Innocent Losses of Constitutional Rights

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Articles

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   I. INTRODUCTION

In which settings might individuals lose constitutional rights innocently, that is, through no conduct on their part (direct, indirect as through agents, or apparent)? Are any such settings differentiated by the type of relevant constitutional right, as between a civil and criminal jury trial? As between differing constitutional criminal procedure rights, like confrontation and jury trial? As between substantive rights, like free

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speech, and procedural rights, like confrontation? As between an enumerated substantive constitutional right, like free speech, and an unenumerated fundamental constitutional right, like privacy? As between differing types of enumerated and somewhat comparable constitutional rights, like free speech and free assembly? As between differing types of unenumerated substantive rights, like abortion and parental childcare? As between somewhat comparable fundamental and nonfundamental rights, like the fundamental right to "just compensation" for "private property" "taken for public use" by government and the nonfundamental right to compensation for private property lost by government for no good reason? Or, as between otherwise comparable constitutional rights in the U.S. and some American state constitutions, as with certain privacy and search and seizure rights?

Some individuals innocently lose constitutional rights, both substantive and procedural, both enumerated and unenumerated, both fundamental and nonfundamental. One can also innocently lose non-constitutional rights. Innocent losses occur when individuals lose rights though they have not acted in any way to prompt such losses, as by acting through direct or implicit waivers, in apparent ways, or through agents. Findings of compelling state interests, rationality, or other sufficient government justifications do not accompany innocent losses.

1 Concededly, there are sometimes difficulties in line-drawing between governmental property deprivations involving fundamental and nonfundamental rights. Yet, eminent domain cases involving real property takings are clearly processed differently than property losses arising from injuries suffered in prison. Compare Knick v. Township of Scott, Pennsylvania, 139 S. Ct. 2162, 2177 (2019) (determining that property owner has a federal constitutional claim for governmental taking of the property for public use which can be pursued at the time of the taking without first pursuing unsuccessfully an initial state law claim for just compensation) and United States v. Reynolds, 397 U.S. 14, 19 (1970) (requiring, per what is now Federal of Civil Procedure 71(h)(1)(B), a jury trial on issue of amount of compensation), with Parratt et. al. v. Taylor, 451 U.S. 527, 543 (1981) (considering the administrative process), overruled by Daniels v. Williams, 474 U.S. 327, 328 (1986) (finding no due process deprivation if injuries caused by a prison officer's mere lack of care) and Hudson v. Palmer, 468 U.S. 517, 536 (1984) (subjecting, too, unauthorized intentional property deprivation by prison guard to post-deprivation administrative process).

2 The notion of consent is fraught with difficulties. See Michelle Tomkovicz, Comment, If You're Reading This, It's Too Late: The Unconstitutionality of Notice Effectuating Implied Consent, 70 EMORY L.J. 153, 160–63 (2020) (exploring the meaning of consent through a philosophical lens in order to understand permutations of consent in different areas of law, including contract, sexual assault, and search laws).

3 See discussion related to innocent losses within the context of parent-child relationships infra Section II F.

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Innocent losses occur under a variety of doctrines, including “common authority,” “presumed consent,” quasi-contract, and agency. Sometimes innocent losses are largely foreclosed, as by the bar on the “unilateral acts” by others to prompt losses of personal jurisdiction defenses for nonresident civil defendants or on the inability of a criminal defense lawyer to waive an accused’s right to jury trial.

This Article begins by demonstrating how the courts have sanctioned innocent losses of varying rights. It reviews, by way of example, the common authority doctrine in Fourth Amendment search cases; the presumed consent doctrine in intentional tort cases involving infringements on bodily integrity; the quasi-contract doctrine in property cases; lawyer agency in both jury trial and nonjury trial right cases; de facto parentage cases; childcare opportunities for genetic donors in formal adoption cases; and childcare opportunities in Safe Haven cases. This Article posits that the rationales supporting innocent losses of constitutional rights are often weak, especially when the losses involve fundamental rights. It ends by urging that innocent losses of all rights should be mitigated, illustrated by a focus on losses of constitutional childcare rights.

II. INNOCENT LOSSES OF CONSTITUTIONAL RIGHTS

A. Common Authority in Search Cases

Federal constitutional privacy interests involving governmental searches can be lost through earlier consent. Often, the one whose body or property authorities seek to search is the one who undertakes consent. While consent may seemingly be given, nevertheless it may be involuntary under certain circumstances. See, e.g., United States v. Russell, 664 F.3d 1279, 1281 (9th Cir. 2012) (noting that circumstances include “(1) whether defendant was in custody; (2) whether the arresting officers have their guns drawn; (3) whether Miranda warnings have been given; (4)
At times, as with a post-conviction criminal probationer or parolee, individuals can give such consent in advance. As well, one person imbued with actual or implied authority may consent on behalf of another person.

Yet, one occupant consenting to a governmental search of physical premises whose occupancy is shared by two people with similar privacy interests can effectively negate a non-consenting co-occupant’s privacy interests in, and Fourth Amendment objections to, a search. In 2004, the U.S. Supreme Court, in Fernandez v. California, recognized that effective consent to a premises search by one occupant impacted another occupant’s Fourth Amendment privacy interests in the premises where the latter occupant did not consent. There, Walter Fernandez told police officers who had come to his apartment, which Roxanne Rojas also occupied at the time, that they did not “have any right to come in.” Shortly thereafter, the police arrested Fernandez at the apartment for attacking both Rojas and Abel Lopez, whose attack in the neighborhood

whether the defendant was told he has a right not to consent; and (5) whether defendant was told a search warrant could be obtained.

See McElroy v. State, 133 N.E.3d 201, 206 (Ind. App. 2019) (“Our Supreme Court has specifically recognized an exception to the warrant requirement in a search of the residence of a probationer or community corrections participant where the probationer or participant has in advance, by valid consent or term in conditions of release, authorized a warrantless, suspicionless search.”); United States v. Caya, 956 F.3d 498, 503 (7th Cir. 2020) (considering within the context of post-imprisonment “extended supervision”). Conditions can be attached to such consents, thus limiting governmental authority. See State v. Hamm, 589 S.W.3d 765, 773–77 (Tenn. 2019) (reviewing cases nationwide regarding whether reasonable suspicion of criminal wrongdoing is necessary to support a search of a probationer and finding that no such suspicion is needed).

But see U.S. v. Moran, 944 F.3d 1, 3 (1st Cir. 2019) (determining that a sister had no actual or apparent authority to consent to a search of her brother’s garbage bags stored in the sister’s storage unit).

The U.S. Supreme Court has explained that while a criminally accused needs to waive personally, via a knowing, voluntary and intelligent decision, constitutional rights promoting a fair trial, a waiver of the constitutional right involving a governmental search or seizure can be undertaken differently, and with lesser protections, since Fourth Amendment rights are not indispensable to obtaining a fair trial. See Schneckloth v. Bustamonte, 412 U.S. 218, 238, 241 (1973). Shared property interests beyond living quarters inhabited by roommates/cotenants/spouses may not always yield common authority. See State v. Dinkins, 2019 WL 2314601, at *3 (N.J. Super. App. May 31, 2019) (holding that a car rental company cannot consent to search of car rented by A though solely driven by B, where B was the target of the search). Of course, additional constitutional privacy protections of those subject to governmental searches can arise under state constitutions. See Hill v. Nat’l Collegiate Athletic Ass’n, 865 P.2d 633, 641 (Cal. 1994) (applying Privacy Initiative of California state constitution to nongovernmental searches).


Id. at 296–97.
prompted the visit to the apartment.\textsuperscript{17} About an hour later, the arresting detective returned to the apartment.\textsuperscript{18} Rojas then gave "oral and written consent" to a search of some part of the apartment.\textsuperscript{19} The search uncovered evidence used to convict Fernandez, who had sought evidence suppression on Fourth Amendment grounds.\textsuperscript{20}

The Court sustained the search, determining that "a person who shares a residence with others assumes the risk that 'any one of them may admit visitors[.] . . .'\textsuperscript{21} At times, courts explicitly tie such an assumption of risk to a reduced expectation of privacy and/or an intent to forego privacy interests.\textsuperscript{22}

The Court in Fernandez did recognize that any consent to search by Rojas would not bind Fernandez if he was present at the apartment and objected.\textsuperscript{23} Yet, as Rojas was the sole, present occupant of the apartment

\begin{footnotes}
\footnotetext[17]{Id. at 295–96.}
\footnotetext[18]{Id. at 296.}
\footnotetext[19]{Fernandez, 571 U.S. at 296. Where consents are not truly voluntary, evidence obtained during the search will be barred from trial under the Fourth Amendment. See Pagán-González v. Moreno, 919 F.3d 582, 590 (1st Cir. 2019) (holding that officers’ deception vitiates voluntariness of consent to search). On promoting more truly voluntary consents to searches, see, for example, Susan A. Bandes, Police Accountability and the Problem of Regulating Consent Searches, 2018 U. ILL. L. REV. 1759 (2018).}
\footnotetext[20]{Fernandez, 571 U.S. at 297. Had the search been undertaken by a tribal officer that involved property on a reservation, likely there would be a similar bar. See generally United States v. Cooley, 919 F.3d 1135 (9th Cir. 2019) (describing how the Indian Civil Rights Act, the Fourth Amendment counterpart, operates).}
\footnotetext[21]{Fernandez, 571 U.S. at 301 (citing Georgia v. Randolph, 547 U.S. 103, 111 (2006)); see also United States v. Matlock, 415 U.S. 164, 171 n.7 (1974) (discussing assumption of risk); United States v. Johnson, 22 F.3d 674, 678 (6th Cir. 1994) (employing Matlock, 415 U.S. at 171 n.7). The assumption of risk analysis has also been used to validate governmental access to much (e.g., cell site location information), but not all, of an individual’s digital records held by third parties (like phone companies). For a criticism of this third-party doctrine in Fourth Amendment cases, see generally Laura K. Donohue, Functional Equivalence and Residual Rights Post-Carpenter: Framing a Test Consistent with Precedent and Original Meaning, 2018 SUP. CT. REV. 347 (2019). Note that some who live in residences may not be deemed to share, under Fernandez, those residences, and thus may be subject to searches in the residences on the consent of the resident owner, and be unable to consent to a search of the resident owner’s belongings in the residence. Dix v. Edelman Fin. Servs., LLC, 978 F.3d 507, 514, 516 (7th Cir. 2020). Even one who does not share a residence may consent to a warrantless search of the residence where the fruits of the search are admissible as evidence, as long as there was apparent authority to consent. See e.g., Moore v. Andreno, 505 F.3d 203, 209 (2d Cir. 2007); United States v. Sanchez, 608 F.3d 685, 689 (10th Cir. 2010).}
\footnotetext[22]{See, e.g., United States v. Shelton, 337 F.3d 529, 535 (5th Cir. 2003) (describing a third-party consent to search a shared residence to involve "a voluntary willingness to forgo . . . privacy," including extending capacity to give consent to searches to a third party with a privacy interest who "has already substantially ceded his expectation of privacy.").}
\footnotetext[23]{Fernandez, 571 U.S. at 301 (citing Randolph, 547 U.S. at 122–23).}
\end{footnotes}
when the police sought the later consent, the Court found that recognizing her consent as binding upon all occupants would respect her "rights" and "her independence."

"Common authority" between Fernandez and Rojas over the apartment allowed Rojas to consent to a police search while Fernandez was away, even if Fernandez was only away because of a police arrest and even if Fernandez had earlier refused to consent to a search. According to the court, those described alternately as "occupant[s]," "resident[s]," and "tenant[s]" shared common authority. In earlier precedents, courts found that shared authority over premises arises when two people possess "common authority over or other sufficient relationship to the premises or effects sought to be inspected." One such precedent concluded: "[t]his

24 The validity of home searches to which the likes of Roxanne Rojas consented when the likes of Walter Fernandez are not present at home at the time of the consent can be challenged due to illegal police detention of the likes of Walter. See Randolph, 547 U.S. at 121-22; Fernandez, 571 U.S. at 302; see also State v. Coles, 95 A.3d 136, 139, 146, 151 (N.J. 2014) (noting that all judges, including the dissenter, agreed that a third party does not validly consent by third party when a criminal defendant's absence from home was caused by police who wished to avoid a likely objection); id. at 151 (Patterson, J., dissenting).

25 Fernandez, 571 U.S. at 307. For Rojas, a warrantless search pursuant to only her consent would also avoid a "delay" caused by the time necessary to obtain a warrant; dispel more quickly police "suspicion" regarding her possible role in the crimes committed by Fernandez; and allow speedy police removal of any "dangerous contraband" found in the residence. Id. (internal citations omitted). A singular factor may not be sufficient to sustain a "common authority" search. See, e.g., United States v. Peyton, 745 F.3d 546, 555 (D.C. Cir. 2014). At times, at least for me, "common authority" cases are difficult to distinguish from "apparent authority" cases. Compare United States v. Amrati, 622 F.3d 914, 916-17 (8th Cir. 2010), with United States v. Smith, 2011 WL 2982309, at *2-3 (D. Neb. July 22, 2011) (recognizing a mistake in law that landlord had apparent authority to consent to search of tenant's home); see also United States v. Murray, 821 F.3d 386, 391-92 (3d Cir. 2016) ("When an individual possesses only apparent, rather than actual, common authority, the Fourth Amendment is not violated if the police officer's entry is "based upon the consent of a third party whom the police, at the time of entry, reasonably believe to possess common authority over the premises, but who in fact does not do so.""") (quoting Illinois v. Rodriguez, 497 U.S. 177, 179, 188-90 (1990)); United States v. Jackson, 598 F.3d 340, 348-49 (7th Cir. 2010) (considering a mother's apparent authority to consent to search of her adult child's computer).

26 Perhaps as well, the apparent consent by Rojas would have also justified the warrantless search. See Illinois v. Rodriguez, 497 U.S. 177, 181 (1990).

27 Fernandez, 571 U.S. at 294, n.1 ("We use the terms 'occupant,' 'resident,' and 'tenant' interchangeably to refer to persons having 'common authority' over premises within the meaning of Matlock.") (citing United States v. Matlock, 415 U.S. 164, 171 n.7 (1974)).

28 Matlock, 415 U.S. at 171; see also id. at 171 n.7 ("[M]utual use of property by persons generally having joint access or control for most purposes," with assumptions of risk that another "might permit the common area to be searched."); United States v. Sawyer, 929 F.3d 497, 500 (7th Cir. 2019) (determining that co-owner of empty rental property, who had "common control," could agree to search of a backpack brought into the property by a
notion of ‘common authority’ over the object of the search does not rest solely on abstract principles of property, but rather stems from a practical understanding of the way in which the parties to a given relationship have access to and share certain property.\textsuperscript{29}

Courts have employed the common authority approach to justify searches of other forms of property, including a residential home,\textsuperscript{30} a trespasser). \textit{Compare} State v. Licari, 659 N.W.2d 243, 251–54 (Minn. 2003) (finding that a landlord could not consent to search of a criminal defendant’s rented storage locker, as there was no “mutual use” of the locker even if there was joint access), \textit{with} United States v. Waller, 426 F.3d 838, 844, 846 (6th Cir. 2005) (determining that a luggage owner retained sufficient expectation of privacy for bag stored in an apartment resident’s bedroom closet, and there was no “common authority” with the resident for the bag).

\textsuperscript{29} United States v. McA!pine, 919 F.2d 1461, 1463 (10th Cir. 1990); \textit{see also} United States v. Corral, 339 F. Supp. 2d 781, 791 (W.D. Tex. 2004) (“[K]ey to establishing the common authority required” for third party consent to warrantless searches is “mutual use, joint access or control, or some other meaningful connection to the property.”). As long as the police had not requested Roxanne to search Walter’s belongings in their shared apartment, seemingly her search of his things, even if secreted away, and her transmission of what she found to police could be employed in a later prosecution of Walter as there was no governmental search. \textit{See} United States v. Rivera-Morales, 961 F.3d 1, 10–11 (1st Cir. 2020) (considering a wife’s search of her husband’s cellphone).

\textsuperscript{30} \textit{See} Coolidge v. New Hampshire, 403 U.S. 443, 486–88 (1971) (considering where a spouse volunteered guns and clothing of her husband); United States v. Jones, 861 F.3d 638, 639–40 (7th Cir. 2017) (considering where the girlfriend of a criminal defendant consented to a search of the mobile home she shared with him). There can be portions of a residential home or apartment which are not shared, and thus may not be searched because “common authority” over those portions is not shared. \textit{See} United States v. Wright, 63 F. Supp. 3d 109, 125 (D.D.C. 2014) (determining that a search of criminal defendant’s backpack and attached bag found in his son’s room in an apartment the defendant shared with his mother was lawful, as the mother, the child’s guardian, consented); United States v. Peyton, 745 F.3d 546, 554–55 (D.C. Cir. 2014) (finding that a criminal defendant’s great-grandmother, with whom defendant shared an apartment, could not consent to police search of defendant’s shoebox which was defendant’s “personal property” and was stored in an area of the apartment where there was only the defendant’s property).
Common authority justifications for property searches under Fernandez, however, cannot reach searches extending beyond reasonable limits or searches deemed unreasonable under more protective state laws, as with state constitutional privacy protections.

B. Presumed Consent in Intentional Tort Cases

The American Law Institute's Restatement (Third) on Intentional Torts, Tentative Draft No. 4 (2019) (hereinafter, the “ALI Torts Draft No. 4”) generally recognizes that an actor should not be liable to another for otherwise tortious intentional conduct if the other person “gives legally effective consent to that conduct.”

Categories of effective consent

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31 See pre- and post-Fernandez cases, including, for example, United States v. King, 604 F.3d 125, 137 (3rd Cir. 2010) (holding that a computer owner could consent to seizure of her computer containing a defendant’s hard drive where she and the defendant shared the computer “without any password protection”); United States v. Thomas, 818 F.3d 1230, 1241–42 (11th Cir. 2016) (finding that a defendant and his wife, who consented to a forensic search of a shared computer, maintained no separate login name and password, and the defendant did not encrypt his files); United States v. Hudspeth, 518 F.3d 954, 960 (8th Cir. 2008) (considering where a wife consented to home computer search though husband had refused to consent and had been arrested at work, and finding that the police were not required to inform wife of husband’s refusal); United States v. Burke, 2009 WL 173829, at *5 (E.D. Cal. Jan. 23, 2009) (contemplating the search of a computer in a wife’s home where the husband did not live, which produced the husband’s stored information on a computer that was not password protected).

32 See United States v. Scott, 732 F.3d 910, 917 (8th Cir. 2013) (finding that defendant’s on-and-off girlfriend had common authority over defendant’s car and therefore had authority to consent to a search of the car).

33 See Frazier v. Cupp, 394 U.S. 731, 740 (1966) (holding that cousin of petitioner had authority to consent to search of duffel bag jointly used with petitioner).

34 See United States v. Amraticl, 622 F.3d 914, 916 (8th Cir. 2010).

35 See Peyton, 745 F.3d at 554 (finding no reasonable search of a shoebox in which a co-tenant said contained the suspect’s “personal property”). But see United States v. Moore-Bush, 963 F.3d 29, 32, 34 (1st Cir. 2020) (exemplifying the limits and specifically discussing that a search involving an eight-month video log of a criminal defendant’s house, specifically driveway and front door, did not violate a defendant’s “reasonable expectation of privacy.”).


37 On intent by a tortfeasor, the ALI generally suggests, at least for the tort of battery, that a tort is intended where the actor intends to cause “a contact” with another, or where the actor’s intent constitutes “transferred intent.” RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 1 (Am. Law Inst., Tentative Draft No. 4, 2019). “[T]ransferred intent” is defined as under § 11 and is not yet available. See id.

38 RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 12 (Am. Law Inst., Tentative Draft No. 4, 2019). Certain consent, then, may not be “legally effective.” Consider, for example, where the law prohibits certain consents. See, e.g., Smith v. Calvary Christian Church, 614 N.W.2d 590, 595 (Mich. 2000) (acknowledging the “difficult question”
include actual consent,\(^\text{39}\) apparent consent,\(^\text{40}\) and presumed consent.\(^\text{41}\) "Presumed consent" encompasses intentional acts by an actor who "is justified in engaging" in the acts without the "actual consent" or the "apparent consent" of the person acted upon.\(^\text{42}\) Thus, the presumed consent by a harmed individual where an otherwise intentional tortfeasor commits the harmful act does not depend upon the harmed person's acts. At times, the harmed individual need not act in order for an intentional tortfeasor to be free from any liability. Any law following the ALI Torts Draft No. 4 generally would sanction innocent losses of rights, including nonfundamental, constitutionally protected liberty interests.\(^\text{43}\) Such a law would usually only be subject to rational basis scrutiny.\(^\text{44}\)

where a consent to the infliction of future harm involves conduct “in violation of the Michigan Penal Code.”; see also 15 U.S.C. § 77n (“Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.”).  

\(^{39}\) Actual consent" encompasses consent to conduct where a person is “willing for that conduct to occur,” with willingness either “express or . . . inferred from the facts,” as long as the conduct “is not substantially different in nature from the conduct that the person is willing to permit.” RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS §§ 13(a), 14(a) (AM. LAW INST., Tentative Draft No. 4, 2019). Actual consent by a principal to an agent’s intentional tort can involve a principal who earlier directed the relevant action or who later ratified the action. See Horwitz v. Holabird & Root, 816 N.E.2d 272, 284 (Ill. 2004) (reviewing a client’s liability for lawyer’s intentional tort).

\(^{40}\) “Apparent consent” encompasses intentional acts undertaken with a reasonable belief that the person acted upon, due to his/her conduct, “actually consents to the conduct.” RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS §§ 12(b), 16(a) (AM. LAW INST., Tentative Draft No. 4, 2019).

\(^{41}\) RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 12(c) (AM. LAW INST., Tentative Draft No. 4, 2019).

\(^{42}\) RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 16(b) (AM. LAW INST., Tentative Draft No. 4, 2019).

\(^{43}\) Innocent losses could occur at the hands of governmental officers, employees, and the like. They could also be caused by private actors whose conduct is deemed “under color of state law” under the Fifth and Fourteenth Amendments. See Rawnson v. Recovery Innovations, Inc., 975 F.3d 742, 751, 751 n.8 (9th Cir. 2020) (determining that a private hospital and its employees acted under color of state law, per the “public function” test); Harper v. Professional Probation Services, Inc., 976 F.3d 1236, 1244 (11th Cir. 2020) (finding that a private probation company acted in quasi-judicial capacity in overseeing probationers and thus needed to act with due process impartiality). The “incoherence of the state action doctrine” in cases involving “private infringements of constitutional rights” is well reviewed in Erwin Chemerinsky’s Rethinking State Action. Erwin Chemerinsky, Rethinking State Action, 80 NW. L. REV. 503, 505, 507 (1985); see also Louis Michael Seidman, State Action and the Constitution’s Middle Band, 117 MICH. L. REV. 1, 4 (2018) (suggesting three “domains” for state action doctrine).

\(^{44}\) See Washington v. Glucksberg, 521 U.S. 702, 728 (1997) (regarding due process); Price v. Tanner, 855 F.2d 182, 2823 (11th Cir. 1988) (regarding equal protection); see also Arbino v. Johnson & Johnson, 880 N.E.2d 420, 432, 444–43 (Ohio 2007) (finding no due
The ALI Draft, however, does not contemplate significant numbers of innocent losses for those who are unable to pursue intentional torts due to presumed consent. Thus, in its Comment, the ALI Draft declares:

[Under presumed consent, an actor ordinarily will only be justified in engaging in conduct in the absence of the other person's actual consent if that conduct is a minor invasion of the interests of the other. Illustrations 6 through 10 all satisfy this condition. For major invasions of the other's rights, the actor will normally be subject to liability unless the actor can prove that he or she satisfies an applicable privilege such as self-defense or defense of property.]

A tap on the shoulder and a handhold on the third date exemplify minor invasions of protected liberty interests. Further, not all major, as contrasted with minor, liberty invasions prompt liability and thus involve governmental sanction of more significant innocent losses of property. Exceptional cases per the ALI Draft, where individuals may be exempt from liability for more significant losses, include emergency circumstances, as well as "medical-treatment cases" where courts should sometimes be "deferential toward medical practitioners when the question of exceeding the scope of consent arises."

C. Quasi-Contract

The American Law Institute (ALI) recognizes in the Restatement (Second) of Contracts some contractual obligations for those who have not consented in any apparent way. One Restatement provision notes process or equal protection violation with Ohio statute limiting noneconomic damages in certain tort actions for all but the most serious injuries); Caviglia v. Royal Tours of Am., 842 A.2d 125, 136–37 (N.J. 2004) (finding no due process or equal protection violation involving a statutory bar on an uninsured driver's recovery of noneconomic damages).

45 RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 16 cmt. d, illus. 6–11 (AM. LAW INST., Tentative Draft No. 4, 2019) (including, through Illustrations 6–10, a tap on the shoulder; a pat on the buttocks of a basketball teammate; placing a blanket over one who is shivering while sleeping; locking a door to provide safety; and a handhold on a third date).

46 RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 16 cmt. d, illus. 6, 10 (AM. LAW INST., Tentative Draft No. 4, 2019)

47 Id. § 16 cmt. c, reporter's notes.

that quasi-contracts, unlike implied contracts, "are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises." Rather, quasi-contracts "are obligations created by law for reasons of justice," as with one spouse's duty to pay for "necessary clothing and supplies" purchased by the other, particularly where the spouses are separated, even though the obligated spouse gained nothing from the purchase, and where, in fact, the obligated spouse directed the seller not to furnish such clothing and supplies. Where such a quasi-contract doctrine obligates a private party in a pending case to yield property, there is a governmental sanction of a loss of a nonfundamental, constitutionally protected interest, which may be subject to rational basis scrutiny. Justice here may involve the earlier assumption of a duty of support by the obliged spouse, until the marriage is dissolved, not unlike the common authority doctrine in Fourth Amendment cases where one roommate yields the power to consent to a warrantless search of shared premises until the joint occupancy has ended.

The term quasi-contract has also been employed in a different way. For example, "a contract implied in law (also called a quasi-contract)" obligated a local school board when its superintendent and its board president signed a contract with a construction company for postfire services at a high school that benefitted the school board, even though the contract was void ab initio (i.e., no board vote and no bidding process).
Another court similarly found a contract implied in law when one knowingly and voluntarily received and benefitted from non-gratuitous services provided by nonfamily members, like food delivery, medication assistance, yardwork, and building maintenance.\(^{54}\) Unlike the obliged spouse in the ALI Restatement, however, here contract performance actually significantly benefitted those contractually bound.\(^{55}\)

**D. Lawyer Agency in Jury Trial Cases**

The federal laws on constitutional criminal and civil jury trial rights demonstrate the variations in the standards for innocent losses of somewhat comparable constitutional rights. Procedural laws significantly ensure criminal jury trial waivers are actually consensual,\(^{56}\) meaning they are informed, voluntary, and undertaken only by the rightsholders.\(^{57}\) By contrast, civil jury trial losses can be significantly less voluntary, such as instances where lawyer agents' careless acts solely prompt client losses, even where the clients expressly indicate their desires for trials by their peers.\(^{58}\)

The ALI Restatement on the Law Governing Lawyers (hereinafter, the "Restatement on the Law Governing Lawyers") recognizes the differentiations between lost criminal and lost civil jury trial rights.\(^{59}\) It declares that, unless "the client has validly authorized the lawyer to make" the decision, the client should personally undertake the general waiver of the criminal jury trial right generally.\(^{60}\) It further notes that the lawyer

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\(^{55}\) *Id.* at 1078.


\(^{58}\) *Id.*


\(^{60}\) *Id.*
cannot even employ such a valid authorization where the relevant criminal procedure laws, as they usually do, dictate “the client’s personal participation or approval.”

By contrast, this Restatement does not generally reserve to clients decisions on civil jury trial waivers.

Rule Eleven of the Federal Rules of Criminal Procedure speaks to criminal jury trial waivers when pleas are taken. The rule seeks to ensure actual consent from the criminally accused. The rule provides that before accepting a plea of guilty or nolo contendere, “the court must address the defendant personally in open court . . . and determine that the defendant understands . . . the right to a jury trial.”

The plea may only be accepted if the court determines “that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).” As well, any judgment entered on a plea is contingent on a finding that “there is a factual basis for the plea.”

State criminal procedure laws are sometimes similar, embodying the requisites attending federal constitutional criminal jury trial right.

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61 Id. § 22(2).
62 Id. § 22(1).
64 See FED. R. CRIM. P. 11(b)(1)(C).
65 Id. Compare id., with People v. Bracey, 821 N.E.2d 253, 257–58 (Ill. 2004) (determining that a jury trial waiver is valid if made by criminal defense counsel in open court in the defendant’s presence, without any objection by the defendant).
67 FED. R. CRIM. P. 11(b)(3). The Constitution does not compel this rule for the state courts. See, e.g., Matthew v. Johnson, 201 F.3d 353, 368 (5th Cir. 2000). This is not to say that, in practice, federal criminal case pleas are usually taken fairly. See, e.g., Julian A. Cook III, Federal Guilty Pleas: Inequities, Indigence, and the Rule 11 Process, 60 B.C. L. REV. 1073, 1076, 1078 (2019) (explaining why “expediency and facial compliance with [FED. R. CRIM. P. 11] (as opposed to searching inquiries regarding a defendant’s knowledge and coercive influences) characterize federal-court procedure,” while discussing “how their shortfalls affect federal defendants generally, and the indigent class in particular, and propose a pathway to reform”). For more U.S. Supreme Court guidance on how plea deals should be construed when disputes arise, see generally Colin Miller, Plea Agreements as Constitutional Contracts, 97 N.C. L. REV. 31 (2018) (urging a need to incorporate into FED. R. CRIM. P. 11 an implied covenant of good faith and fair dealing).
68 See, e.g., ARIZ. R. CRIM. P 17.3; COLO. R. CRIM. P. 11(b). But see People v. Burge, 147 N.E.3d 896, 901, 904, 906, 911 (Ill. App. Ct. 2019) (noting that Criminal Procedure Code has separate “directory” provisions on criminal pleas “at arraignment” that differ from the rule provisions on post-arraignment pleas, though the statute may violate separation of powers principles by intruding on Supreme Court rulemaking).
Where a criminal case is not resolved by a plea and will be tried in a federal district court, if "the defendant is entitled to a jury trial, the trial must be by jury unless[. . .] the defendant waives a jury trial right in writing[,] . . . the government consents[,] and . . . the court approves."\(^70\)

Federal Civil Procedure Rule (Fed. R. Civ. P.) 38 speaks very differently about civil jury trial waivers.\(^71\) The rule requires a timely written jury trial demand, whose absence can prompt a waiver by a party.\(^72\) One prominent federal civil practice treatise concludes, "it seems clear that the test of waiver that is applied to other constitutional rights, that there must be 'an intentional relinquishment or abandonment of a known right or privilege,' is not fully applicable to the jury trial context."\(^73\)

While, in exercising its discretion under Fed. R. Civ. P. 39(b), a district court may overlook civil jury trial waivers, there is sometimes no finding of abuse of discretion where counsel's inadvertence produces the failure to overlook a waiver.\(^74\) Some state civil procedure jury trial laws are similar.\(^75\)

\(^70\) FED. R. CRIM. P. 23(a). Again, state rules are often similar. See, e.g., ME. R. CRIM. P. 23(a); W. VA. R. CRIM. P. 23(a). Of course, criminal defense counsel can negatively impact a defendant's exercise of the jury trial right by conceding during closing statements the defendant's guilt on some counts. But see People v. Burns, 38 Cal. Rptr. 3d 442, 446 (Cal. App. 5th 2009) (rejecting argument that defendant's counsel's concession to guilt on a charge violated his constitutional rights).

\(^71\) See FED. R. CIV. P. 38.

\(^72\) See FED. R. CIV. P. 38(b), (d).

\(^73\) WRIGHT ET AL., supra note 56 (internal citations omitted) (noting, however, that there is a "presumption against jury trial waiver.").


\(^75\) See, e.g., 735 ILL. COMP. STAT. § 2-1105(a) (2015) (mandating that untimely civil jury trial demand by either a plaintiff or a defendant prompts a jury trial right waiver); CAL. R. CIV. P. 6 (f) (mandating that civil jury trial waiver by, e.g., failing to timely pay the required nonrefundable fee or failing to announce that a jury is required at the time the cause is first set for trial, should the cause be set upon notice or stipulation); FLA. R. CIV. P. 1.430(d) (mandating that civil jury trial right be waived if not properly demanded). In California, the statutory methods of accomplishing civil jury trial waivers have been deemed exclusive so that only limited forms of attorney conduct operate. See Chen v. Lin, 255 Cal. Rptr. 3d 386, 390 (Cal. App. Dep't Super. Ct. 2019) (ruling that contrary local court rulemaking is preempted); see also Duran v. Pickwick Stages Sys., 35 P.2d. 148, 151 (Cal. Ct. App. 1934)
In cases wherein lawyers represent civil litigants, lawyers' failures to undertake effective jury trial demands can prompt jury trial right losses by clients. There are no explicit dictates on in-court hearings or writing requirements that seek to insure the losses of civil jury trial rights are knowing and voluntary, either on the part of the lawyers or their clients. Then-Judges Neil Gorsuch and Susan Graber proposed Fed. R. Civ. P. amendments in 2016 that would ensure a civil jury trial for a party "unless the party waives a jury, in writing." The Advisory Committee on Civil Rules did not move forward with the proposal in April of 2017.

E. Lawyer Agency Beyond Jury Trial Cases

Litigants can innocently lose federal constitutional hearing opportunities beyond jury trial rights in both criminal and civil cases. Such losses can arise, for example, due to procedural law violations, such as a lawyer's deficient or untimely requests regarding witness testimony, or to ethical law violations, like a lawyer settling a client's civil claims without actual client consent.

The judicial system traditionally protects more greatly the constitutional hearing opportunities of those criminally accused, whether in federal or state courts. Here, very significant life, liberty, and property interests are often at stake. Thus, before a guilty plea can prompt a
federal court conviction, under the Federal Rules of Criminal Procedure, district judges must personally address the criminally accused and receive assurance that there are informed and voluntary waivers of such hearing opportunities, as “the right at trial to confront and cross-examine adverse witnesses, . . . to testify and present evidence, and to compel the attendance of witnesses.” Judges should reject proposed plea agreements where there were no such informed and voluntary waivers. State cases generally afford similar protections to the criminally accused. This does not mean that the criminally accused need to be informed on all the effects of their guilty pleas.

82 This is not to say there is no room for improvement. See, e.g., Jenia I. Turner, Transparency in Plea Bargaining, 96 NOTRE DAME L. REV. 973, 976 (2021) (noting that lack of transparency in plea bargaining prevents adequate oversight of coercive plea bargains, causes untruthful guilty pleas and inequality among defendants, hinders criminal defense attorneys’ work, impairs victims’ rights, and inhibits informed public debate); Michael D. Cicchini, Under the Gun: Plea Bargains and the Arbitrary Deadline, 93 TEMP. L. REV. 89, 91 (2020) (urging the need to abolish arbitrary deadlines to complete plea bargains).

83 FED. R. CIV. P. 11(b)(1)(A), (E), (F). On the rationales for requiring such colloquies, see, for example, United States v. Shorty, 741 F.3d 961, 966 (9th Cir. 2013). The attributes of the colloquies between trial judges and criminal defendants regarding constitutional right waivers can differ depending upon the right. See, e.g., Tatum v. Foster, 847 F.3d 459, 460-61, 464 (7th Cir. 2017) (stating the difference between competency to stand trial and self-representation colloquy); People v. Johnson, 126 N.E.3d 570, 574 (Ill. App. Ct. 2019) (identifying a colloquy regarding trial waiver though defendant signing a jury trial waiver form); Dunn v. State, 434 P.3d 1, 3 (Okl. Crim. App. 2018) (due process right to be present at evidentiary hearing on a motion to withdraw a plea cannot be waived by counsel alone). It has been suggested that pre-plea procedures go beyond such colloquies. See, e.g., William Ortman, Confrontation in the Age of Plea Bargaining, 121 COLUM. L. REV. (forthcoming 2021) (manuscript at 52) (suggesting a pre-plea Sixth Amendment deposition opportunity in order to recognize the defendant’s right to confront adverse witnesses on whose testimony the government relied in bringing a prosecution).


85 See, e.g., ARIZ. R. CRIM. P. 17.2(a)(3) (stating a court must personally address a criminal defendant in determining “the defendant understands[] . . . the constitutional rights that the defendant foregoes by pleading guilty.”); ARK. R. CRIM. P. 24.4(c) (employing similar language as the Arizona rule); see also, e.g., People v. Thomas, 144 N.E.3d 970, 973, 982 (N.Y. 2019) (determining that waivers by the criminally accused during colloquies can be sustained, even when they differ from the language in the written trial waiver form).

86 See, e.g., People v. Burge, 147 N.E.3d 896, 908 (Ill. App. Ct. 2019) (finding failure to admonish criminally accused of collateral consequences of guilty plea is not a constitutional violation, but may prompt remedy if “real justice” is denied); State v. Straley, 147 N.E.3d 623, 626, 628 (Ohio 2019) (finding failure to inform criminally accused that
Notwithstanding these protections in guilty plea proceedings, the judicial system does not comparably enforce protections of hearing opportunities during jury trials often. Explicit consents to waivers of procedural rights by the accused are usually unnecessary. Unilateral actions by counsel can diminish or destroy the accused’s hearing opportunities. Thus, as for the accused’s right to a speedy trial, “delay caused by . . . defendant’s counsel” may strip the accused of this protection, though this “general rule attributing to the defendant delay caused by . . . counsel is not absolute.” Attribution of counsel’s actions to a criminal defendant is seemingly more likely when the defendant, through counsel, attempts “to evade the consequences of an unsuccessful tactical decision.” While state laws can provide the criminally accused...
with greater hearing opportunities than are afforded under the federal constitution, counsel’s actions can, here as well, generate hearing opportunity losses.

Trial losses of the criminally accused’s hearing opportunities are less likely to be deemed innocent where the lawyer acts as an agent of, and under the direction of, the accused. Here, losses are justified. Losses are more innocent when the lawyer acts in ways directly contrary to the expressed wishes of the accused, who nevertheless is bound by the lawyer’s acts. Yet, contrary wishes notwithstanding (perhaps earlier shielded by attorney-client communication privilege), a criminally accused can innocently lose hearing opportunities and can be often bound by her attorney’s actions (even when not tactical), as long as the attorney acted in an objectively reasonable way and, but for her actions, the criminally accused probably would not have seen different results.

Protections for the criminally accused against lawyer-produced and, thus, innocent losses of procedural rights sometimes can occur without time-consuming and expensive inquiries into objective reasonableness

testimony to which there was no objection per FRE 103(a) (internal quotations omitted); see also People v. Massey, 142 N.E.3d 803, 809 (Ill. App. Ct. 2019) (defining ineffective assistance of criminal trial counsel to mean “performance [that] was objectively unreasonable” and that caused a “different” outcome; awarding great deference to counsel’s strategic decisions, with counsel’s acts strongly presumed to be reasonable); People v. Walker, 131 N.E.3d 136, 141 (Ill. App. Ct. 2019) (classifying a decision by criminal defense counsel on sharing/discussing items received in discovery as “a matter of trial strategy” entitled to “strong presumption” of attorney competence).

94 See, e.g., State v. Vincenty, 202 A.3d 1273, 1278 (N.J. 2019) (noting that common law privilege against self-incrimination affords greater protection than does the federal constitution); State v. Shaw, 207 A.3d 229, 246 (N.J. 2019) (concluding that the N.J. constitution is more protective than federal constitution “when it comes to consent searches.”).

95 Hearing opportunities at sentencing, as well as at trial, can be innocently lost. See, e.g., Andrus v. Texas, 140 S. Ct. 1875, 1878 (2020).

96 Of course, such direction will be discounted when the acting lawyer provided ineffective assistance. See Day v. United States, 962 F.3d 987, 988–89 (7th Cir. 2020) (considering an accused’s receipt of bad advice when rejecting plea deal).

97 See CAL. RULES OF PROF’L CONDUCT r. 2.1 (2018) (characterizing the lawyer as a “counselor” to its clients).

98 See Geoffrey C. Hazard Jr., An Historical Perspective on the Attorney-Client Privilege, 66 CALIF. L. REV. 1061, 1062 (1978) (explaining the importance of attorney-client privilege within the criminal arena).

99 See, e.g., People v. Sophanavong, 2020 IL 124337 at *4, 6 (Ill. Aug. 20, 2020) (determining that a defendant’s guilty plea cannot be challenged on grounds that no presentence investigation report was ever done since the issue was not raised for three years).

and the possibilities of different results. Consider the recent amendments
to Federal Rule of Evidence 404(b), effective in December of 2020, which establish the prosecutor’s obligation to give notice of an intended use of evidence under Rule 404(b), whether or not the defense attorney makes a request for such a notice.

By contrast, the judicial system protects less vigorously the constitutional hearing opportunities of civil litigants, whether in federal or state courts. For example, civil litigants sometimes lose hearing opportunities for their claims where their attorneys settle the claims without client consultations, at times over their clients’ express rejections of the offers to which the clients are then bound. Losses can arise due to the apparent or presumed attorney settlement authority which may lack ability to be overcome. Other attorney conduct involving, for

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101 See FED. R. EVID. 404.
102 FED. R. EVID. 404(b), advisory committee’s note to 2020 amendment.
103 Some civil litigants, like those facing involuntary civil commitments or terminations of parental rights, do have greater procedural due process rights than most other civil litigants. On involuntary civil commitments of sexually dangerous persons, see 725 ILL. COMP. STAT. § 3.01 (requiring proof beyond a reasonable doubt); 725 ILL. COMP. STAT. § 5 (2013) (regarding rights to counsel and jury trial), reviewed, People v. Trainor, 752 N.E.2d 1055, 1057 (Ill. 2001). On parental rights terminations, see J.B. v. Florida Dep’t of Children & Families, 170 So. 3d 780, 785 (Fla. 2015) (determining that parents have right to effective counsel when state seeks to terminate their parental rights); N.J. Div. of Youth & Family Services v. B.R., 929 A.2d 1034, 1038 (N.J. 2007) (adopting effective counsel norms for criminal cases).
104 Parness, supra note 57, at 460.
example, pleading, discovery, or trial practice failures may yield lost hearing opportunities.

The constitutional hearing opportunities of certain civil litigants are heightened when more significant life, liberty, or property interests are at stake. Courts recognize most significant interests in proceedings involving involuntary civil commitment (e.g., as with a sexual predator), punitive damage assessments, child guardianships, and termination of parental rights. Here, hearing opportunities for civil litigants should be more difficult to lose, whether by a personal consent or by an attorney agent. Yet, the protections against innocent losses of

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108 See, e.g., FED. R. CIV. P. 12(b)(6) (providing a method for dismissal for failure to state a claim upon which relief may be granted). But see FED. R. CIV. P. 11(c)(4) (noting that sanction is “limited to what suffices to deter repetition of the conduct or comparable conduct by others similarity situated.”).

109 See, e.g., FED. R. CIV. P. 26(g)(1)-(3) (providing sanctions for signing failure by attorney regarding discovery “request, response, or objection” can be imposed on “the party on whose behalf the signer was acting.”); Devault v. Steven L. Herndon, Prof’l Ass’n 684 P. 2d 978, 979–80 (Idaho 1984) (finding that attorney’s discovery failures lead to dismissal of client’s claim; inability to “penalize” client for attorney’s acts “would make for disorder and preclude effective judicial administration in the trial court.”).

110 Compare Temple v. Providence Care Ctr., 233 A.3d 750, 762–63 (Pa. 2020) (recognizing defendant’s loss of new trial opportunity when motion for new trial or request for mistrial was not timely and specifically made at trial and in post-trial motion; some loss, though, was attributed to the attorney’s “strategic choice”), with Doe v. Parrillo, 2020 IL App (lst) 191286, at *8, *9 (Ill. App. Ct. Sept. 28, 2020) (determining that defense counsel’s failure to participate in trial resulted in a one million dollar judgment; defendant “shares responsibility for his counsel’s choices,” though court found that it did “not know” when the defendant learned of his counsel’s refusal to participate).

111 See, e.g., 725 ILL. COMP. STAT. § 3.01 (mandating committing of sexually dangerous persons only upon proof beyond a reasonable doubt); 725 ILL. COMP. STAT. § 5 (2013) (permitting committing sexually dangerous persons only after being afforded the right to be represented by counsel, at state expense if there is indigency).


113 See, e.g., In re Adoption of J.E.V., 141 A.3d 254, 269 (N.J. 2016) (recognizing a need for colloquy with a parent who wants self-representation).


115 See, e.g., RESTATEMENT (SECOND) OF TORTS § 892A(1) (AM. LAW INST. 1979) (“One who effectively consents to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it.”); id. § 892C(2) (rendering ineffective consent if one is a member of a class specially protected by criminal laws).

116 See Primera Beef, LLC v. Ward, 457 P.3d 161, 166–69, 172 (Idaho 2000) (determining that, while an attorney who is acting or communicating during his/her representation of a client is presumed to be acting on behalf of that client, the presumption does not reach to an attorney’s implied authority to acts resulting in “the surrender or giving
hearing rights in civil cases typically should not be as strong as the protections afforded the criminally accused.\footnote{See, e.g., New Jersey Div. of Child Prot. & Permanency v. R.L.M., 236 N.J. 123, 150 (2018) (finding a colloquy with parent who wants self-representation "need not be as comprehensive as the colloquy mandated when a criminal defendant seeks to proceed unrepresented."); In re K.C. & A.C., 2019 WL 1766072, at *3 (W. Va. Apr. 19, 2019) (detailing factor for determining whether incarcerated parent has a right to attend a parental rights termination proceeding in person).} When civil litigants are proceeding pro se, courts sometimes expand hearing opportunities to further mitigate any innocent losses of constitutional due process interests.\footnote{See, e.g., Solis v. County of Los Angeles, 514 F.3d 946, 956 n.12 (9th Cir. 2008).} For example, as one federal circuit held, federal district courts must abide by the general rule that pro se plaintiffs receive special notices on the consequences of failing to respond to summary judgment motions with affidavits or otherwise.\footnote{Timms v. Frank, 953 F.2d 281, 283 (7th Cir. 1992); see also Savis, Inc. v. Cardenas, slip op. 2020 WL 4736411, at *4 (N.D. Ill. Aug. 14, 2020) (finding local court rule requirements failed to satisfy the \textit{Timms} standard).}

Civil litigants can lose certain civil case hearing opportunities even before civil actions commence. For example, if a party is incarcerated, that party has no constitutional right to be made available in person in order to testify in a pending civil action.\footnote{See, e.g., Myers v. Emke, 476 N.W.2d 84, 85 (Iowa 1991) (noting inmate could supply his testimony by deposition); Clements v. Moncrief, 549 So.2d 479, 481 (Ala. 1989) ("[A] prisoner has no right to be removed from his place of confinement in order that he might appear and testify in his own behalf in a civil suit unrelated to his confinement."). \textit{Compare} Curtiss v. Curtiss, 886 N.W.2d 565, 568–69 (N.D. 2016) (noting that prisoners have "diminished constitutional protections, but they maintain a due process right to reasonable access to the courts."), with Hazellett v. Hazelett, 119 N.E.3d 153, 161 (Ind. App. 2019).} Here, the loss may be innocent,
since the party's earlier conduct has no relationship to any desire to forego later procedural rights.\textsuperscript{121} Further, current civil litigants can also lose, via earlier, pre-suit contracts, certain hearing opportunities, like jury trial rights\textsuperscript{122} or personal jurisdiction defenses.\textsuperscript{123} Here, the loss is far less innocent, as a party consented to a loss of a later procedural right. Yet, many see the unfairness, if not invalidity, of such contracts as involving innocent losses, as the consent standards do not require knowing, voluntary, and informed assents.\textsuperscript{124}

\textbf{F. De Facto Parentage Cases}

The 2017 Uniform Parentage Act (UPA) of the National Conference of Commissioners on Uniform State Laws (NCCUSL)—but neither of its earlier UPAs (1973 UPA and 2000 UPA)—expressly recognizes "de facto" parenthood as a form of childcare parentage for those without biological or formal adoption ties.\textsuperscript{125} Such parenthood arises from quite explicit agreements for shared custody between an existing legal parent

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{121} See Hazlett, 119 N.E.3d at 160–61.
\item \textsuperscript{122} See, e.g., Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. (including compulsory and binding arbitration pacts).
\item \textsuperscript{124} See, e.g., Judith Resnik, Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights, 124 YALE L.J. 2804, 2804 ("[A]rbitration [is] not a vindication but an unconstitutional evisceration of statutory and common law rights.")
\item \textsuperscript{125} The term "de facto" parent did not originate in the 2017 UPA. The Comment to the Act indicates its de facto parentage standard was modeled on Maine and Delaware statutes. UNIF. PARENTAGE ACT § 609 cmt. (UNIF. LAW COMM'N 2017). The term has also been employed by the American Law Institute (ALI). Its 2002 Principles of the Law of Family Dissolution defines a de facto parent as "one other than a legal parent or parent by estoppel." PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION §§ 2.03(1)(c), 3.02(1)(c) (AM. LAW INST. 2002). Its Council Draft No. 2 (Mar. 20, 2019) of the RESTATEMENT OF THE LAW: CHILDREN AND THE LAW defines a de facto parent as a "third party who establishes . . . that (1) the third party lived with the child for a significant period of time" while assuming "significant obligations of parenthood without expectation of financial compensation," establishing "a bond and dependent" parental-like relationship; and receiving the consent of "a parent" to the formation of this relationship. Appx. A, § 1.82 (AM. LAW. INST., Tentative Draft No. 2, 2019).
\end{enumerate}
\end{footnotesize}
and a nonparent.\textsuperscript{126} For de facto parentage, an existing legal parent must "foster[] or support[]" a "bonded and dependent relationship" between the child and the nonparent who may become a de facto parent.\textsuperscript{127} The nonparent must undertake "full and permanent" parental responsibilities.\textsuperscript{128}

The 2017 UPA’s de facto parentage provision is far more precise in its details on parental-like acts and consent to shared parental authority than is its provision on the two-year residency/hold out parentage presumption.\textsuperscript{129} While both de facto parentage and residency/hold out parentage encompass human acts occurring at no particular time or in no particular place, only de facto parentage requires all of the following conditions:

(a) A proceeding to establish parentage of a child under this section may be commenced only by an individual who: (1) is alive when the proceeding is commenced; and (2) claims to be a de facto parent of the child.

(b) An individual who claims to be a de facto parent of a child must commence a proceeding . . . (1) before the child attains 18 years of age[] and (2) while the child is alive . . .

(d) In a proceeding to adjudicate parentage of an individual who claims to be a de facto parent of the child, if there is only one other individual who is a parent or has a claim to parentage of the child, the court shall adjudicate the individual who claims to be a de facto parent to be a parent of the child if the individual demonstrates by clear-and-convincing evidence that: (1) the individual resided with the child as a regular member of the child’s household for a significant period; (2) the individual engaged in consistent caretaking of the child; (3) the individual undertook full and permanent responsibilities of a parent of the child without expectation of financial compensation; (4) the individual held out the child as the individual’s child; (5) the individual established a bonded and dependent relationship with the child which is parental in nature; (6) another parent of the child fostered or supported the bonded and dependent relationship required under paragraph (5); and (7) continuing the relationship between the individual and the child is in the best interest of the child.

\textsuperscript{126} Expecting legal parents, under the 2017 UPA, are not bound to any agreements on de facto parentage for children to be born of sex later, as the model law requires, e.g., "a bonded and dependent relationship with the child." UNIF. PARENTAGE ACT § 609(d)(5) (UNIF. LAW COMM’N 2017). Thus, a possible "bonded and dependent relationship" with a fetus, a fertilized egg, or some child of sex yet unconceived, does not exist.

\textsuperscript{127} \textit{Id.} § 609(d)(6).

\textsuperscript{128} \textit{Id.} § 609(d)(3).

\textsuperscript{129} \textit{Id.} § 204(a)(2) (expressing that common residency/hold out parentage involves a nonparent who resided with a child for the first two years of the child’s life while holding the child as her/his own). The initial UPA, in 1973, differed significantly. UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. LAW COMM’N 1973) (mandating that common residency need not start at child’s birth, and only includes nonparents who were male).
In a proceeding to adjudicate parentage of an individual who claims to be a de facto parent of the child, [if] there is more than one other individual who is a parent or has a claim to parentage of the child and the court determines that the requirements of subsection (d) are satisfied, the court shall adjudicate parentage under Section 613.130

Clearly, de facto parentage, but not residency/hold out parentage, requires human acts that a nonparent and an existing legal parent recognize as embodied within very positive parent-child relationships.

Of particular note, however, is the 2017 UPA requirement that an existing legal parent (i.e., “another parent”) “fostered or supported” the parental-like relationship between the child and the nonparent.131 This fostering and support seemingly can qualify as “actual consent” (whether “express” or “inferred”) or as “apparent consent” to shared custody by the one existing legal parent. While addressing childcare arrangements between one legal parent and a nonparent, the 2017 UPA does not mention any conduct—consensual or otherwise—involving a second existing legal parent (like a noncustodial voluntary acknowledgment parent or a presumed spousal parent), or any expecting legal parent (like a biological father of a child born of sex who maintains a paternity opportunity interest, or a biological mother, via egg donation, of a child who she intended and still wishes to parent).132 Such an unmentioned parent may not even know of “another” parent’s fostering and support. Under the UPA language, it is quite conceivable that the fostering and support nonparent may later become a de facto parent, concurrent with the effective termination of the parentage interests of the unaware second existing or expecting parent.133

130 UNIF. PARENTAGE ACT § 609(a), (b), (d), (e) (UNIF. LAW COMM’N 2017).
131 Id. § 609(d)(6).
133 UNIF. PARENTAGE ACT § 816(d) (UNIF. LAW COMM’N 2017) (where there is no state law recognition of the possibility of three or more custodial parents, a court must “adjudicate parentage . . . in the best interest of the child,” with guiding factors enumerated). In the 2017 UPA, there is provided no express and significant mechanism for a second existing legal, or an expecting legal parent, to challenge a petition to establish de facto parentage. See id. § 609(c) (beyond the birth or adoptive parent, if there is another individual “who is a parent or has a claim to parentage of the child” for whom an alleged de facto parent seeks parental status, that individual’s interests must be adjudicated). Yet, one may wonder how a court would learn of this individual. One may also wonder whether it is reasonable to assume that such an individual would likely know of the de facto parent petition and thus be able to intervene. In Vermont, which substantially enacted the 2017 UPA, an alleged de facto parent’s petition to adjudicate his/her “claim to parentage” is to be determined by “clear and
Also of note is the 2017 UPA provision that a proceeding to establish de facto parentage may commence only at the hands of a living individual claiming to a de facto parent.\textsuperscript{134} Thus, upon a breakup of a family relationship between an individual and an existing legal parent and his or her child, the parent or the child may not proceed to establish de facto parentage in the individual for child support purposes.\textsuperscript{135} By contrast, an existing legal parent and/or the child (and others, like a child-support agency) may pursue an alleged residency/hold out parent for support,\textsuperscript{136} where, unlike de facto parentage, there is no requirement of “consistent caretaking,” a “bonded and dependent relationship with the child,” or the undertaking of “full and permanent responsibilities of a parent.”\textsuperscript{137} The differences in the standing norms present significant equal protection and public policy concerns.\textsuperscript{138} Oddly, the more that a live-in nonparent acts as a parent, the less likely that nonparent can be pursued later as a parent for child support.\textsuperscript{139}

The judicial community has somewhat accepted the invitation in the 2017 UPA to innocent losses of childcare rights.\textsuperscript{140} In Vermont, an adjudication of de facto parentage “does not disestablish the parentage of convincing evidence,” with no explicit statutory mention of the participatory rights of a nonresidential person with “a claim to parentage.” VT. STAT. tit. 15C § 501(a)(1), (b) (2018). \textsuperscript{134} UNIF. PARENTAGE ACT § 609(a) (UNIF. LAW COMM’N 2017). The 2019 Draft of the ALI’s Children and Law Restatement is similar as it speaks to “a de facto parent . . . who establishes” parenthood by evidence in order to seek an allocation of custodial or decision-making responsibility for a child. RESTATEMENT OF THE LAW: CHILDREN AND THE LAW § 1.82(a), (d), app. A (AM. LAW. INST., Tentative Draft No. 2, 2019).

See UNIF. PARENTAGE ACT § 609(a) (UNIF. LAW COMM’N 2017).

any other parent.” Such an adjudicatory proceeding may include judicial consideration of “a claim to parentage of the child” by another. Yet, there is no explicit requirement for notice of the claim to an existing or expecting parent with a competing claim to parentage. Thus, a birth mother's new spouse who is not a biological parent of the child could seek de facto parent status, perhaps to accompany his/her presumed marital parent status. He/she may do so to lessen—if not eliminate—any childcare interest the birth mother’s former residential, intimate partner who supported the pregnancy or cared for the child for a while held, as well as any childcare interest the biological father of a child who continues to maintain a parentage opportunity interest in a child born of sex held. While courts do not deem such a partner or father a legal parent, each individual has a constitutional parentage opportunity interest and thus should be deemed an expecting legal parent.

Both the 2002 ALI Principles of the Law of Family Dissolution: Analysis and Recommendations (hereinafter, the “2002 ALI Principles”) and the current ALI March 20, 2019 Draft (hereinafter, the “2019 ALI Draft”) for a new Restatement of the Law on Children and the Law recognize forms of “de facto” parentage. Each of the forms requires residence and consent by an existing legal parent, at times without notice to or consensual acts by a second parent, either existing or expecting.

The 2002 ALI Principles further recognize a “parent by estoppel,” defined as an individual who lived with the child for at least two years,

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141 VT. STAT. tit. 15C § 501(c) (2017).
142 Id. § 501(b); see id. § 206 (providing guidelines for “[a]djudicating competing claims of parentage”).
143 Id. § 502(a) (requiring petitions to be served on “all parents and legal guardians of the child”). But see VT. STAT. tit. 15C § 502(b) (permitting an “adverse party,” presumably including an intervenor, to file a response to a petition).
144 See UNIF. PARENTAGE ACT § 102(a)–(c) (UNIF. LAW COMM’N 2017) (providing various “parent” definitions).
145 Id. § 201 (describing criteria for the establishment of the parent-child relationship).
146 PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION §§ 2.03(1)(c), 3.02(1)(c) (AM. LAW INST. 2002) (requiring residence with the child, as well as “the agreement of a legal parent to form a parent-child relationship,” unless the legal parent completely fails, or is unable, “to perform caretaking functions”).
147 RESTATEMENT OF THE LAW: CHILDREN AND THE LAW § 1.82(a) (AM. LAW INST., Tentative Draft No. 2, 2019) (noting that requirements include residence with the child, as well as establishment that “a parent consented to and fostered the formation of the parent-child relationship”).
148 PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION §§ 2.03(1)(c), 3.02(1)(c) (AM. LAW INST. 2002); RESTATEMENT OF THE LAW: CHILDREN AND THE LAW § 1.82(a) (AM. LAW INST., Tentative Draft No. 2, 2019).
with "a reasonable, good-faith belief" of biological ties and who continued to accept the responsibilities of fatherhood when the belief ended; an individual who lived with the child for at least two years pursuant to an agreement with the child’s legal parent (or, if there are two legal parents, both parents) and who held out parentage while accepting "full and permanent" parental responsibilities, assuming the child's best interests are served; and an individual who lived with the child since birth pursuant to "a prior co-parenting an agreement with the child’s legal parent (or, if there are two legal parents, both parents), assuming the child’s best interests are served.  

The 2002 ALI Principles recognize as a "de facto parent" one who is an individual "other than a legal parent or a parent by estoppel" and who lived with and cared for the child for at least two years under an "agreement of a legal parent to form a parent-child relationship." A de facto parent, unlike a legal parent or a parent by estoppel, has no presumptive right to an allocation of decision-making responsibility for the child. Further, a de facto parent has no presumptive right of "access to the child's school and health-care records to which legal parents have access by other law."
The 2019 ALI Draft describes a de facto parent as a third party who establishes that he/she "lived with the child for a significant period of time," was "in a parental role" long enough that he/she "established a bond and dependent relationship . . . that is parental in nature," had no "expectation of financial compensation," and that "a parent consented to" the third party's parental-like role.156

The 2019 ALI Draft and the 2002 ALI Principles on de facto parentage, but not the 2002 ALI Principles on parentage by estoppel, invite a new parentage designation that adversely impacts the childcare interests of an existing, or expecting, legal parent without his or her actual or apparent consent.157 As with intentional torts, here too the ALI supports a presumed consent approach.158

Some American states had in 2017, or currently have, statutes or common law precedents on nonmarital, nonbiological, and nonadoptive custodial parentage similar to the suggested 2017 UPA and 2019 ALI Draft de facto parent norms. For example, before 2017, the drafters of the 2017 UPA utilized159 quite comparable Maine and Delaware statutes160 and a less comparable Wisconsin Supreme Court precedent.161 Since 2017, a few states have statutorily recognized de facto parenthood under the 2017 UPA guidelines.162

Current American state de facto parentage laws vary.163 In Delaware, courts can recognize a de facto parent as one who had "a parent-like relationship" with "the support and consent of the child’s parent," who exercised "parental responsibility," and who "acted in a parental role for a length of time sufficient to have established a bonded and dependent

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156 RESTATEMENT OF THE LAW: CHILDREN AND THE LAW § 1.82(a) (AM. LAW. INST., Tentative Draft No. 2, 2019) (requiring establishment of each element by clear and convincing evidence).

157 See id. § 1.82(a)(4) (defining de facto parent consent requirement); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(b)(iv), (I)(c)(ii) (AM. LAW. INST. 2002) (defining both "de facto parent" and "parent by estoppel" consent requirements).

158 See RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 16(b) (AM. LAW. INST., Tentative Draft No. 4, 2019) (defining presumed consent).

159 UNIF. PARENTAGE ACT § 609 cmt. (UNIF. LAW COMM’N 2017).

160 DEL. CODE tit. 13, § 8-201(c) (West2013); ME. REV. STAT. tit. 19-a, § 1891(1), (3) (2016).

161 In re Custody of H.S.H.-K., 533 N.W.2d 419, 421 (Wis. 1995) (concluding that a parental-like relationship can prompt visitation rights when in child’s best interests).


relationship with the child that is parental in nature." 164 In Washington, a
de facto parent must reside with the child for a significant period, engage
in consistent childcare, expect no financial compensation for acting in
parental manner, have a bonded and dependent relationship that is
parental in nature, and have the support of another parent. 165 In Kentucky,
a “de facto custodian” can secure “the same standing in custody matters
that is given to each parent.” 166

On occasion, a state’s statutes may recognize residency/hold out and
de facto parents who are neither biologically tied to, nor formal adopters
of, children. 167 For example, the Maine Parentage Act, effective in July
2016, provides for presumed parents who resided with a child from birth
for at least two years and “assumed personal, financial, or custodial
responsibilities,” 168 as well as for de facto parents who, inter alia, resided
with the child “for a significant period of time,” established with the child
“a bonded and dependent relationship,” and “accepted full and permanent
responsibilities as a parent . . . without expectation of financial
compensation[.] . . .” 169 Similarly, there are both residency/hold out and
de facto parent statutes in Delaware, 170 Washington, 171 and Vermont. 172

164 Del. Code tit. 13, § 8-201(a)(4), (b)(6), (c) (West 2013) (outlining definitions of
“mother,” “father,” and the three factors to attain “de facto parent status.”). De facto parents
are on equal footing with biological or adoptive parents. See, e.g., Smith v. Guest, 16 A.3d
920, 928, 931 (Del. 2011). But see In re Bancroft, 19 A.3d 730, 743, 750 (Del. Fam. Ct. 2010)
(finding statute overbroad and violative of fit mother’s and father’s due process rights
when the mother’s boyfriend seeks to be a third parent). Cf. K.A.F. v. D.L.M., 96 A.3d 975 (N.J.
standing to seek child care order where birth mother ceded some of her parental authority,
but where adoptive parent had not; former partner must show “exceptional circumstances” per
elements by preponderance of the evidence).
403.270(1)(a)–(b)).
168 Id. § 1881(3).
169 Id. § 1891(3).
and presumed residency/hold out parent).
residency/hold out parent “for the first four years” and outlining de facto parent requirements).
parent after the first two years and outlining de facto parent requirements).
Beyond statutes, some judicial precedents recognize a form of de facto parentage without employing the term.\textsuperscript{173} In 2008, the South Carolina Supreme Court, adopting a Wisconsin Supreme Court analysis, determined that a nonparent was eligible for psychological parent status only after satisfying a four-prong test.\textsuperscript{174} This test required that the petitioning prospective parent show: (1) the biological or adoptive parents consented to, and subsequently fostered, the petitioner forming and establishing a parent-like relationship with the child; (2) the child and petitioner concurrently lived in the same household together; (3) the petitioner assumed parenthood obligations by undertaking significant responsibilities for the child’s education, development, and care, which included contributions towards the child’s support without expecting financial compensation; and (4) the petitioner has existed in that parental role for a sufficient length of time to establish a dependent, bonded, and parental relationship with the child.\textsuperscript{175} In 2009, a federal appeals court noted that the Mississippi Supreme Court long recognized that a person standing “in loco parentis,” or “one who has assumed the status and obligations of a parent without a formal adoption,” has the same “rights, duties[,] and liabilities” as a natural parent.\textsuperscript{176}

By contrast, in some American states where there are no or limited de facto parent statutes, courts choose not to develop precedents, even where they are sympathetic to the pleas for establishing de facto parentage.\textsuperscript{177} In Illinois\textsuperscript{178} and elsewhere,\textsuperscript{179} high courts have refused to

\textsuperscript{173} Beside psychological or in loco parentis parenthood, see, for example, KY. REV. STAT. § 403.270(1)-(2) (2018) ("de facto custodian") (construed in Garvin v. Krieger, 601 S.W.3d 481, 484–85 (Ky. Ct. App. 2020)).

\textsuperscript{174} Marquez v. Caudill, 656 S.E.2d 737, 739, 743–44, 747 (S.C. 2008) (following In re Custody of H.S.H.-K., 533 N.W.2d 419, 435–36 (Wis. 1995), which set out norms for nonparent child visitation orders); see also Conover v. Conover, 146 A.3d 433, 446–47 (Md. 2016) (recognizing de facto parent doctrine by utilizing In re Custody of H.S.H.-K., 533 N.W.2d 419 (Wis. 1995)).

\textsuperscript{175} Marquez, 656 S.E.2d at 743–44.

\textsuperscript{176} First Colony Life Ins. Co. v. Sanford, 555 F.3d 177, 183 (5th Cir. 2009) (relying on, inter alia, and quoting Farve v. Medders, 128 So.2d 877, 879 (Miss. 1961)); see also Schneidler v. Lee, 445 P.3d 238, 243 (Okla. 2019) (addressing “in loco parentis” and elaborating on Ramey v. Sutton, 362 P.3d 217 (Okla. 2015)).

\textsuperscript{177} See, e.g., In re Parentage of Scarlett Z.D., 28 N.E.3d 776, 789–90 (Ill. 2015).

\textsuperscript{178} Id. at 790 (noting that, while there is a need for a “comprehensive . . . solution,” it must come from the legislature).

act because they deem any new de facto parentage norms to be the responsibility of state legislators.\textsuperscript{180}

Whether in statutes or precedents, de facto childcare parentage (or some form thereof) sometimes arises in American states without the actual consent or apparent consent—per the ALI Torts Draft No. 4—of an existing legal parent (like a voluntary acknowledged parent or a spousal parent), or without the knowledge of an expecting legal parent (like an unwed biological father).\textsuperscript{181} The 2017 UPA condones such de facto parentage, noting that only "another parent" needs to foster or support the de facto parent's dependent relationship.\textsuperscript{182} Likewise, the 2019 ALI Draft requires "a parent" to consent to the de facto parent's "formation of the parent-child relationship."\textsuperscript{183} The fostering or consenting parent in the 2017 UPA and 2019 ALI Draft, incidentally, cannot rescind consent when the petitioning alleged de facto parent seeks a childcare order.\textsuperscript{184}

\textbf{G. Childcare Opportunities for Genetic Donors in Formal Adoption Cases}

There are some federal constitutional protections of childcare opportunities for the noncustodial genetic donors of nonmarital children

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\textsuperscript{180} Similarly, one may not pursue common law marriage precedents where statutes already address varying forms of actual and putative spouses. \textit{See, e.g., In re Parental Responsibilities Concerning D.P.G., 472 P.3d 567, 569, 571 (Colo. App. 2020) (concluding no common law marriage where elements of putative spouse statute, \textit{COLO. REV. STAT.} \textsection 14-2-111, have not been met).}

\textsuperscript{181} \textit{UNIF. PARENTAGE ACT} \textsection 609(d)(6) (UNIF. LAW COMM’N 2017).

\textsuperscript{182} \textit{RESTATEMENT OF THE LAW: CHILDREN AND THE LAW} \textsection 1.82(a)(4) (AM. LAW. INST., Tentative Draft No. 2, 2019); \textit{see also}, \textit{e.g., E.N. v. T.R., 236 A.3d 670, 672, 677 n.11 (Md. Ct. Spec. App. 2020) (noting only one legal parent needs to consent and foster a de facto parent, though also acknowledging in footnote eleven an arguable “implied consent by the second legal parent”); Schnedler v. Lee, 445 P.3d 238, 243 (Okla. 2019) (stating acquiescence and encouragement by sperm donor of a parental-like relationship between a child and the birth mother’s same sex partner is unnecessary, even when donor “alleged he had maintained some relationship—albeit minimal and covert.”); Lanfear v. Ruggerio, 2020 WL 6107218, at *3 (Vt. Oct. 16, 2020) (determining that a biological father and birth mother of a child born of sex seemingly consented to at least some parental-like acts of third person).}

\textsuperscript{183} \textit{See, e.g., R.M. v. T.A., 182 Cal. Rptr. 3d 836, 849–50 (Cal. Ct. App. 2015).}
whose custodial parents place them for formal adoption.\footnote{There are often greater, though not absolute, protections afforded to noncustodial genetic donors of marital children, as here, spousal parentage presumptions usually operate. See, e.g., In re Adoption of A.C.B., 159 Ohio St.3d 256, 255–56 (Ohio 2020) (noting former husband’s failure to provide sufficient child support in last year made his consent to stepparent adoption was non-essential).} Such donors include men whose consensual sex with birth mothers prompted the births of the children, as well as women whose eggs prompted births of children to custodial mothers who earlier agreed to coparent with the donors.\footnote{See D.M.T. v. T.M.H., 129 So. 3d 320, 327–28 (Fla. 2013).} The constitutional protections spring from the United States Supreme Court’s 1983 in Lehr v. Robertson.\footnote{Lehr v. Robinson, 463 U.S. 248 (1983). There may be further constitutional protections under familial association precedents. See, e.g., Wagner v. Spokane, 2020 WL 7241056, slip op. at *4 (E.D. Wash. Dec. 9, 2020) (requiring removal of children from parental custody before one may assert associational rights).} There, the six-justice majority opined that a state statutory adoption scheme could not likely “omit many responsible fathers” of children born of consensual sex to unwed mothers who placed the children for adoption, as such genetic parents had parental opportunity interests.\footnote{Lehr, 463 U.S. at 261–64.} Some lower courts have extended this ruling to women whose eggs prompted births of nonmarital children over whom the donors and birth mothers intended to coparent.\footnote{See, e.g., D.M.T., 129 So. 3d at 327–28 (Fla. 2013) (also relying on due process and privacy protections within the Florida constitution).}

Omissions of genetic donors from formal adoption proceedings do, unfortunately, occur.\footnote{See, e.g., Malinda L. Seymore, Grasping Fatherhood in Abortion and Adoption, 68 Hastings L.J. 817, 822 (2017) (discussing unwed fathers).} Such omissions sometimes result in innocent losses of protected childcare opportunities or, more significantly, of childcare rights involving “care, custody, and control.”\footnote{See Troxel v. Granville, 530 U.S. 57, 66 (2000) (recognizing fundamental right of parents to make decisions concerning “the care, custody, and control of their children.”).} One can easily imagine such omissions under the following Utah statute:

The Legislature finds that an unmarried mother has a right of privacy with regard to her pregnancy and adoption plan, and therefore has no legal obligation to disclose the identity of an unmarried biological father prior to or during an adoption proceeding, and has no obligation to volunteer information to the court with respect to the father.\footnote{UTAH CODE § 788-6-102(7) (2019). Identical findings are made in IDAHO CODE § 16-1501A(4) (current through 2020).}

The legislature deems necessary the losses for a biological parent who is not married to the birth mother in order to promote “the interests
of the state, the mother, the child, and the adoptive parents," as they
"outweigh the interest of an unmarried biological father who does not
timely grasp the opportunity to establish and demonstrate a relationship
with his child."\textsuperscript{193} Where a father’s failure to grasp is caused by “fraud or
misrepresentation,”\textsuperscript{194} the statute deems that father to be “in the best
position to prevent or ameliorate the effects of fraud” and thus “the burden
of fraud [is] borne by him.”\textsuperscript{195} The father can overcome fraud only by
registering with the putative father registry, including instances where his
female sex partner expressed that she was incapable of conceiving. The
possible father would need to stalk his former sex partner to make sure his
parentage interests are protected.\textsuperscript{196} Similarly, there are burdens on an egg
donor when a same-sex female couple conceives a child as do-it-
yourselfers.\textsuperscript{197} Seemingly, the female donor would perhaps need to sign
up with the putative father registry or file a maternity case.

More significantly, some unwed biological fathers and some egg
donors who did seize their parental opportunity interests under Lehr—by
being an intended parent via an assisted reproduction contract, a de facto
parent, or a hold out/residency parent—may remain unknown to the
adoption court in Utah (and elsewhere). The Utah provision providing for
“no obligation to volunteer information” does not distinguish between
biological parents who did or did not seize their parental opportunity
interests in certain ways.\textsuperscript{198} By contrast, “right of privacy”
notwithstanding, adoption proceedings involving a then “unmarried
mother” will likely result in revelations of that mother’s earlier marriage
during pregnancy or at the time of birth.

Outside of Utah, other states also likely omit some actual or
prospective childcare parents from formal adoption proceedings. These
states may do so by not prompting custodial parents placing children for
adoption to make voluntary disclosures of presumed spousal parents,
intended parents in assisted reproduction settings, or genetic donors who

\textsuperscript{193} \textit{Utah Code} § 78B-6-102(6)(c) (2019).

\textsuperscript{194} \textit{Id.} § 78B-6-102(6)(d).

\textsuperscript{195} \textit{Id.; see also id.} § 78B-6-102(6)(e) (noting that “[a]n unmarried biological father has
primary responsibility to protect his rights.”).

\textsuperscript{196} See \textit{Unif. Parentage Act} Art. 4 cmt. (Unif. Law Comm’n 2017) (discussing
putative father registries and constitutionality).

\textsuperscript{197} For an egg donor, there is no clear and explicit recognition of a putative mother
registry or a putative parent registry under Utah statutes. \textit{See Utah Code} § 78B-6-120(1)(e)
(2019) (mandating consent to adoption of “biological parent” who executed a “voluntary
declaration of paternity”); \textit{see also id.} § 78B-6-121.5 (compact for interstate sharing of
putative father registry information).

\textsuperscript{198} \textit{Id.} § 78B-6-102(7).
have actually child-cared or who planned to do so. Omissions arise when states fail to undertake any independent searches designed to reveal actual child caretakers who may be existing or expecting legal parents.\(^{199}\) Of course, any searches must account for the privacy rights of those interested in any possible adoption.\(^{200}\)

Possible losses of childcare interests by biological parents, spousal parents, intended parents, and others can be mitigated by greater recognitions of the governmental need, pre-adoption, to encourage (existing or expecting) parentage information revelations by birth mothers, and/or to undertake independent investigations into the actual or possible legal childcare interests of those not then present who are either expecting (i.e., potential) or existing legal parents.\(^{201}\)

Employing a higher standard of review on appeal in adoption order challenges can also foster mitigation of such losses.\(^{202}\) Mitigation can be facilitated where at least limited post-adoption challenges to earlier adoptions, while sometimes quite disruptive, are available.\(^{203}\) Where post-adoption challenges involving intentional (and perhaps grossly negligent) conduct by individual adoption petitioners, adoption centers, or governmental agents can prompt remedies like damages rather than undoing earlier adoptions,\(^{204}\) there are incentives for improvements in pre-

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\(^{199}\) Expecting or existing legal parentage can also arise, for example, under de facto parent laws. See discussion supra Section II.F.

\(^{200}\) Those interested in possible adoptions include not only expecting or existing legal parents, but also the children themselves, those ruled out as parents, siblings, and other established or possible family members (like grandparents, especially if they are custodians or guardians of the children who are placed for adoption). See RESTATEMENT OF THE LAW: CHILDREN AND THE LAW § 1.80 cmt. a (AM. LAW. INST., Tentative Draft No. 2, 2019) (discussing grandparental, sibling, and other third-party interests in contact with a child).


\(^{202}\) Compare, e.g., K.H. v. M.M., 151 N.E.3d 1259, 1265 (Ind. Ct. App. 2020) (noting adoption ruling will not be disturbed “unless the evidence leads to but one conclusion and the trial judge reached an opposite conclusion,” essentially, a “clearly erroneous” standard) (citing In re Adoption of T.L., 4 N.E.3d 658, 662 (Ind. 2014); E.B.F. v. D.F., 93 N.E.3d 759, 762 (Ind. 2018)), with Crebs v. State, 474 P.3d 1136, 1142 (Wyo. 2002) (noting alleged constitutional speedy criminal trial right violations are reviewed de novo) and Sorrell v. IMS Health Inc., 564 U.S. 552, 566 (2011) (“The First Amendment requires heightened scrutiny whenever the government creates ‘a regulation of speech because of disagreement with the message it conveys.’”).

\(^{203}\) Mitigation of these possible losses also occurs when courts require satisfaction of an independent test involving a child's best interests before judicial approval of an adoption petition. See, e.g., In re Adoption of K.S., 980 N.E.2d 385, 387 (Ind. Ct. App. 2012).

\(^{204}\) See, e.g., Peña v. Mattox, 84 F.3d 894, 896, 899–901 (7th Cir. 1996) (recognizing state laws, though not federal constitutional law, may bestow “parental rights” on genetic
adoption processes which invite innocent losses of protected parental interests. Courts may also enjoin processes that likely systematically “omit” responsible genetic parents under the Lehr requirement on parental opportunity interests.205

Changes in the last half century regarding Florida adoption notice laws that govern the existing and expecting parental interests of unwed genetic fathers of children born of consensual sex demonstrate the variations in statutory protections against innocent losses of parentage or parentage opportunity interests.206

A half century ago, “genetic fathers who were unmarried to the mothers of their children had few opportunities in Florida to participate in adoption proceedings.”207 Florida courts found that a “genetic father’s consent to adoption (often sought by the mother’s [then] husband) [was] unnecessary even when the [genetic] father had made voluntary child support payments.”208

After 1975, the legislature expanded genetic fathers’ rights to participate in adoption cases involving their nonmarital children.209 From then until 2001, courts required, unless explicitly excused, post-birth written consent from fathers who established paternity through court proceedings,210 signed and filed acknowledgments of paternity,211 or “provided child support” in a customary and repetitive manner.212

Legislative initiatives in 2001 expanded adoption participation rights to incorporate potential genetic fathers who “attempted to provide” such consistent support during the mother’s pregnancy.213 Moreover, and notably, the legislature “extended participation rights to men” who birth

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207 Id. at 71.
208 Id.; see also Clements v. Banks, 159 So. 2d 892, 892–93 (Fla. Dist. Ct. App. 1964) (holding that prior voluntary support of an illegitimate child did not give standing to the putative father to contest adoption of the child by the mother’s husband).
209 Parness, supra note 206, at 72.
210 Id. (citing FLA. STAT. § 63.062(1) (1997) (amended 2001)).
211 Id. (citing FLA. STAT. § 63.062(1)(b)(4) (1997) (amended 2001)).
212 Id. (citing FLA. STAT. § 63.062(1), (1)(b)(4), (1)(b)(5) (1997) (amended 2001)).
mothers reasonably "identified" as possible genetic fathers to their children.\footnote{214}

As of 2001, in cases where courts did not know the name or location of those men from whom they required consent to adoption, like those "identified" as potential fathers, a judge would question the mothers and their relatives at adoption hearings.\footnote{215} The judges inquired regarding "men who provided or promised to provide support, men with whom the mothers cohabited at the time of conception, and men that the mothers had 'reason to believe' could be the genetic fathers."\footnote{216} Adoption entities also undertook, if needed, "diligent" searches to determine the location of identified men.\footnote{217} If men remained unidentified or with an unknown location upon inquiry, Florida law further required the adoption entity or mother to notify the men by publishing a notice "in newspapers in counties where 'conception may have occurred,' where the mothers reside, and where the men whom the mothers believe might be the genetic fathers reside."\footnote{218} Legislation also required within the notice "physical descriptions of the genetic mothers and possible genetic fathers, including information on 'age, race, hair[,] and eye color' as well as 'height and weight.'"\footnote{219} These notices also needed to contain the dates and cities where conception "may have occurred[,]" as well as the children's birth dates.\footnote{220}

The so-called "Scarlett Letter" laws on publication notice took effect on October 1, 2001.\footnote{221} Only some of the provisions faced attacks for lack of constitutionality with respect to informational privacy in May of 2002.\footnote{222} Among the challenged provisions were the requirements for published notices to missing fathers.\footnote{223} A Palm Beach County circuit court...
judge denied relief at the trial level. The Palm Beach judge found the provisions "served compelling governmental interests with no less intrusive means available to achieve those interests." A Florida appeals court then invalidated the provisions on publication notice in 2003, finding the Florida constitutional privacy right encompasses individual interests in both "avoiding disclosures of personal matters and in making certain important decisions independently." Determining the invasion of these interests to be "patent," the court refrained from performing a constitutional analysis of Florida's privacy right. The appeals court held that the state did not meet its burden to justify the "personal, intimate, and intrusive" nature of constructive notice provisions, and explicitly declined to address whether "alternative proposals" for notification by publication to genetic fathers could meet this burden.

Shortly after the 2003 ruling, Florida lawmakers unanimously established the "Florida Putative Father Registry," whose stated purpose was "to preserve the right to notice and consent to an adoption." If a man believed he could be a genetic father, under the new law, he must register with the state—specifically including the name, address, and physical description of the potential mother, as well as the date and location where conception could have occurred. A man could thereby "preserve the right to notice and consent to . . . adoption" if the woman named in the registry placed a baby up for adoption. The man may also file a "claim of paternity . . . at any time before the child's

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224 Id. (citing G.P., 842 So.2d at 1061 and noting the trial judge "did find the statutes were unconstitutional as to women whose pregnancy was a result of sexual battery.")(internal quotations omitted).
225 Parness, supra note 206, at 73 (citing G.P., 842 So.2d at 1061).
226 Id. (citing G.P., 842 So.2d at 1060–61).
227 Id. (citing G.P., 842 So.2d at 1062).
228 Id. (citing G.P., 842 So.2d at 1062).
229 Parness, supra note 206, at 73–74 (internal quotations omitted) (quoting G.P., 842 So.2d at 1063).
230 Id. at 74 (internal quotations omitted) (citing G.P., 842 So.2d at 1063, which states "[w]e do not address" the validity of a more narrowly drawn statute.").
231 Id. (citing FLA. STAT. § 63.054 (2003)); see also FLA. STAT. § 63.054 (2020).
232 FLA. STAT. § 63.054(1) (2014).
233 Id.
234 Id. § 63.054(3).
235 FLA. STAT. § 63.054(1).
A man could not register, however, if the mother had already begun the requisite legal process to terminate the man’s parental rights.237

The Florida “paternity registry law effectively denie[d] parent[age] opportunities to many fit genetic fathers[,] . . . even though other laws continue to expose these same men to child support” obligations “long after birth and . . . any significant chance for developing a meaningful parent-child relationship.”238 Importantly, the 2003 paternity registry law stated:

An unmarried biological father, by virtue of the fact that he has engaged in a sexual relationship with a woman, is deemed to be on notice that a pregnancy and an adoption proceeding regarding that child may occur and that he has a duty to protect his own rights and interest. He is, therefore, entitled to notice of a birth or adoption proceeding with regard to that child only as provided in this chapter.239

In accordance with this change, the law eradicated the judicial inquiries requirement into, and meticulous adoption entity searches for, “any man who the mother has reason to believe may be the father . . . and who . . . [h]as been identified by the birth mother as a person she has reason to believe may be the father . . .”—which was included in the 2001 version of the statute.240

The judicial system and the public could more easily discover the identities of potential genetic fathers of children placed for adoption before 2003.241 The 2001 statute required that those who petitioned to terminate parental rights pending adoption act in “good faith,” and that “diligent efforts”242 be undertaken to find the men identified by the

236  Id.
237  Id.
238  Parness, supra note 206, at 74–75. See generally, e.g., In re Ramos v. Broderek, 88 N.Y.S.3d 204, 204 (N.Y. App. Div. 2018) (holding that no equitable estoppel defense existed for an unwed biological father because the child did not form a close relationship with the mother’s former or current husbands, and therefore the best interests of the child are served by adjudicating the defendant as the child’s father); In re Lozaldo v. Cristando, 83 N.Y.S.3d 211, 211 (N.Y. App. Div. 2018) (holding that an unwed biological father needed to maintain his life insurance policy to fulfill his child support obligations); see also Jeffrey A. Parness & Matthew Timko, De Facto Parent and Nonparent Child Support Orders, 67 AM. U. L. REV. 769, 798 (2018).
241  Parness, supra note 206, at 75.
mothers as the potential fathers. Under the 2003 law, only unmarried genetic fathers who had already taken affirmative steps to claim potential parental rights by obtaining a judicial declaration of paternity, or by officially recognizing or claiming paternity, called for “diligent” searches. Likewise, since 2003, courts necessitated an unmarried genetic father provide consent to adoption only if he stepped up in the aforementioned way and developed a “substantial” relationship with his child or “demonstrated a full commitment” to parental responsibility.

Under the 2003 law, an unmarried genetic father, unaware of the child’s conception or existence but retaining the duty to protect his own interests and rights, may “file a notarized claim of paternity form with the Florida Putative Father Registry maintained by the Office of Vital Statistics of the Department of Health” in order to step up to possible parenthood. The Department typically maintains such forms in confidence. Under current law, when adoptions are pursued, there is a judicial inquiry and diligent search for a potential genetic father in accordance with statute. The genetic father is accountable for failing to comply with the filing requirement even if the mother’s misrepresentation or deceitful act caused his failure to file. The 2003 law also provided that, in cases where a parent or the state places a newborn child under six months old with “adoptive parents,” an unmarried genetic father must have, in order to participate in adoption proceedings, filed a notarized claim of paternity form “prior to the time the mother executes her consent for adoption.” Since an unwed genetic mother can consent to adoption forty-eight hours after giving birth, or on the day she learns “she is fit to be released from the licensed hospital or birth center,” the law leaves little time for a genetic father to step up to claim parental rights.

243 See id. § 63.062(1)–(6). But see FLA. STAT. § 63.087(4)(d) (2012) (incorporating the same requirements).
244 FLA. STAT. § 63.062(1)(b) (2012).
245 Id. § 63.062(1)(b)(4)–(5) (requiring genetic fathers to file an affidavit or acknowledgement).
246 Id. § 63.087(3)(b) (2012).
247 Id. § 63.062(2)(a).
248 FLA. STAT.§ 63.062(2)(a) (discussing children less than six months old who are placed for adoption).
249 Id. § 63.054(1) (2014).
250 Id. § 63.088(4)–(5) (West 2012).
251 Parness, supra note 206, at 76.
252 FLA. STAT. § 63.062(2)(b) (2012).
253 Id. § 63.082(4)(b) (2016).
254 Parness, supra note 206, at 76.
"Undeniably, the 2001 Scarlett Letter provisions regarding constructive notices to persons reasonably believed to be potential genetic fathers were excessive;" yet, there were "alternative proposals" outside of a paternity registry that could have accomplished the legitimate governmental interests in facilitating parentage for fathers. Further, there are means of notifying potential genetic fathers that do not present significant consequences of "personal, intimate, and intrusive" performance of such notifications.

Florida lawmakers had good reason in 2003 to require searches for, and notices to, genetic fathers when unmarried mothers placed newborn children up for adoption. All potential and actual genetic fathers are not alike. Consider the men in the Scarlett Letter case: allegedly, one male was a twenty-seven-year-old statutory rapist, and others included three men who slipped a date rape drug to a thirty-something-year-old single woman. None of these males, assuming the allegations to be true, had paternity interests that would trigger judicial inquiries, much less diligent searches. By contrast, seven other men in the Scarlett Letter case simply had sex at different times with a single woman in her twenties. A few others, at worst, used drugs and engaged in sex with a single woman in her late twenties who, herself, "had an on again, off again drug problem." At least some of these men, when identified, merited a chance to express an interest in childcare and to seek the formation of a meaningful parent-child relationship with their genetic offspring—especially since they remained responsible for providing child support should no adoptions occur.

H. Childcare Opportunities in Safe Haven Cases

Not unlike formal adoption laws, state laws regarding safe havens also prompt infringements of the protected childcare opportunities for

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255 Id. at 76.
257 See id.
258 Parness, supra note 206, at 76.
259 Id. at 76–77.
261 See id. at 1204.
262 Parness, supra note 206, at 77.
263 Neufeld & Georgi, supra note 260, at 1204, 1204 n.35.
264 See id. at 1204.
genetic donors. Although written in general, neutral terms, many state laws now effectively permit birth mothers to solely undertake the abandonment of newborns. These acts foreclose, without notice or a chance to be heard, any legal parenthood for the intended parents under a valid surrogacy agreement; for genetic fathers or mothers who are fit and willing to parent their intended children born of non-surrogacy assisted reproduction; for genetic fathers who registered with putative father registries; or for genetic fathers who otherwise exhibited a desire to parent any children born of consensual sex with the genetic mother. Legal parenthood would be lost, even for some who are federal constitutional childcare parents, as through spousal parent presumptions or earlier pre-birth and/or post-birth de facto parent childcaring. Birth mothers can walk away from parental support responsibilities early in a child's life. Laws generally forbid comparable desertions by genetic donors in cases where the birth mothers maintain custody as well as for some birth fathers when their parental rights are terminated when their children are older in age.

Enabling American state statutory provisions following the 1999 "Baby Moses" law in Texas are frequently deemed "Safe Haven" (or

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265 See Carol Sanger, Infant Safe Haven Laws: Legislating in the Culture of Life, 106 COLUM. L. REV. 753, 791 (2006) (discussing the disadvantages of Safe Haven laws, including the birth mother's ability to give up a child without the father's knowledge); see also Jeffrey A. Parness, Lost Paternity in the Culture of Motherhood: A Different View of Safe Haven Laws, 42 VAL. U. L. REV. 81, 86 (2007) (“However, Safe Haven Laws clearly advance the culture of motherhood . . . that women can terminate the childrearing and paternity opportunity interests of men, both before and after birth.”).

266 See Parness supra note 265, at 85 (providing examples of state statutes which do not require the birth mother to disclose the identity of the genetic father when abandoning a child).

267 See id. (describing explicit examples of such applicable statutes).

268 See, e.g., N.E. v. Hedges, 391 F.3d 832, 834, 836 (6th Cir. 2004) (holding that a genetic father’s “child support requirements occur without regard to [his] wishes or his emotional attachment to his offspring,” and he could not “escape responsibility,” even though he alleged 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.”); see also In re T.M.C. v. State, 52 P. 3d 934, 935, 938 (Nev. 2002) (holding that there was no termination of financial responsibilities for a genetic father where the child was a teenager and the father abandoned her long ago, and the child’s best interests were thus served because she may later benefit from financial aid, including her father’s reimbursement, of a state welfare agency for money it had provided).

269 See, e.g., State v. Fritz, 801 A.2d 679, 688 (R.I. 2002) (holding that a genetic father’s financial obligations did not automatically cease upon the termination of his parental rights). Contra State Dep’t of Human Res. ex rel. Overstreet v. Overstreet, 78 P.3d 951, 956 (Okl. 2003) (holding that a father’s parental duties, including his financial support obligations, ceased once his parental rights were terminated).

“Safe Haven Infant Protection”) laws.\textsuperscript{271} Lawmakers typically justify these laws on child protection grounds. They often guarantee the caretakers of certain newborns both anonymity and immunity from prosecution for child abandonment.\textsuperscript{272} Safe Haven laws do, however, vary widely from state to state.\textsuperscript{273} The laws differ on certain issues, such as which children may be left (e.g., younger than three days, younger than thirty days, abused children, etc.); where children may be left (e.g., hospitals only, at a police or fire station, etc.); who may leave children (e.g., genetic parent only, any person with lawful custody, etc.); and the procedures for receiving children (e.g., anonymity always, whether questions may be asked by the recipients to the person surrendering the child, etc.).\textsuperscript{274}

While there is much variation, most state Safe Haven provisions effectively permit abandonment of very young children by birth mothers without requiring the mothers to reveal much, if anything, about the actual or presumed (as with spouses) genetic donors.\textsuperscript{275} Notably, the birth mother also does not need to reveal information about other potentially involved parties, including those who provided childcare earlier or who planned to provide childcare with the birth mothers, as through non-surrogacy assisted reproduction pacts.\textsuperscript{276} Abandoning birth mothers also do not need to reveal any pre-birth arrangements on future childcare by future nongenetic, but intended, parents, as through surrogacy pacts\textsuperscript{277} or assisted reproduction pacts.\textsuperscript{278}

\textsuperscript{272} Id.
\textsuperscript{273} Id.
\textsuperscript{274} See id.
\textsuperscript{275} See USLEGAL, supra note 271.
\textsuperscript{276} See UNIF. PARENTAGE ACT § 703 (UNIF. LAW COMM’N 2017) (“An individual who consents ... to assisted reproduction by a woman with the intent to be a parent of a child conceived by the assisted reproduction is a parent of the child.”).
\textsuperscript{277} Gestational surrogates (which involve no egg donation) and genetic surrogates (which involve an egg donation) may have different post-birth rights involving child abandonment. See, e.g., id. § 808(a) (“A party to a gestational surrogacy agreement may terminate the agreement, at any time before an embryo transfer, by giving notice ... to all other parties.”); see also id. § 814(a)(1)-(2) (stating an intended parent to a genetic surrogate agreement “may terminate the agreement at any time before a gamete or embryo transfer” and permitting a genetic surrogate to withdraw consent at any time before seventy-two hours after the birth).
\textsuperscript{278} See id. § 707(a) (“An individual who consents ... to assisted reproduction may withdraw consent any time before a transfer that results in a pregnancy[...].”)
Lost parents need not be alleged rapists or deadbeats for the Safe Haven laws to operate. The parents may be married men with genetic ties and positive feelings about fatherhood; women married to birth mothers, including those with genetic ties who undertook valid assisted reproduction pacts; or women or men who had planned with expecting birth mothers, through surrogacy pacts, to parent later-born children. In most instances, the identities of genetic donors, or intended parents, will be undiscoverable.

A Wisconsin statute, for example, states that when a birth mother relinquishes child custody and there is no evidence of abuse or neglect, “[n]o person may induce or coerce or attempt to induce or coerce a parent . . . who wishes to remain anonymous into revealing . . . her identity.” A West Virginia statute declares that a hospital taking possession of an abandoned child from a parent “may not require the person to identify himself or herself and shall otherwise respect the person’s desire to remain anonymous.” A New Mexico statute is somewhat sympathetic to lost parents, but ultimately provides little practical help. The New Mexico statute states: “A safe haven site 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 safe haven site.” Finally, a South Carolina statute declares that a safe haven must ask the person leaving the infant for medical information contained on a form provided by the Department of Social Services, however, an accompanying subsection also declares that “[t]he person leaving the infant is not required to disclose his or her identity.”

A few state Safe Haven laws initially appear quite sympathetic to lost parents. In Florida, the statutory procedures regarding women who abandon newborns grant to lost parents some opportunities to void earlier parental rights terminations or adoptions within one year if “the court finds that a person knowingly gave false information that prevented the parent from timely making known his or her desire to assume parental responsibilities toward the minor or from exercising his or her parental

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279 See Parness, supra note 206, at 76–77 (“[A]ll potential and actual genetic fathers are not alike.”).
280 Id. at 75.
282 W. Va. Code § 49-4-201(b) (2020).
283 N.M. Stat. § 24-22-3(B) (2013).
285 Id. § 63-7-40(A).
There is also, however, a Florida Safe Haven provision which declares that, "[e]xcept 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." Thus, Florida laws often provide no practical opportunities for diligent searches so that the childcare interests of genetic donors, or other intended parents, of the very young are not lost.

By contrast to Florida Safe Haven laws, when birth mothers place minor children for adoption in Florida, proceedings to terminate all parental rights in anticipation of an adoption requires judicial inquiries into, and adoption entity searches for, genetic donors and any non-donor parents. The subjects of these due diligence explorations once included those persons who were married to the birth mothers, who were previously judicially deemed childcare or adopted parents, who acknowledged or claimed parentage through voluntary acknowledgment processes, and who cohabitated with the birth mothers.

Safe Haven laws need such due diligence explorations with adequate privacy protections. These explorations should also encompass, given advances in assisted reproduction technologies, those who were intended parents of children born via assisted reproduction through either surrogacy or non-surrogacy pacts.

These due diligence explorations should be compelled in advance in many Safe Haven instances, as where, under *Lehr v. Robertson*, the governmental schemes will likely systematically "omit" many responsible genetic parents who are expecting, or existing, legal parents. Certain failures to provide such due diligence might prompt monetary remedies for some genetic parents, causing failures to be deterred.

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286 FLA. STAT. § 63.0423(9)(a) (2012).
287 Id. § 383.50(5).
288 See id. § 63.088(2), (5).
289 FLA. STAT. § 63.088(4) (amended 2008).
291 See, e.g., *Dees v. Cty. of San Diego*, 960 F.3d 1145, 1152 (9th Cir. 2020) (holding that an "actual loss of custody" must be proven in a Fourteenth Amendment claim by parents seeking money damages where a minor child has been separated from their parents by state actors).
III. MITIGATING INNOCENT LOSSES OF PARENTAGE RIGHTS

Eliminating, or dramatically reducing, the chances for innocent losses of constitutional rights, must be pursued. Generally, there should be no losses for those who did not act directly, indirectly, or apparently in ways that justify the losses. Further, instances where fundamental rights are at stake warrant greater protections against innocent losses.

Parentage laws involving de facto status, formal adoption, and Safe Haven child placement demonstrate both the lack of justification for certain innocent losses of parental rights, as well as the need for enhanced protections for established parenthood as compared to anticipated parenthood. In the three parentage settings, innocent losses may befall established (existing) legal parents, or anticipated (expecting) legal parents with federal constitutional rights encompassing the care, custody, and control of their children. In these settings, there may be losses for those who undertook no direct, indirect, or apparent action in ceding parental power.

Protections against innocent losses of parental rights should differentiate between possible losses by existing legal parents and expecting legal parents. Existing legal parents, albeit usually defined by U.S. state laws, possess federal constitutional rights regarding the care, custody, and control of their children under U.S. Supreme Court precedents, including *Troxel v. Granville*. Expecting legal parents possess federal constitutional parentage opportunity interests in establishing existing legal parenthood under U.S. Supreme Court precedents, including *Lehr v. Robertson*. Such expecting parents, as with semen or egg donors, include those genetically tied to future or current children. Expecting parents may also include those with no genetic ties who intend, through assisted reproduction pacts, to parent

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292 See discussion supra Section II G–H.
293 See discussion supra Part II.
294 See generally Parness, supra note 201 (explaining that parentage can exist, or be established, under law without formal governmental recognition, as when de facto parent status is later recognized due to earlier parental-like acts).
295 See *Troxel v. Granville*, 530 U.S. 57 (2000) (holding that a Washington law allowing a non-parent third party to petition childcare visitations was unconstitutional and violated a parent’s fundamental right to make decisions regarding the care, custody, and control of their children).
296 *Lehr*, 463 U.S. at 267–68 (holding that a genetic father who failed to establish a relationship with his child may lose parentage rights afforded by the law).
297 Parness, supra note 57, at 431.
future children, as well as those who intend, through de facto parent pacts, to parent current children.298

Common authority cases in the Fourth Amendment arena differ from parentage cases. In Fourth Amendment search cases, there exists pacts on reciprocal powers regarding third party access to property, though the pacts are often only implicit.299 Shared parental childcare between two existing or expecting legal parents, however, usually does not prompt similar pacts, or risk assumptions, involving the possible consequences for parentage due to the unilateral acts by one of two parents.300

Like the notion of common authority in the Fourth Amendment arena, the notion of presumed consent in intentional tort cases should not extend to innocent losses of parental rights. Such presumed consent in tort cases is justified only where there is a "minor" invasion of privacy.301 Losses of parentage interests, for either existing or expecting legal parents, involve major privacy invasions.302 These invasions are quite distinct from shoulder taps or handholds on first dates, however uninvited.303

Similarly, the notion of quasi-contract should not extend to innocent losses of parentage rights. The spousal necessity doctrine is not unlike the spousal parentage doctrine because in both settings the fact of marriage prompts consequences involving constitutional losses.304 Marriage triggers either spousal support or child support; yet, a spousal parent can avoid child support by overcoming (as by rebutting) spousal parentage through evidence of no genetic tie, or no earlier assisted reproduction pact.305 De facto parentage, where successfully pursued on behalf of an alleged de facto parent due to a developed parental-like relationship, cannot be so easily overcome by an objecting, existing legal parent who must now share, if not lose,306 child custody interests though they were

298 Id.
299 See cases cited and discussion supra Section II A.
300 Compare cases cited and discussion supra Section II A, with cases cited and discussion supra Section II F–H.
301 See RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 16 cmt. d, illus. 11 (AM. LAW INST., Tentative Draft No. 4, 2019).
302 See discussion supra Section II F–H.
303 See sources cited supra notes 29–39 (discussing presumed consent in intentional tort cases).
305 See UNIF. PARENTAGE ACT § 201 cmt. (UNIF. LAW COMM’N 2017).
306 See id. §§ 609(e), 613 (UNIF. LAW COMM’N 2017) (stating that an existing legal parent, as with a spousal parent—unless there may be three parents under law—can lose
uninvolved in, or unaware of, the developing parental-like relationship of the de facto parent.

More importantly, many of those bound under the quasi-contract doctrine must invite, and do benefit from, performances under pacts that are technically non-contracts. Losses of protected parentage interests, as in Safe Haven settings, occur without any invitations, and with harms (not benefits) to those incurring losses.\(^{307}\) When the quasi-contract doctrine prompts a separated spouse’s support for things such as necessary clothing and supplies, more difficult questions arise regarding justifications for innocent losses. Yet, here, as with child support duties for some presumed spousal parents (e.g., those married to birth mothers at the time of conception, pregnancy, and/or birth but who are not genetic donors), there was conduct involving an earlier marriage whose legal consequences were, or quite reasonably should have been, known. Consensual sex with a woman who clearly indicated that child conception was impossible would less reasonably prompt one to think about future innocent losses of parentage interests through de facto parentage in a third party, or through a unilateral Safe Haven placement.

Lawyer agency in criminal and civil cases can prompt client losses of constitutional rights, which are innocent where the client did not agree to, or specifically authorize, the lawyer to act in the particular way.\(^{308}\) Yet, here, one (the lawyer) prompting innocent losses by another (the client) was acting as an agent, while typically employing expertise not held by the other, and attempting to act in “tactical” ways to benefit the other.\(^{309}\) By contrast, in de facto parent formal adoption and Safe Haven settings, parental interests can be innocently lost by an existing or expecting legal parent who was unaware of, and did not invite or desire, a new parent in the child’s life, and who did not delegate to another existing or expecting legal parent the authority to prompt a new parentage.\(^{310}\)

IV. CONCLUSION

Innocent losses of constitutional rights arise when the rightsholders have not acted in any way to prompt the losses, as by direct or implicit personal waivers, in apparent ways, or through agents. Courts, legislators,
and commentators have sanctioned such innocent losses in varying settings, including the "common authority" doctrine in Fourth Amendment search cases; the "presumed consent" doctrine in intentional tort cases; the quasi-contract doctrine in property cases; lawyer agency doctrines in court procedure cases; and, childcare cases involving de facto parentage, formal adoptions, and Safe Havens.\textsuperscript{311}

The rationales for such innocent losses are weak, especially when fundamental rights are lost. Innocent losses of constitutional rights must be mitigated. Generally, losses of constitutional rights should be limited to settings where the rightsholders themselves acted in some way, whether directly, indirectly, apparently, or through agents.

\textsuperscript{311} See discussion \textit{supra} Part II.