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ADOPTION NOTICES TO GENETIC FATHERS: NO TO SCARLET LETTERS, YES TO GOOD-FAITH COOPERATION

JEFFREY A. PARNES^{*}

I. INTRODUCTION

American courts and legislatures have struggled, and continue to struggle, to define the participation rights of genetic fathers in governmental adoption schemes for infants born to unwed mothers as a result of consensual sexual intercourse. Federal constitutional privacy interests in both paternity opportunity and childrearing compel a certain level of genetic father participation. However, excessive levels of participation would undermine the goals of swift, final, and inexpensive adoptions, as well as some maternal preferences.

The difficulties in balancing genetic father participation with competing interests are well illustrated by recent developments in Florida. There, the so-called "Scarlet Letter" laws¹ (effectively branding women as promiscuous and unfit parents for little reason) were rather quickly followed by a "Putative Father Registry" law.² Unfortunately, neither law strikes a proper balance. Scarlet Letter laws are unwarranted (as well as unconstitutional), while putative father registries confer inadequate participation rights. The most appropriate course of action would be for Florida, as well as other states, to incorporate a good-faith cooperation responsibility for most genetic mothers during newborn adoptions.

II. THE OPPORTUNITY FOR PATERNITY

As indicated by the United States Supreme Court in *Lehr v. Robertson*,³ many genetic fathers may have constitutionally protected childrearing interests when the genetic mothers of their children are unmarried at all times from conception to birth.⁴ Fathers secure these interests when they take advantage of their paternity

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¹ FLA. STAT. §§ 63.087, 63.088 (2001) (repealed 2003).

² FLA. STAT. ANN. § 63.054 (West, Westlaw through 2003 Reg. Sess. and 2003 Spec. Sess. A-E).

³ 463. U.S. 248 (1983).

⁴ *Id.* at 252.

opportunities by establishing in a timely fashion "significant custodial, personal, or financial" relationships with their offspring.⁵ Unfortunately, neither *Lehr* nor its progeny fully describes how genetic fathers may successfully grasp these paternity opportunities. Also, paternity opportunities now differ significantly from state to state, creating uncertainties as well as formalistic, procedural pitfalls. More significantly, many have read the *Lehr* decision to invite states to deny genetic fathers paternity opportunity and childrearing interests, even when their failures in establishing significant parent-child relationships were caused by "ignorance" or "grudging and crabbed"⁶ legal doctrines, or were caused by genetic mothers or others who concealed the whereabouts of children.

In *Lehr*, the story of the birth of Jessica to an unmarried couple, Lorraine and Jonathan, yielded "far different"⁷ opinions, depending on whose story the Justices accepted. Six Justices emphasized Lorraine's story,⁸ while the three dissenters emphasized that of Jonathan.⁹ In *Lehr*, Lorraine had married Richard eight months after Jessica's birth.¹⁰ Richard then sought to adopt Jessica by seeking an adoption order in Ulster County shortly after Jessica's second birthday,¹¹ on or about December 21, 1978.¹² Jonathan, Jessica's genetic father, contested the adoption, arguing that he was entitled to advance notice of the adoption proceeding and an opportunity to be heard.¹³

Under New York statutory law, a genetic father of a child born to an unmarried woman was entitled to notice only if: (1) he had filed his name in "the putative father registry"; (2) he had been adjudicated to be the father, "identified as the father on the child's birth certificate," or "identified as the father by the mother in a sworn written statement"; (3) he had married the mother before the child was six months old; or (4) he had lived "openly" with the child and the child's mother while holding himself out as the child's father.¹⁴ Conceding he did not meet the requirements of the statute, Jonathan urged that "special circumstances gave him a

⁵ *Id.* at 262.

⁶ *Id.* at 275 (White, J., dissenting).

⁷ *Id.* at 270 (White, J., dissenting).

⁸ *See id.* at 250-51.

⁹ *See id.* at 268-69.

¹⁰ *Id.* at 250.

¹¹ *Id.*

¹² *See In re Adoption of Martz*, 423 N.Y.S.2d 378, 380 (N.Y. Fam. Ct. 1979) (trial court decision leading to *Lehr*).

¹³ *Lehr*, 463 U.S. at 250.

¹⁴ *Id.* at 250-51 (discussing N.Y. DOM. REL. LAW § 111-a (McKinney, Westlaw through 2005)).

constitutional right to notice and a hearing before Jessica was adopted.”¹⁵ Those circumstances included Jonathan filing “a visitation and paternity petition” in a New York court in Westchester County about a month after the adoption proceeding began,¹⁶ but before the court signed an adoption order.

A month after filing the paternity petition, on March 3, 1979, Jonathan learned of the Ulster County adoption petition.¹⁷ Four days later, Jonathan sought to halt the adoption proceedings so that only his case would proceed. The adoption court judge responded to Jonathan’s request for a stay by indicating that he had signed the adoption order earlier that day.¹⁸ By then, the judge was aware of Jonathan’s pending paternity case because Lorraine’s attorney informed the judge about it a few days after Lorraine learned of the paternity petition.¹⁹ The adoption court judge concluded that notice to Jonathan was not required.²⁰

Two New York appellate courts sustained Jessica’s adoption.²¹ The New York Court of Appeals affirmed, in part, on the basis that Jonathan “made no tender indicating any ability to provide any particular or special information relevant to Jessica’s best interest.”²² Accordingly, any notice afforded to Jonathan would not have furthered the purpose of such notice: to enable a genetic father “to provide the [adoption] court with evidence concerning the best interest of the child[.]”²³ Furthermore, the court of appeals noted that Jonathan knew where Lorraine was even before he petitioned for visitation and paternity; that he thereafter never filed a statutory notice of intention to claim paternity (which, under New York law, would have assured him participation rights in any adoption proceeding involving Jessica); and that he did not make a “prompt”

¹⁵ *Id.* at 252.

¹⁶ *Id.* at 252. Jonathan filed the paternity petition on January 30, 1979; process was served on Lorraine on February 22, 1979. *In re Martz*, 423 N.Y.S.2d at 380.

¹⁷ *Lehr*, 463 U.S. at 253. On March 3, 1979, Jonathan was served a copy of Lorraine’s motion in the adoption case for consolidation with the paternity case. *In re Adoption of Jessica XX*, 430 N.E.2d 896, 897 (N.Y. 1981).

¹⁸ *In re Martz*, 423 N.Y.S.2d at 384 n.4.

¹⁹ *Lehr*, 463 U.S. at 252-53. *See also In re Martz*, 423 N.Y.S.2d at 384 (On February 26, 1979, trial judge learned of the paternity action when Lorraine sought a change of venue of the paternity case to the court wherein the adoption case was pending; it was unclear to the trial judge whether Richard “had any actual or imputed knowledge” of Jonathan’s “claim to the fatherhood.”).

²⁰ *Lehr*, 463 U.S. at 253.

²¹ *Id.* at 253-54. The adoption order in *In re Martz* was affirmed in *In re Adoption of Jessica XX*, 434 N.Y.S.2d 772 (N.Y. App. Div. 1980) and then in *In re Adoption of Jessica XX*, 430 N.E.2d 896 (N.Y. 1981).

²² *Lehr*, 463 U.S. at 255.

²³ *Id.*

application to intervene in the adoption case once he learned of it.²⁴

On appeal to the United States Supreme Court, the only legal issues were: (1) "whether the New York statutes are unconstitutional because they inadequately protect the natural relationship between parent and child" and (2) whether these statutes "draw an impermissible distinction between the rights of the mother and the rights of the father."²⁵

Regarding the rights that flow from "the natural relationship between parent and child,"²⁶ the Court distinguished between an unwed genetic father who had formed a "significant custodial, personal, or financial relationship"²⁷ with his child, thereby acquiring "substantial" federal constitutional childrearing interests, and an unwed genetic father who had not yet formed such a relationship.²⁸ In *Lehr*, the Court found that Jonathan had not formed a significant relationship with Jessica and that, in fact, he had not sought "to establish a legal tie until after she was two years old."²⁹ Consequently, the issue before the *Lehr* Court was not the "adequacy of New York's procedure for terminating a *developed* relationship," but whether New York had sufficiently protected Jonathan's "*opportunity to form*" a parent-child relationship with Jessica.³⁰ It found there was adequate protection.³¹

The Supreme Court thus deemed "procedurally adequate" the New York statutory conditions on advance notice of adoption proceedings to unwed genetic fathers.³² The Court observed that "the right to receive notice was completely within [Jonathan's] control"

²⁴ *In re Jessica XX*, 430 N.E.2d at 901 n.7. In his dissent, the Chief Judge noted that Jonathan would have reasonably thought that a filing of statutory notice by him was "a meaningless act," since Jonathan knew that the adoption judge was aware of the paternity case before the adoption was finalized. *Id.* at 904 (Cooke, C.J., dissenting). Additionally, the Chief Judge noted that a "prompt" intervention between Saturday, March 3, and Tuesday, March 6, would have seemed unnecessary to Jonathan as Lorraine's venue request before the adoption court was "returnable" on March 12. *Id.* at 904-05.

²⁵ *Lehr*, 463 U.S. at 255 n.10.

²⁶ *Id.*

²⁷ *Id.* at 262.

²⁸ *See id.* at 261-62. "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' his interest . . . acquires substantial protection But the mere existence of a biological link does not merit equivalent constitutional protection." *Id.* at 261 (citations omitted).

²⁹ *Id.* at 262-63.

³⁰ *Id.* at 263-65 (emphasis added).

³¹ *Id.* at 265.

³² *Id.* at 264.

and that he simply needed to mail a postcard to the putative father registry.³³ Jonathan's ignorance of the putative father registry requirement was no defense,³⁴ and the Court rejected Jonathan's plea that his case was "special" because both the adoption court and the mother were aware of his pending paternity petition before the adoption order was entered.³⁵ Thus, the Court refused to make an exception for special circumstances, reasoning that strict compliance with the statutes served the public interest in facilitating adoptions of young children expeditiously.³⁶ Furthermore, the Court noted that such a position was fair because Jonathan was "presumptively capable of asserting and protecting" his own rights.³⁷

Regarding the distinction that New York lawmakers had drawn between maternal and paternal rights, the Court recognized the need for "a substantial relation between the disparity and an important state purpose."³⁸ The state adoption procedure distinguished between women and men who were genetic parents in that it allowed all mothers, but not all fathers, "the right to veto an adoption and the right to prior notice of any adoption proceeding."³⁹ According to the Court, the distinction served three objectives: (1) "promot[ing] the best interests of the child"; (2) "protect[ing] the rights of interested third parties"; and (3) securing prompt and final adoptions of nonmarital children.⁴⁰ To achieve these objectives, the New York laws afforded veto and participation rights only to genetic parents who had established, and not later abandoned, "custodial, personal, or financial" relationships with their children.⁴¹

By giving birth, genetic mothers always initially have such established relationships. However, only certain putative fathers can claim such a relationship, generally through the process of legitimization, but also through active participation in raising the child.⁴² The Court deemed that the New York statutes sufficiently recognized unwed genetic fathers who came forward to participate in childrearing, noting that the statutory scheme did not likely "omit

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 264-65.

³⁶ *Id.*

³⁷ *Id.* (stating further that "[Jonathan's] argument amounts to nothing more than an indirect attack on the notice provisions of the New York statute").

³⁸ *Id.* at 265 (citing *Craig v. Boren*, 429 U.S. 190, 197-99 (1976)).

³⁹ *Id.* at 266. The state endowed mothers with this right, assuming, of course, no earlier termination of maternal rights had occurred.

⁴⁰ *Id.* at 266-67.

⁴¹ *Id.*

⁴² *Id.*

many responsible fathers.”⁴³ Furthermore, the Court deemed that the statutes adequately protected other, uninvolved fathers on the basis that the right to receive notice was entirely within the father’s control.

Unlike the majority of the Court, the dissenters in *Lehr* focused more on the story told by Jonathan, resulting in a very different conclusion regarding the adequacy of the protection afforded to Jonathan’s natural relationship with Jessica.⁴⁴ According to Jonathan, whose factual account was never subject to an evidentiary hearing, Jonathan and Lorraine “cohabited for approximately [two] years, until Jessica’s birth,” during which time Lorraine acknowledged to friends and relatives that Jonathan was Jessica’s father.⁴⁵ Later, when Lorraine sought public aid, she reported to the New York State Department of Social Services that Jonathan was the father of Jessica.⁴⁶ Jonathan “visited Lorraine and Jessica in the hospital every day during Lorraine’s confinement.”⁴⁷ Then, upon discharge, Lorraine largely concealed her whereabouts from Jonathan for nearly a year, though he sporadically located her and visited with Lorraine, Jessica, and Lorraine’s other child “to the extent” Lorraine was willing to permit it.⁴⁸ From August 1977 until August 1978, Jonathan was unable to locate Lorraine and Jessica, though he never ceased looking for them.⁴⁹ Jonathan located them again in August 1978 “with the aid of a detective agency.”⁵⁰ By this time Lorraine was married to Richard Robertson.⁵¹ Jonathan maintained that he offered to furnish financial assistance and establish a trust fund for Jessica, but Lorraine refused.⁵² Lorraine also rejected Jonathan’s request to visit Jessica and “threatened” him “with arrest unless he stayed away.”⁵³ Jonathan subsequently retained counsel

⁴³ *Id.* at 264. Schemes omitting many responsible fathers would seemingly prompt procedural due process claims if governmental actions were predictable and preventable through the use of feasible alternatives. *See, e.g.,* Snow v. Grillo, No. 04 C 3996, 2004 WL 2958685, at *1 (N.D. Ill. Dec. 16, 2004) (reviewing Parratt v. Taylor, 451 U.S. 527 (1981) and its progeny)). *See also* Monell v. Dep’t of Soc. Servs. of New York, 436 U.S. 658 (1978) (holding that, although a municipality is not liable on respondeat superior grounds for the unconstitutional acts of its agents, it is liable where injuries result from its official policy).

⁴⁴ *Id.* at 268-71 (White, J., dissenting).

⁴⁵ *Id.* at 268-69.

⁴⁶ *Id.* at 269.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *See id.*

⁵³ *Id.*

who wrote to Lorraine in early December 1978, requesting visitation for Jonathan and threatening legal action.⁵⁴ The Robertsons' adoption petition, filed on December 21, 1978, closely followed Jonathan's retention of counsel.⁵⁵

With this "far different picture," the dissenters concluded "that but for the actions" of Lorraine, Jonathan would have developed a relationship with Jessica that warranted full veto and participation rights in the adoption case.⁵⁶ The dissent also looked to a 1980 statutory amendment in New York that guaranteed a genetic father's right to consent to adoption when he was "prevented" from establishing a significant parent-child relationship by the genetic mother or another "having lawful custody of the child."⁵⁷ Thus, the dissent appears to draw a conclusion that blood ties, together with third-person interference and an inquiring genetic father who indeed parented for some time, are sufficient circumstances to prompt adoption notice and participation requirements.⁵⁸

Additionally, the dissenters viewed the significance of Jonathan filing a paternity suit as comparable to the statutory factors that afforded other genetic fathers an affirmative right to notice and veto power. Noting that Jonathan's "identity and interest [was] as clearly and easily ascertainable as those fathers in the [statutory] categories,"⁵⁹ the dissent observed that failure to provide him with the same rights constituted the "sheerest formalism."⁶⁰ Such a formalistic procedure failed to serve the government's goals of the child's best interest and expeditious, conclusive adoptions.⁶¹

Finally, the dissenters implied that states could better ensure a genetic father's participation in adoption proceedings by requiring unwed genetic mothers "to divulge" the name of their child's biological father.⁶² The dissent observed that states could even do so when it is the spouse of the genetic mother, like Richard, who seeks adoption.⁶³ Support for this proposition exists in the fact that the government already requires such identifications in other settings,

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 270-72.

⁵⁷ *Id.* at 271 n.3 (quoting N.Y. DOM. REL. LAW § 111(1)(d) (McKinney Supp. 1982-1983) (as amended by Ch. 575, 1980 N.Y. Laws to provide a right of consent to unwed fathers whose failure to step up was due to actions by "the person or authorized agency having lawful custody of the child").

⁵⁸ *Id.* at 272-74.

⁵⁹ *Id.* at 274.

⁶⁰ *Id.* at 275.

⁶¹ *Id.*

⁶² *Id.* at 273 n.5.

⁶³ *Id.*

as when public assistance is sought by mothers on behalf of their children.⁶⁴

Both the majority and the dissent in *Lehr* recognized that unwed genetic fathers possess several paternity opportunity interests in their offspring born to unwed mothers. Even the six justices in the majority expressed concern about the validity of state adoption notice laws that deny paternity opportunities to men who had no "control" over establishing paternity because they failed to receive notice or laws that likely omit many "responsible fathers."⁶⁵

The so-called "Scarlet Letter" provisions enacted in Florida, and later invalidated on privacy grounds,⁶⁶ aimed at protecting such paternity opportunity interests when unwed mothers sought adoptions for their children.⁶⁷ Unfortunately, the replacement to the Scarlet Letter provisions, the Putative Father Registry Act,⁶⁸ does little to safeguard those paternity interests. For example, the replacement may deny many responsible fathers paternity opportunities although they had no control over establishing paternity; such a scheme even concerned the majority in *Lehr*, though the Court had little sympathy for Jonathan.

III. THE FALL OF THE SCARLET LETTER LAW AND ITS AFTERMATH

The Scarlet Letter provisions of Florida's adoption statutes took effect in October 2001.⁶⁹ Generally, the provisions declared that when a genetic mother offers her child for adoption while unaware of (or withholding) the genetic father's identity, she must publish a newspaper notice that contains her name, any name or description of the possible genetic father(s), and the likely date and place of conception.⁷⁰ The provisions were intended to promote greater finality in adoptions by reducing potential disruptions by late-arriving genetic fathers. Although not always effective, the statutes provided for pre-adoption notice to genetic fathers, especially those who might wish to step up to parenthood. These Scarlet Letter provisions were invalidated by a Florida court in April

⁶⁴ *Id.*

⁶⁵ *Id.* at 264.

⁶⁶ *G.P. v. State*, 842 So. 2d 1059 (Fla. Dist. Ct. App. 2003) (invalidating FLA. STAT. §§ 63.087, 63.088 (2001) (commonly known as the Scarlet Letter provisions)).

⁶⁷ FLA. STAT. ANN. § 63.087 (West, Westlaw through 2002 pocket part) (amended 2003).

⁶⁸ FLA. STAT. ANN. § 63.054 (West, Westlaw through 2003 Reg. Sess. and 2003 Spec. Sess. A-E).

⁶⁹ FLA. STAT. ANN. § 63.087 (West, Westlaw through 2002 pocket part) (amended 2003).

⁷⁰ See *G.P.*, 842 So. 2d at 1061-62 (citing FLA. STAT. § 63.087(f)(1)1-3 (2001)).

2003,⁷¹ later repealed by the legislature, and quickly replaced by new and very different statutory provisions.⁷²

A review of the old and new Florida provisions demonstrates that searches for unwed men who stand to lose parental rights as a result of adoptions are not very rigorous, especially when compared with searches for men sought for child support payments. While the Scarlet Letter provisions were excessive in that they failed to exempt from the notice requirements cases involving forcible rape,⁷³ their replacement inadequately protects paternity opportunity interests. The putative father registry requirement potentially causes paternity losses for genetic fathers who are fit and willing to parent their children. Further, the replacement creates inappropriate distinctions between genetic fathers who wish to parent, and are fit to parent, based solely upon the conduct of genetic mothers, without seeking to mitigate such distinctions. It treats harshly men who had no "control" over paternity establishment. This all occurs in a setting where after genetic fathers have secured legal paternity and childrearing interests, genetic mothers generally cannot petition to terminate their parental status, even where the men are alleged to be unfit parents.⁷⁴

Before the Scarlet Letter provisions were enacted, genetic fathers who were unmarried to the mothers of their children had few opportunities in Florida to participate in adoption proceedings. Florida courts employed a Florida statute in the 1960s that made the genetic father's consent to adoption (often sought by the mother's later-married husband) unnecessary even when the father had made voluntary child support payments in accordance with his statutory responsibility.⁷⁵ Before 1975, another Florida statute governing consent to adoption made no provision for consent by fathers unless they were married to the mother at the time of concep-

⁷¹ *Id.* at 1062-63.

⁷² See FLA. STAT. ANN. § 63.054 (West, Westlaw through 2003 Reg. Sess. and 2003 Spec. Sess. A-E) (providing for the putative father registry). See also FLA. STAT. ANN. § 63.087 (West, Westlaw through 2005) (the current version of section 63.087 that eliminates the publication notice requirement to potential genetic fathers).

⁷³ See *G.P.*, 842 So. 2d at 1061 (finding the statutes unconstitutional "as to women whose pregnancy was the result of sexual battery").

⁷⁴ In *Osborn v. Marr*, 127 S.W.3d 737, 738-41 (Tenn. 2004), the Tennessee Supreme Court found a genetic mother could not seek paternal rights termination under a state statute (although the statute did allow parental termination petitions by prospective adoptive parents, a state agency, or a court-appointed special advocate agency).

⁷⁵ See, e.g., *Clements v. Banks*, 159 So. 2d 892 (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).

tion or birth; it then said: "No consent shall be required from the father of a child born out of wedlock when the mother of the child does not know the identity of the father and a reasonable search would not reveal his identity."⁷⁶

The legislature expanded the adoption participation rights of genetic fathers of nonmarital children after 1975. Thus, until 2001, unless "excused by the court," post-birth written consent was required of fathers who established paternity by court proceedings;⁷⁷ who had signed and filed paternity acknowledgments;⁷⁸ or who had provided child support "in a repetitive, customary manner."⁷⁹ In 2001, legislative initiatives expanded participation rights to include possible genetic fathers who "attempted to provide" such consistent support during the mother's pregnancy.⁸⁰ Furthermore, and more significantly, the legislature extended participation rights to men reasonably "identified" by birth mothers as potential genetic fathers.⁸¹

As of 2001, in situations in which courts lacked knowledge of the name or location of those men from whom consent to adoption was required, including men "identified" as potential fathers, judges would question the mothers and their relatives who were present at adoption hearings.⁸² The judges had to inquire about men who provided or promised to provide support,⁸³ men with whom the mothers cohabited at the time of conception,⁸⁴ and men the mothers had "reason to believe" could be the genetic fathers.⁸⁵ Adoption entities were also to undertake, if necessary, "diligent" searches to locate these same men once they were identified, if their locations remained unknown.⁸⁶ If the men were still unidentified, or if their locations remained unknown upon such inquiries, Florida law required the mother or adoption entity to publish notice to such men in newspapers in counties where "conception may

⁷⁶ FLA. STAT. ANN. § 63.062(1) (West 1973), *amended by* Florida Adoption Act, ch. 226, §4, 1975 Fla. Laws 640, 641. *See also* Florida Adoption Act, ch. 159, 1973 Fla. Laws 312, 315 (the original act with the relevant language, which was later amended by ch. 226, 1975 Fla. Laws 640, 641).

⁷⁷ FLA. STAT. ANN. § 63.062(1) (West, Westlaw through 2000 pocket part).

⁷⁸ § 63.062(1)(b)(4).

⁷⁹ § 63.062(1)(b)(5).

⁸⁰ FLA. STAT. ANN. § 63.062(1)(d)(2) (West, Westlaw through 2001 pocket part). *See also* Act of Apr. 18, 2001, ch.3, § 3, 2001 Fla. Laws 5, 8.

⁸¹ § 63.062(1)(b)(5).

⁸² . STAT. ANN. § 63.088(3) (West, Westlaw though 2001 pocket part).

⁸³ § 63.088(3)(d).

⁸⁴ § 63.088(3)(c).

⁸⁵ § 63.088(3)(g).

⁸⁶ § 63.088(4).

have occurred,” where the mothers reside, and where the men whom the mothers believed might be the genetic fathers reside.⁸⁷ These notices were also to contain 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.”⁸⁸ Furthermore, these notices were to contain the birth dates of the children as well as the dates and cities where conception “may have occurred.”⁸⁹

The new laws took effect on October 1, 2001, without the Governor’s approval.⁹⁰ In May 2002, only some of the provisions were attacked as unconstitutional on federal and state informational privacy grounds.⁹¹ In particular, the requirements for published notices to unidentified or missing fathers were challenged. At the trial level, a Palm Beach County circuit judge chiefly denied relief,⁹² though the provisions were not even defended in court by the Florida Attorney General.⁹³ Although the trial judge found that the provisions implicated privacy rights, he upheld the provisions on the basis that they served compelling governmental interests with no less intrusive means to achieve those interests.⁹⁴

On appeal, again without the participation of the Attorney General, the district court of appeal invalidated the Scarlet Letter provisions regarding publication notice.⁹⁵ According to the court, the Florida constitutional privacy right encompasses individual interests both in avoiding disclosures of personal matters and in making certain important decisions independently.⁹⁶ Finding the provisions’ invasion of these interests to be “patent,” the court did not perform a constitutional case analysis of Florida’s privacy right.⁹⁷ Finally, the court held that the state did not meet its burden to justify the “personal, intimate, and intrusive” nature of the construc-

⁸⁷ § 63.088(5).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Act of Apr. 18, 2001, ch. 3, § 17, 2001 Fla. Sess. Law 5, 61. *See also* H.R. 141, 2001 Leg., 17th Reg. Sess. (Fla. 2001); Message from Jeb Bush, Governor of Florida, to Katherine Harris, Florida Secretary of State (Apr. 17, 2001) (located on Westlaw database in the legislative history of H.R. 141).

⁹¹ *G.P.*, 842 So.2d at 1061.

⁹² *Id.* The trial judge “did find the statutes were unconstitutional as to women whose pregnancy was a result of sexual battery.” *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 1060-61.

⁹⁶ *Id.* at 1062.

⁹⁷ *Id.*

tive notice provisions.⁹⁸ It expressly declined to address whether “alternative proposals” for notifying genetic fathers by publication might meet this burden.⁹⁹ Notably, the appellate court said nothing about the statutory requirements of judicial inquiry and diligent searches by adoption entities relating to men who may be the fathers of the children placed for adoption.

Not long after the appeals court invalidated the Scarlet Letter provisions, Florida lawmakers unanimously passed a bill to establish the “Florida Putative Father Registry.”¹⁰⁰ The stated purpose of the registry was to “preserve the right to notice and consent to an adoption.”¹⁰¹ That goal was not met. The new law requires a man to register with the state if he believes he may be a genetic father.¹⁰² Such a potential father would have to provide the name, address, and physical description of the potential mother, as well as the date and place where conception could have occurred.¹⁰³ Thereafter, a registered individual preserves the right to notification if a woman specifically named in the registry places a baby for adoption.¹⁰⁴ A claim of paternity may be filed at any time prior to the child’s birth.¹⁰⁵ A potential father cannot register, however, if the mother has already initiated proceedings to terminate the genetic father’s parental rights.¹⁰⁶

On May 30, 2003, Florida Governor Jeb Bush signed the paternity registry bill, noting that it imposed a certain level of responsibility on the father.¹⁰⁷ After Governor Bush repealed some of the 2001 initiatives, including the Scarlet Letter provisions, when he signed the paternity registry bill, the Lieutenant Governor reportedly announced this repealing to Florida Adoption Council members, who responded with a standing ovation.¹⁰⁸

The new Florida paternity registry law effectively denies paternity opportunities to many fit genetic fathers who wish to parent,

⁹⁸ *Id.* at 1063.

⁹⁹ *Id.* (stating that “[w]e do not address” the validity of a more narrowly drawn statute).

¹⁰⁰ FLA. STAT. ANN. § 63.054 (West, Westlaw through 2003 Reg. Sess. and 2003 Spec. Sess. A-E).

¹⁰¹ § 63.054(1).

¹⁰² *Id.*

¹⁰³ § 63.054(3).

¹⁰⁴ § 63.054(1).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Randolph Pendleton, *Bush Signs Bill Repealing ‘Scarlet Letter Law’*, ORLANDO SENTINEL TRIBUNE (Fla.), May 31, 2003, at B5.

¹⁰⁸ Sherri Ackerman, *Florida Adoption Officials Applaud Bush Veto of “Scarlet Letter Law”*, TAMPA TRIBUNE, (Fla.), May 31, 2003, at Metro 7.

even though other laws continue to expose these same men to child support lawsuits long after birth and long after any significant chance for developing a meaningful parent-child relationship has passed. The denials are more frequent now than before because more responsibilities have shifted to unwed genetic fathers. Most noteworthy, the 2003 paternity registry bill said:

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.¹⁰⁹

In accordance with this shift, the bill eliminated the general requirement of judicial inquiries and diligent adoption-entity searches for, and advance consent by, "any man who the mother has reason to believe may be the father . . . and who . . . has been identified by the birth mother as a person she has reason to believe may be the father."¹¹⁰

The identities of potential genetic fathers of children placed for adoption were more likely to be discovered before 2003. The 2001 statutes required that those who petition to terminate parental rights pending adoption act in "good faith" and that "diligent efforts"¹¹¹ be undertaken to find the men identified by the mothers as the potential fathers.¹¹² Under the 2003 amendments, "diligent" searches¹¹³ are only required for unwed genetic fathers who have already affirmatively stepped up by securing a judicial declaration of paternity¹¹⁴ or by officially claiming or acknowledging paternity.¹¹⁵ Also, since 2003, courts require the unwed genetic father's consent only if he has stepped up in the ways mentioned and either developed a "substantial" relationship with his child¹¹⁶ or "demonstrated a full commitment" to parental responsibility.¹¹⁷

Under the 2003 amendments, an unwed genetic father who is unaware of the pregnancy or birth, but who has the "duty to pro-

¹⁰⁹ Act of May 30, 2003, ch. 58, § 18, 2003 Fla. Laws 455, 496-97.

¹¹⁰ FLA. STAT. ANN. § 63.062(1)(d)(3) (West, Westlaw through 2002 pocket part).

¹¹¹ FLA. STAT. ANN. § 63.062(3) (West, Westlaw through 2000 pocket part).

¹¹² § 63.062(1)-(5).

¹¹³ FLA. STAT. ANN. § 63.087(4)(d) (West, Westlaw through 2003 18th Leg., 1st Reg. Sess. and Spec. Sess. A-E).

¹¹⁴ § 63.062(1)(b)(3).

¹¹⁵ §§ 63.062(1)(b)(4) to -(5) (requiring affidavit or acknowledgement).

¹¹⁶ § 63.062(2)(a) (children over six months old placed for adoption).

¹¹⁷ § 63.062(2)(b) (children less than six months old placed for adoption).

tect his own rights and interest,"¹¹⁸ can step up to potential parenthood by filing "a notarized claim of paternity form with the Florida Putative Father Registry within the Office of Vital Statistics of the Department of Health."¹¹⁹ The forms typically are maintained in confidence. However, there is no judicial inquiry and no diligent search for a potential genetic father, even if he is identifiable by the mother as the likely genetic father.¹²⁰ Additionally, the genetic father is apparently not excused from the filing requirement even if his failure to file resulted from misrepresentation or deceit on the part of the mother. Thus, new laws provide that where a newborn (less than six months old) is placed with "adoptive parents," the unwed genetic father must have filed a notarized claim of paternity form "prior to the time the mother executes her consent for adoption"¹²¹ in order to participate in adoption proceedings. Furthermore, under the new Florida law, an unwed genetic mother may consent to adoption forty-eight hours after birth, or on the day she is notified that "she is fit to be released from the licensed hospital or birth center."¹²² Consequently, the amended statute potentially leaves very little time for genetic fathers to step up, even for those who are well informed and conscientious.

IV. THE NEED FOR GOOD-FAITH COOPERATION

Undeniably, the 2001 Scarlet Letter provisions regarding constructive notices to persons reasonably believed to be potential genetic fathers were excessive.¹²³ But are there "alternative proposals"¹²⁴ beyond a paternity registry that would promote the legitimate governmental interests in facilitating paternity designations for genetic fathers?¹²⁵ And could the notification of potential genetic fathers be accomplished without significant consequences of a "personal, intimate, and intrusive" nature?¹²⁶

The answer to both questions is yes. In 2003, Florida lawmakers still had good reason to require searches for and notices to more, if not all, genetic fathers when unwed mothers placed newborns for adoption. Although difficult to distinguish at times, all

¹¹⁸ Ackerman, *supra* note 108, at Metro 7.

¹¹⁹ § 63.054(1).

¹²⁰ § 63.088(4)-(5).

¹²¹ FLA. STAT. ANN. § 63.062(2)(b) (West, Westlaw through 2005 Reg. Sess.).

¹²² § 63.082(4)(b).

¹²³ See *supra* note 88.

¹²⁴ *G.P. v. State*, 842 So. 2d 1059, 1063 (Fla. Dist. Ct. App. 2003).

¹²⁵ See *supra* note 95 and accompanying text.

¹²⁶ *G.P.*, 842 So. 2d at 1063.

potential and actual genetic fathers are not alike. Consider the differences between the men involved in *G.P. v. State*.¹²⁷ Allegedly, one male was a 27-year-old statutory rapist.¹²⁸ Others included the "numerous classmates" of a minor unwed mother, as well as three men who slipped a date rape drug to a single woman in her thirties.¹²⁹ Under Florida law, none of these males seem to have paternity interests that should prompt further judicial inquiries and diligent searches. By comparison, seven other men in *G.P.* simply had sex at different times with a single woman in her twenties.¹³⁰ A few others, at worst, were "drug users" who had sex with a single woman in her late twenties who herself had "an on again, off again drug problem."¹³¹ Do none of these men merit a chance to form a meaningful parent-child relationship with their genetic offspring, especially as they remain responsible for child support should no adoptions occur and should the men later be found?

In response to the ruling in *G.P.*, the Florida General Assembly should have devised a narrower plan for judicial inquiries and diligent searches for potential or actual genetic fathers who possess paternity interests under *Lehr*. Such a plan would have confidentiality protections, as with the putative father registry, in which filings do not constitute public records. In 2003, the Florida legislature could have added the following additional sentence, not unlike the new sentence it did add regarding genetic fathers: When she initiates an adoption proceeding, an unmarried adult biological mother, by virtue of the fact that she has engaged in a consensual sexual relationship with a man that led to a pregnancy and birth, has some duty to designate an adult biological father who is eligible under law for parental rights.

Governmental programs already exist that better encourage, if not compel, genetic mothers to name actual or potential genetic fathers. These programs could serve as models for new Florida legislation on finding and notifying genetic fathers about proposed adoptions. For example, if a state participates in certain federal programs that assist needy children,¹³² the Social Security Act¹³³ de-

¹²⁷ See Jennafer Neufeld & Dalia Georgi, *In re: Adoption of a Minor Child: Circuit Court of the 15th Judicial Circuit, Palm Beach County, Florida*, 11 AM. U. J. OF GENDER SOC. POL'Y & L. 1199 (2003) (reviewing *G.P. v. State*). Notably, *G.P.* was brought on behalf of six unwed mothers. *Id.* at 1203.

¹²⁸ *Id.* at 1203.

¹²⁹ *Id.* at 1204.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See 42 U.S.C.S. § 602 (LexisNexis, LEXIS through 2005) (stating that state participation is voluntary).

mands that the state have a child support plan that permits "the establishment of the paternity of a child at any time before the child attains 18 years of age";¹³⁴ provides "services relating to the establishment of paternity" for children for whom assistance is provided;¹³⁵ and, most significantly, requires genetic mothers receiving public aid to cooperate "in good faith" to establish paternity.¹³⁶ Thus, greater governmental encouragement of women to divulge more information about potential genetic fathers (whether or not adoption is contemplated) is not extraordinary, though it must be undertaken with care. Borrowing federal good-faith cooperation principles, Florida lawmakers would not be looking simply to gather money; rather, as in the unchallenged provisions of the 2001 initiatives, they would be looking to protect "many responsible fathers" who otherwise would lose paternity opportunities for reasons beyond their control.¹³⁷

When considering new procedures for designating the genetic fathers of children born to unwed mothers, Florida lawmakers should look to three different time periods: pre-birth, birth, and post-birth. In addressing the pre-birth stage, Florida legislators should, at the very least, establish fairer paternity designation mechanisms by requiring greater governmental efforts to identify, locate, and educate genetic fathers of children born to unwed mothers who wish to pursue adoption shortly after birth. Obviously, when the children placed for adoption are not infants¹³⁸ or are born to married mothers,¹³⁹ comparable state efforts are difficult to achieve. Beyond the paternity registry law of 2003, the Florida legislature could better safeguard the paternity opportunity interests that the Scarlet Letter provisions served while still securing

¹³⁵ See generally Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No.104-193, 110 Stat. 2105 (1996) (focusing on helping needy parents and children and preventing nonmarital pregnancies).

¹³⁴ 42 U.S.C.S. § 666(a)(5)(A)(i) (LexisNexis, LEXIS through 2005).

¹³⁵ § 654(4)(A).

¹³⁶ § 654(29)(A).

¹³⁷ *Lehr v. Robertson*, 463 U.S. 248, 264 (1983).

¹³⁸ See, e.g., FLA. STAT. ANN. § 63.062(2)(a)-(b) (1975) (requiring that unwed genetic fathers whose consent to their children's adoptions are needed must have more significant relationships with the children when the children are over six months old).

¹³⁹ Here, even genetic ties and actual parent-child relationships may not be enough to establish parental rights for unwed genetic fathers when the mothers were married at the time of conception and when they remain in intact marriages. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (construing California law).

relevant privacy interests¹⁴⁰ and avoiding adoption procedures that "omit many responsible fathers."¹⁴¹

In the pre-birth setting, Florida should strongly encourage unwed expectant mothers to voluntarily notify known genetic fathers of impending births. The state should also aid identified genetic fathers in their understanding of the legal consequences of birth. In analogous settings, other state laws require that, during prenatal care visits, pregnant women and certain family members receive counseling as well as instruction on nutrition and the delivery process.¹⁴² State-administered programs should convey information on such matters as pre-birth and post-birth parental responsibilities; paternity designation mechanisms, including the consequences that flow from failures to act; and the legal guidelines on paternity, with helpful explanations of legal distinctions in such settings as childrearing, child support obligations, and participation rights in adoptions. In particular, Florida should help unwed genetic fathers understand that failure to secure, or loss of, parental interests and rights does not eliminate the potential for parental responsibilities, such as child support, long after birth.

In the birth setting, Florida should strongly encourage unwed genetic mothers to complete birth certificates or other parentage designations so that most children will have fathers designated under law around the time of birth. When birth certificates are incomplete and mothers place their children for adoption, Florida should not be content with searches of paternity registries or similar governmental records. Florida should also require that unwed mothers, and certain others present at birth, receive information on matters such as child support duties, paternity presumptions, and genetic-testing services. When new mothers contemplate voluntary parental-rights terminations followed by adoptions, Florida should transmit, or facilitate the transmission of,¹⁴³ additional in-

¹⁴⁰ See, e.g., *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 557-58 (Minn. 2003) (holding that employees have no invasion of privacy claim if personal information needed by employer was not distributed to the public at large).

¹⁴¹ *Lehr*, 463 U.S. at 264. See also Claire L. McKenna, Note, *To Unknown Male: Notice of Plan for Adoption in the Florida 2001 Adoption Act*, 79 NOTRE DAME L. REV. 789 (2004) (applying compelled speech doctrine cases in support of the contention that such provisions may be constitutional).

¹⁴² See, e.g., ALA. ADMIN. CODE r. 420-5-13-05 (2005) (providing that "patient and family" are to be counseled and instructed).

¹⁴³ Requirements that medical service providers convey certain information to their patients have been sustained even where the providers found them ideologically objectionable. See *Summit Med. Ctr. of Ala., Inc. v. Riley*, 274 F. Supp. 2d 1262, 1277-78 (M.D. Ala. 2003). Of course, information of no value to recipients (and

formation on paternity laws. Specifically, mothers should be aware of any laws that allow fathers to undo later proposed, or even completed, adoptions (as when fraud or other circumstances prevent fathers from coming forward).¹⁴⁴

In the post-birth setting, Florida should strongly encourage, when appropriate, new or amended birth certificates and other parentage designations (such as voluntary acknowledgment) operative as of the time of birth. Periodic governmental inquiries should normally be made a few months after unwed mothers depart child-birth facilities without having made any paternity designation. Similar inquiries may also be appropriate when health care providers or others develop reasonable concerns about the accuracy of earlier paternity designations. Certain information should also be freely dispersed and available post-birth, upon inquiry, about in-state genetic testing services, paternity designation mechanisms (such as voluntary acknowledgments of paternity and court proceedings), and government-supported and private counseling services. Comparably, other states' laws require the dissemination of both instructions on well-baby care and information on sources of pediatric care during follow-up health care visits by new mothers,¹⁴⁵ which represent matters arguably more complex than state parentage laws.

Unfortunately, Florida has not yet tried to re-implement the legitimate public policy behind some of the 2001 initiatives. Rather, it now follows the sentiment of a Utah adoption statute that states:

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.¹⁴⁶

which may even cause them trauma) will not be covered. *Summit Med. Ctr. of Ala., Inc. v. Riley*, 318 F. Supp. 2d 1109, 1112-13 (M.D. Ala. 2003).

¹⁴⁴ This analysis suggests there is also the need to amend so-called "Safe Haven" laws that permit unwed mothers to offer newborns for adoption without revealing anything about the genetic fathers; the laws contemplate later termination of all parental rights and then adoptions by strangers. An illustrative law is FLA. STAT. ANN. §§ 383.50-383.51 (West, Westlaw through 19th Leg., 1st Reg. Sess. 2005). The need for amendments to these "Safe Haven" laws is discussed in Jeffrey A. Parness, *Deserting Mothers, Abandoned Babies, Lost Fathers: Dangers in Safe Havens*, 24 QUINNIPIAC L. REV. (forthcoming 2005).

¹⁴⁵ See, e.g., MO. CODE REGS. ANN. tit. 19, § 30-30.090(5) (J) (2005).

¹⁴⁶ UTAH CODE ANN. §78-30-4.12(4) (West, Westlaw through 1st Spec. Sess. 2005).

V. CONCLUSION

Unwed mothers bearing children who are the result of consensual sexual intercourse should not have their related sexual activities put on public display by state governments. However, should these women wish to place their children for adoption, they should not enjoy absolute privacy regarding the circumstances leading to conception and birth. Most men who father children with unwed mothers, at the least, maintain paternity opportunity interests. These interests are not adequately safeguarded by putative father registries or paternity lawsuits alone. These interests require that state adoption laws generally promote good-faith maternal cooperation in the designations of legal paternity.