laws infringe upon the paternity opportunity and the childrearing interests of many genetic fathers. The governmental action that infringes on these interests is found in the systematic disregard of "many responsible fathers"[79] who could be safeguarded without undue infringements on the privacy interests of genetic mothers, without undermining their children's best interests, and without diminishing the existing legal doctrine on access to abortion services.[80]

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75. In a few areas, Safe Haven provisions cover children who are forty-five days old or younger; *see, e.g.*, KAN. STAT. ANN. § 38-15,100 (2001), or ninety days old or younger; *see, e.g.*, N.M. STAT. ANN. § 24-22-2(c) (Michie 2004). In North Dakota, the child need only be less than a year old. N.D. CENT. CODE §§ 27-20-02, 50-25.1-15 (2004).

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

77. Caban v. Mohammed, 441 U.S. 380, 397 (1979).

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

79. *Id.* at 264-65 (suggesting that a state adoption process found to omit many responsible fathers would be unconstitutional).

80. This paper does not argue that the noted failures in the Safe Haven laws render all such laws invalid under the Federal Constitution or the state constitutions because they unduly burden exercises of fatherhood opportunity interests or other parental rights of unwed genetic fathers. It concedes that such analyses may be difficult under *Lehr*. *See, e.g.*, Heidbreder v. Carton, 645 N.W.2d 355, 374 n.13 (Minn. 2002). Rather, this paper finds that constitutional

rights analyses are unnecessary to effectuate legal change affording fairer treatment to unwed genetic fathers in maternal desertion settings because reform is supported by legitimate social policies. There is precedent, however, for such constitutional rights. *See, e.g.*, Friehe v. Schad, 545 N.W.2d 740, 836 (Neb. 1996) (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"); *In re* Baby Girl Eason, 358 S.E.2d 459, 462 (Ga. 1987) ("unwed fathers gain from their biological connection with a child an opportunity interest . . . which is constitutionally protected."); *and In re* Baby Boy W., 988 P.2d 1270, 1272-1274 (Okla. 1999) (procedural due process claim recognized in private adoption involving an unwed genetic father's right to "notice" of child's birth and chance to grasp "parental opportunity interest" in child).