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# SEX AS CONSTRUCTIVE NOTICE: NORTH CAROLINA'S NEED FOR A PUTATIVE FATHER REGISTRY

LISA ALUMBAUGH KAMARCHIK\*

## I. INTRODUCTION

If this scheme were likely to omit many responsible fathers, and if qualification for notice were beyond the control of an interested putative father, it might be thought procedurally inadequate.<sup>241</sup>

In the seminal United States Supreme Court case of *Lehr v. Robertson*, Justice John Paul Stevens, writing for the majority, refused to set aside the adoption of a child where a father, Lehr, knew about the existence of his child but neglected to register with New York's putative father registry.<sup>242</sup> Registering with the state putative father registry would have guaranteed that he received notice and opportunity to contest any future adoption of his child.<sup>243</sup> While the mother in *Lehr* concealed the whereabouts of the child after she was discharged from the hospital, the mother never hid the fact that she was pregnant and even told Lehr he was the father.<sup>244</sup> Would the outcome have been different if the mother had also hidden the pregnancy and birth from Lehr? In North Carolina the answer is a troubling and resounding "no."

North Carolina has no mechanism by which an unwed father may unilaterally preserve, independent of a mother's deceptive conduct, his right to notice and opportunity in an adoption action.<sup>245</sup> Under the current statutory adoption scheme, a putative father must take action to "grasp the opportunity"<sup>246</sup> to develop a relationship with his child, but his reasonable ability to take such action hinges first on the knowledge of the pregnancy or existence of the child. This makes North Carolina's current adoption scheme, as applied to putative fathers who have been deceived as to the *existence* of their children, in the words of Justice Stevens, "procedurally inadequate."

Putative fathers in North Carolina need a mechanism that is actually within their control in order to "grasp the parental relationship" with their children when mothers have hidden the facts of their pregnancies and births from them.

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241. *Lehr v. Robertson*, 463 U.S. 248, 263-64 (1983).

242. *Id.* at 264.

243. *Id.* at 249.

244. *Id.* at 269.

245. North Carolina has no putative father registry. See generally Chapters 7B and 48-50A of the NORTH CAROLINA GENERAL STATUTES; Dale Joseph Gilsinger, Annotation, *Requirements and Effects of Putative Father Registries*, 28 A.L.R.6th 349 (2019); U.S. Dep't. of Health & Hum. Servs., *The Rights of Unmarried Fathers*, CHILD WELFARE INFO. GATEWAY 3 (current through August 2017), <https://www.childwelfare.gov/pubPDFs/putative.pdf>.

246. Quoted expression is from *Lehr*, 463 U.S. at 262.

“Sex is notice” – the grounds upon which many states deny a putative father notice and opportunity to contest an adoption – should not be the measure for whether a putative father gets a chance to have a relationship with his child in cases where the mother has committed fraud. Further, as suggested by *Lehr*, a putative father’s *opportunity* to grasp a parental relationship is constitutionally-mandated,<sup>247</sup> and the North Carolina legislature should implement a putative father registry to give effect to the constitutional mandate. A carefully crafted putative father registry would give putative fathers a unilateral, affirmative act they can perform to ensure that they receive notice and opportunity to participate in any subsequent adoption of their putative children, regardless of a mother’s deceptive acts.

## II. SCOPE OF ARTICLE

Throughout this article, the term “putative father” is used to refer to men who have conceived children with women to whom they are not married. This article specifically addresses putative fathers who have been deceived as to the *existence* of their children, resulting in their children being placed for adoption without their knowledge, as the population in need. Moreover, because this article is concerned primarily with the constitutional ramifications of denying putative fathers their constitutionally protected opportunity to develop parent-child relationships with their offspring, as endorsed by North Carolina’s current adoption scheme, a putative father’s statutory avenues to establish paternity and legitimation of his child are outside the scope of this article.

Where a mother has deceived a father as to the existence of the pregnancy and birth (either by affirmatively lying or lying by omission), and then placed the child for adoption without the father’s knowledge, a putative father will not have the knowledge or incentive to establish paternity or petition for legitimation. The primary purpose for establishing paternity of a child born out of wedlock is to allow for the enforcement of the father’s duty to support the child, not for establishing the putative father’s constitutionally protected status as a legal or physical custodian.<sup>248</sup> Similarly ineffective, a petition for legitimation entitles a putative father to notice and opportunity to contest an adoption if, and only if, it was filed *before* the adoption petition, which likewise cannot protect fathers who do not discover the existence of their progeny until after the adoption has commenced.<sup>249</sup>

Instead, the focus here is in on the constitutional violation created by having an adoption scheme that does nothing to safeguard a putative father’s opportunity to establish a parental relationship when he has been lied to about the existence of his child. This population of unfortunate fathers could be protected with the promulgation of a putative father registry, together with some minor revisions to the current adoption code. Lest one think that this

247. *Id.* at 262.

248. 3 Suzanne Reynolds, LEE’S NORTH CAROLINA FAMILY LAW 16-21 (5th ed. 2002).

249. *Id.* at 16-99.

population is too small to need protection, consider the number of deceived fathers who have had the resources to appeal adverse decisions to the appellate courts of North Carolina, and reasonably surmise that there are many more who have not had the means to object at all.<sup>250</sup>

### III. CURRENT STATUTORY SCHEMES

In illustrating the lack of safeguards for putative fathers in the current adoption scheme, it is helpful to highlight the differences between the state's adoption statutes and the state's termination of parental rights statutes.<sup>251</sup> Although they have the same legal effect of terminating a parent's legal and physical rights to his child, North Carolina's adoption and termination statutes are substantially different.<sup>252</sup> Crucially, the statutory scheme for adoption unjustifiably provides less safeguards for a parent's rights than the statutory scheme for termination.

First, a parent's failure to timely respond to a termination petition may result in termination only after the court orders a hearing on the petition.<sup>253</sup> In contrast, a parent's failure to timely respond to a notice of adoption results in a perfunctory determination that his consent to the adoption is not necessary and that the adoption may proceed without further notice to him.<sup>254</sup>

Second, in a termination proceeding, a parent has the right to counsel and the right to be appointed counsel in cases of indigence.<sup>255</sup> The court may appoint a guardian ad litem for the parent if the parent is incompetent, has diminished capacity, cannot adequately act in his own interest, or is an unmarried, unemancipated minor himself.<sup>256</sup> None of these benefits inure to a parent in an adoption proceeding.

Third, in termination proceedings, the burden is upon the movant to prove the facts justifying termination by clear and convincing evidence.<sup>257</sup> In an adoption proceeding, a putative father has the burden to prove that his consent is necessary before he can challenge the adoption.<sup>258</sup> Specifically, he

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250. *E.g.*, *A Child's Hope, LLC v. Doe*, 630 S.E.2d 673 (N.C. Ct. App. 2006); *In re Adoption of S.D.W.*, 758 S.E.2d 374 (N.C. 2014); *In re Baby Girl Dockery*, 495 S.E.2d 417 (N.C. Ct. App. 1998); *In re Adoption of Clark*, 381 S.E.2d 835 (N.C. Ct. App. 1989), *rev'd*, 393 S.E.2d 791 (N.C. 1990); *Matter of Adoption of P.E.P.*, 407 S.E.2d 505 (N.C. 1991); *In re M.M.*, 684 S.E.2d 463 (N.C. Ct. App. 2009) (termination); *In re T.L.B.*, 605 S.E.2d 249 (N.C. Ct. App. 2004) (termination).

251. See Chapters 48 and 7B of the NORTH CAROLINA GENERAL STATUTES, respectively.

252. Portions of the discussion in this section are adapted from this author's contribution to Respondent-Appellee's New Brief at 68-74, *In re Adoption of S.D.W.*, 758 S.E.2d 374 (N.C. 2014) (No. 348PA13). The author is grateful to Respondent's appellate counsel, Jonathan McGirt, for the opportunity to aid the honest cause of Mr. Johns and other fathers like him.

253. N.C. GEN. STAT. § 7B-1107 (2017).

254. N.C. GEN. STAT. § 48-3-603(a)(7), § 48-2-207(a) (2017).

255. N.C. GEN. STAT. § 7B-1101.1(a) (2017).

256. *Id.* § 7B-1101.1(b).

257. N.C. GEN. STAT. § 7B-1111(b) (2017).

258. *Id.* § 48-3-603(a)(7) (2017).

must prove that he has met at least one of the statutory prongs of Section 48-3-601 discussed below.<sup>259</sup>

Fourth, the actions that a parent must perform to preclude termination are less onerous than those required to preclude adoption. In terminations, termination will not be granted if a putative father has: (1) established paternity judicially or by affidavit; (2) legitimated the child; (3) filed a petition for legitimation; (4) married the mother of the child; or (5) provided “substantial financial support *or* consistent care” with respect to the child and mother.<sup>260</sup>

In adoptions, pursuant to Section 48-3-601, a father’s consent for adoption is required if he:

- (1) is or was married to the mother at the time of the child’s probable conception;
- (2) had a marriage solemnized in apparent compliance with the law to the mother at the time of the child’s probable conception;
- (3) legitimated the child prior to the filing of the adoption petition;
- (4) received the child into his home and openly held the child out as his own prior to the petition;
- (5) is the adoptive father of the child; or
- (6) has acknowledged his paternity and, *prior to the petition*, has either:
  - (a) obligated himself to support the child by written agreement or court order,
  - (b) married or attempted to marry the mother in a solemnized marriage in apparent compliance with the law, or
  - (c) has provided “reasonable and consistent payments for the support” of the biological mother or child in accordance with his means “*and* has regularly visited or communicated, or attempted to visit or communicate” with the mother and/or the child, or both.<sup>261</sup>

Specifically as to the support and care provisions in Paragraph (6)(c), the adoption provisions are more stringent than the termination provisions because, at a minimum, a parent in an adoption must acknowledge paternity, provide reasonable and consistent payments, *and* attempt to regularly communicate with the mother or child *before* the filing of the petition. In contrast, in a termination case, a parent can preclude termination solely by providing substantial financial support – regardless of whether he has

259. *Id.* § 48-3-601.

260. § 7B-1111(a)(5) (emphasis added).

261. § 48-3-601 (emphasis added).

acknowledged paternity or attempted to have a relationship with the mother or child. Most importantly, an unwed father who does not know or have reason to know of his child's existence prior to the filing of an adoption petition cannot accomplish *any* of the above adoption provisions prior to the filing of the adoption petition. To use the phrase coined by Judge Donna Stroud, writing for the North Carolina Court of Appeals, compliance with the adoption statutes by a putative father in that instance becomes "a practical impossibility."<sup>262</sup>

Fifth, the nature of the resolutions of termination and adoption proceedings is substantially different. Termination proceedings occur in a bifurcated manner.<sup>263</sup> That is, there is first an adjudicatory hearing where the court determines whether grounds for termination exist.<sup>264</sup> In the event they do exist, and are proven by petitioners by clear and convincing evidence, the court next holds a best interest hearing to determine whether termination would be in the best interests of the child.<sup>265</sup> It is completely possible for the court to determine that, while grounds to terminate exist, it is not in the child's best interest for the termination to occur.<sup>266</sup> In contrast, if an adoption petition is not contested, the Clerk of Superior Court may issue a decree without a formal hearing.<sup>267</sup> If an adoption petition is contested, a hearing is held and the court "shall grant the petition upon finding *by a preponderance of the evidence* that the adoption will serve the best interests of the child" so long as other administrative findings are made.<sup>268</sup>

Sixth and finally, in terminations, a motion to reinstate a terminated parent's rights is permissible in extraordinary circumstances so long as adoption has not occurred.<sup>269</sup> In adoptions, a parent's legal and physical rights are irrevocably severed.<sup>270</sup>

In sum, notwithstanding that they have the same legal effect of terminating a biological parent's rights, parents in termination actions enjoy a right to counsel and the opportunity to meaningfully participate as parties in the preliminary hearings and bifurcated trial while movants rightfully shoulder the burden of proof and must meet a greater evidentiary standard of proof.<sup>271</sup> All of these safeguards are denied to parents in adoption proceedings, and this lack of safeguards works a special infringement on the rights of deceived putative fathers.

262. *In re S.D.W.*, 745 S.E.2d 38, 50 (N.C. Ct. App. 2013), *rev'd*, 758 S.E.2d 374 (N.C. 2014).

263. N.C. GEN. STAT. § 7B-1109 (2017).

264. *Id.* § 7B-1109(a).

265. N.C. GEN. STAT. § 7B-1110(a) (2017).

266. *Id.* § 7B-1110(b).

267. N.C. GEN. STAT. § 48-2-601(a) (2017).

268. N.C. GEN. STAT. § 48-2-603 (2017) (emphasis added).

269. N.C. GEN. STAT. § 7B-1114(a)(1)-(2) (2017).

270. N.C. GEN. STAT. § 48-1-106(c) (2017).

IV. PRECEDENT CASE: IN RE ADOPTION OF S.D.W.<sup>272</sup>

If a comparison of North Carolina's adoption and termination statutory schemes serves to highlight the lack of safeguards afforded to deceived putative fathers, a review of the controlling North Carolina case on this issue serves as a warning of the harm that can result. In *In re Adoption of S.D.W.*, the North Carolina Supreme Court held that a putative father had a sufficient opportunity to develop a relationship with his child even though he was unaware of the pregnancy, the birth, or the existence of the child until almost six months *after* the adoption petition was filed.<sup>273</sup> The father, Gregory Joseph Johns, was unaware because the mother, Laura Welker, actively concealed the pregnancy and birth, going so far as to provide a false name on multiple adoption forms.<sup>274</sup>

Between May 2009 and March 2010, Johns and Welker had sex "hundreds of times."<sup>275</sup> A few months after their relationship began, the parties became pregnant despite Welker's use of an intrauterine device.<sup>276</sup> Welker informed Johns, and they agreed to terminate the pregnancy.<sup>277</sup> Welker began using a different form of birth control, and the parties continued having sex.<sup>278</sup> John never wore condoms during these sexual encounters.<sup>279</sup> After the parties ultimately broke up in early March 2010, Welker cut off contact with Johns.<sup>280</sup>

Unbeknownst to Johns, Welker had become pregnant and gave birth to his son, S.D.W., on October 10, 2010.<sup>281</sup> Because the parties had not been in contact since early March 2010, Johns had no reason to know that Welker had been pregnant and given birth in October.<sup>282</sup> One day after S.D.W. was born, Welker relinquished the child for adoption, falsely listing "Gregory Thomas James" as the child's father and leaving the line for Johns' last known address blank on the adoption forms<sup>283</sup> – despite knowing both his proper name and address.<sup>284</sup> Welker had also failed to identify Johns on S.D.W.'s birth certificate, and she would go on to falsely list "Gregory Thomas James" on another adoption form in an effort to thwart Johns' discovery of his son.<sup>285</sup>

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272. For ease of reference in text and citation, this article refers to the N.C. Court of Appeals opinion as "*In re S.D.W.*" and the N.C. Supreme Court opinion as "*In re Adoption of S.D.W.*" as that is how the opinions are titled by the courts.

273. *In re Adoption of S.D.W.*, 758 S.E.2d at 375.

274. *Id.* at 376. Welker supplied, "Gregory Thomas James" instead of "Gregory Joseph Johns."

275. *Id.* at 375.

276. *Id.* at 376.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.* at 380.

283. *Id.* at 376.

284. *Id.* at 382.

285. *Id.* at 383.

Two days after S.D.W. was born, S.D.W. began living with prospective adoptive parents.<sup>286</sup> The prospective adoptive parents filed a petition to adopt on November 2, 2010, just twenty-three days after S.D.W. was born.<sup>287</sup> On November 26, 2010, Welker reinitiated contact with Johns for the purpose of having an isolated incident of sexual intercourse and did not inform him she had been pregnant or given birth.<sup>288</sup> More than five months later, sometime in late April 2011, Johns first heard a rumor that Welker had given birth to a child.<sup>289</sup> Johns confronted Welker, who initially denied having been pregnant.<sup>290</sup> On April 25, 2011, Welker admitted to Johns she had given birth to his son and placed him for adoption.<sup>291</sup>

The specific date the adoption petition was filed (November 2, 2010) was critical because this was the date *before which* Johns would have had to comply with the statutory requirements of Section 48-3-601 for his consent to the adoption to be required.<sup>292</sup> That is, in order for Johns to exercise his constitutionally protected opportunity to develop a relationship with his son as contemplated in *Lehr*, he would have needed to: (1) acknowledge paternity of S.D.W.; (2) provide reasonable and consistent support to Welker and/or S.D.W.; and (3) attempt to visit or communicate with Welker and/or S.D.W. before November 2, 2010.<sup>293</sup> Unfortunately, Johns did not learn of either the child or the pregnancy until almost six months later.<sup>294</sup>

It would seem impossible for a father to acknowledge paternity of a child under Section 48-3-601 when he does not know about either the existence of a child or even of a pregnancy.<sup>295</sup> Herein lies the procedural inadequacy of North Carolina's adoption scheme to protect Johns and all similarly situated putative fathers. Indeed, Johns was not faulted under any of the other provisions of Section 48-3-601. He was not faulted for failing to file a legitimation proceeding before that date.<sup>296</sup> He was not faulted for failing to enter into a child support agreement prior to that date.<sup>297</sup> He was not faulted for failing to receive S.D.W. into his home prior to that date.<sup>298</sup> He was not faulted for failing to openly hold out S.D.W. as his biological

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286. *Id.* at 376.

287. *Id.*

288. *Id.*

289. *Id.* at 383.

290. *Id.*

291. *In re S.D.W.*, 745 S.E.2d at 41.

292. N.C. GEN. STAT. § 48-3-601 (2017); *see supra* note 21 and accompanying text.

293. § 48-3-601(2)(b)(4)(II).

294. *In re Adoption of S.D.W.*, 758 S.E.2d 374, 383 (Jackson, dissenting).

295. These situations are distinguishable from cases where a putative father knows of either a pregnancy or birth before the petition but does not know if it is *his* child. In those instances, the father can at least take some steps to comply with Section 48-3-601. "Yet § 48-3-601 does not allow a potential father's support obligation to be conditioned on establishing a biological link with the child." *In re Byrd*, 529 S.E.2d 465, 468 (N.C. Ct. App. 2000); *see also* *Matter of Adoption of C.H.M.*, 812 S.E.2d 804, 806 (2018) (birth mother first told the putative father the child belonged to him, but the child was a product of a sexual assault by an unknown man).

296. § 48-3-601(2)(b)(3).

297. § 48-3-601(2)(b)(4)(I).

298. § 48-3-601(2)(b)(5).



child prior to that date.<sup>299</sup> He was not even faulted for failing to marry Welker.<sup>300</sup>

The only way to assign fault to Johns – that is, the only way to find that the qualifications for notice *were* within Johns’ control – was to conclude that he was on notice of *the* actual pregnancy from the first act of sex that could give rise to *a* pregnancy. Hence, “sex is notice,” and the precedent of *In re Adoption of S.D.W.* ensures that similarly situated fathers will likely be denied their constitutionally protected opportunities to develop relationships with their children.

At the trial level, as soon as Welker told Johns she had placed their son for adoption, Johns attempted every legal avenue available to prevent the adoption in order to develop a relationship with his son. Johns responded promptly to the notice of adoption, ensuring his consent would not be vitiated by Section 48-3-603(a)(7).<sup>301</sup> Additionally, he asked to intervene in the adoption, moved to dismiss the adoption, requested child custody, and sought DNA testing.<sup>302</sup> The petitioners filed a motion for summary judgment, arguing that Johns did not have standing to intervene and that his consent to the adoption was not required.<sup>303</sup> Johns then filed a host of motions alleging that his consent was necessary, he had standing to intervene, fraud had been perpetrated, and his constitutional rights had been violated.<sup>304</sup> After a hearing, the trial court granted the petitioners’ motion for summary judgment, denied all of Johns’ motions, found that his consent was not necessary, and allowed the adoption to proceed.<sup>305</sup>

Johns’ appeal to the North Carolina Court of Appeals essentially arose under the second prong of *Lehr*: that the qualifications for notice were beyond his control.<sup>306</sup> The Court of Appeals agreed that requiring strict compliance with Section 48-3-601 in instances where a putative father was unaware of his child’s existence until after the adoption petition had been filed might violate a father’s due process rights under the federal and state constitutions.<sup>307</sup> It reasoned that Section 48-3-601 might be unconstitutional

299. *Id.*

300. Perhaps one could say Johns was not *expressly* faulted for failing to marry Welker since the majority did characterize Johns as “demonstrat[ing] only incuriosity and disinterest” after the parties’ relationship ended. *In re Adoption of S.D.W.*, 758 S.E.2d at 380. Welker changed her phone number and “cut off all contact” with Johns after the relationship ended. *Id.* at 374, 382. Judge Stroud, writing for the majority in the Court of Appeals’ opinion, considered this conundrum and refused to fault Johns for failing to engage in behaviors that might violate anti-stalking statutes. *In re S.D.W.*, 745 S.E.2d at 49.

301. N.C. GEN. STAT. § 48-3-603(A)(7) (2017) provides: “Consent to an adoption of a minor is not required of a person or entity whose consent is not required under G.S. 48-3-601, or any of the following: . . . (7) An individual listed in G.S. 48-3-601 who has not executed a consent or a relinquishment and who fails to respond to a notice of the adoption proceeding within 30 days after the service of the notice . . . .”

302. *In re Adoption of S.D.W.*, 758 S.E.2d at 376-77.

303. *Id.*

304. *Id.*

305. *Id.* at 377.

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

307. *In re S.D.W.*, 745 S.E.2d at 44.

if a father could “show that he promptly attempted to grasp the opportunity of fatherhood once he discovered his [child’s] existence, but the statute foreclosed that opportunity.”<sup>308</sup> In characterizing statutory compliance in these instances as a “practical impossibility,” the court was careful to limit its holding to cases where a father did not know, or have reason to know, of the pregnancy but could promptly take steps while the adoption proceeding was *still pending*.<sup>309</sup>

The North Carolina Court of Appeals reversed the grant of summary judgment to petitioners. Also, the court remanded the case with instructions to hold a hearing about whether Johns had developed a constitutionally protected interest sufficient to require his consent.<sup>310</sup> It suggested that any unconstitutional application of Section 48-3-601 could be remedied by the trial court inquiring whether Johns: (1) took affirmative steps to assume parental responsibility; (2) after the point in time when he knew or should have known of the pregnancy; and (3) before the adoption decree was finalized.<sup>311</sup>

Applying this paradigm generally would safeguard a putative father’s constitutionally protected opportunity in instances where he would otherwise be precluded from attaining any status by the action of either the mother or a third party. Moreover, it would have appropriately balanced the competing interests of the child in having a stable and permanent home, the parents in exercising their fundamental rights and opportunities, and other third parties in protecting the child’s welfare.

Petitioners appealed.<sup>312</sup> The North Carolina Supreme Court rejected the three-pronged framework. It concluded that, despite the mother’s deception, Johns had “the opportunity to be on notice of the pregnancy and that he failed to grasp that opportunity by taking any of the steps that would establish him as a responsible father.”<sup>313</sup> This conclusion ignores that the opportunity discussed in *Lehr* is not an “opportunity to be on notice of the pregnancy,” it is the “opportunity to develop a relationship with his offspring”<sup>314</sup> which one cannot possibly take if one does not know – or have reason to know – he is a father. Instead, *Lehr* should be read as standing for the proposition that a putative father has a *right* to be on notice of the pregnancy, so then he can

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308. *Id.* at 40.

309. *Id.* at 49-50. In discussing decisions from other jurisdictions, the opinion favorably emphasizes language from a Kansas Supreme Court opinion, suggesting that a child’s interest in stability, the interests of third parties, and other policy reasons may eventually “justify a rule that a putative father’s opportunity to develop a parenting relationship ends with the finalization of a newborn child’s adoption even if the reason the father did not grasp his opportunity was because of the mother’s fraud.” *In re Adoption of A.A.T.*, 196 P.3d 1180, 1196 (Kan. 2008), *cert. denied*, 556 U.S. 1184 (2009).

310. *In re S.D.W.*, 745 S.E.2d at 51.

311. *Id.* at 49-50.

312. *In re Adoption of S.D.W.*, 758 S.E.2d at 375.

313. *Id.* at 381.

314. *Id.* at 381.

choose whether to exercise his constitutionally protected opportunity to develop a relationship with his child.

In focusing largely on the fact that Johns did not use a condom,<sup>315</sup> the N.C. Supreme Court appears to be concerned not with when a putative father discovers he might be *the* father, but rather when the putative father discovers he might be *a* father. Naturally, this occurs when a putative father engages in sexual intercourse. Since no forms of birth control, except for abstinence, are one hundred percent effective, this leads to the conclusion that if one has sexual intercourse, one is on notice that pregnancy might result. Notwithstanding the majority's pronouncement that its decision was not to be interpreted as "sex is notice,"<sup>316</sup> following their reasoning, it is difficult to see how the outcome would have been different had Johns used a condom (albeit a necessarily defective one).

It is true that Mr. Johns would not likely have found himself in such a tragic and unique predicament if only he had "saved himself for marriage." However, abstinence outside of marriage or "sex is notice" should not realistically be the legal safeguards in present-day America, where almost forty percent of babies are born to unmarried women.<sup>317</sup> Indeed, the law has already acquiesced to the presence of children born out of wedlock through legitimation and paternity statutory schemes.<sup>318</sup> If the state legislature does not take action to protect fathers similarly situated to Mr. Johns, it is difficult to predict the legacy this precedent will leave.<sup>319</sup>

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315. *In re Adoption of S.D.W.*, 758 S.E.2d at 374, 381-82 (Jackson, dissenting). Also, compare the majority's view of the evidence with the dissent's view of it. "From John's perspective, the sex was unprotected, and contraception was wholly Welker's responsibility. The burden on him to find out whether he had sired a child was minimal, for he knew how to contact Welker. All he had to was ask, for when he finally did call her, she told him." *Id.* at 381 (Justice Edmunds, writing for the majority). This contrasts with the dissent's view of the evidence which observed that Welker told Johns that she was using specific birth control, Welker had not concealed her previous pregnancy from Johns, Welker actively concealed the new pregnancy from Johns, Welker listed no father on the birth certificate, Welker provided a false name on multiple adoption forms, and Welker initially lied to Johns about the pregnancy when he first asked. *Id.* at 380. The majority reasoned "[b]ecause of his passivity in the face of ample evidence that Welker may have become pregnant with his child and given birth," the qualifications for notice were not beyond Johns' control. It then follows that the Court believes Johns had the ability to comply with Section 48-3-601 *before* he knew Welker had been pregnant, given birth, or put the child up for adoption. *Id.* at 381.

316. *Id.* at 380. "Johns contends that petitioners urge us to adopt a rule that an act of sex is by itself notice of a possible resulting pregnancy. We instead decide this case on the basis of the facts as applied to the statutes. Both parents demonstrated troubling behavior."

317. Ctrs. for Disease Control & Prevention, *Unmarried Childbearing*, NAT'L CTR. FOR HEALTH STAT., <https://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm> (last visited Aug. 17, 2019).

318. See Articles 2 and 3 of Chapter 49 of the NORTH CAROLINA GENERAL STATUTES, respectively.

319. See the unpublished decision of *In re the Adoption of S.K.G.*, No. COA17-638, 2018 WL 414149, at \*5-6 (N.C. Ct. App. Jan. 16, 2018). In *S.K.G.*, the putative father tried to distinguish himself from Mr. Johns in *S.D.W.* and was successful in doing so – but only to his detriment. The putative father had "unprotected" sex a few times with the mother, but he saw her visibly pregnant months after they had broken up. *Id.* at \*5-6. The mother did not attempt to deceive the putative father; she notified him as soon as the baby was born when she realized it was of mixed race. *Id.* Despite the fact that she was married and living with a boyfriend, the putative father's timeframe

## V. FRAUD PROTECTIONS IN OTHER STATES

Other jurisdictions frequently make allowance for the possibility that the father may be hindered in his efforts to comply with notice statutes. Some have expressly recognized that adoptions and terminations should require similar safeguards, for example, in the form of shifting the burden of proof or excusing statutory compliance with a showing of “justifiable cause.”<sup>320</sup>

The Supreme Judicial Court of Maine, in *In Re Adoption of Tobias D.*, decided there was no reason to dispense with the same constitutional safeguards “simply because the termination is accomplished by private parties in the context of an adoption.”<sup>321</sup> In *Tobias*, the birth mother initially told the father (“R.M.”) about the pregnancy; she later stated she had an abortion, and R.M. believed her.<sup>322</sup> After giving the child up for adoption, the mother wrote a letter to R.M. when the baby was four months old, telling him that she had given birth to his child.<sup>323</sup> Citing an earlier termination proceeding,<sup>324</sup> the state supreme court set aside R.M.’s termination of parental rights and gave the trial court this guidance:

A parent’s fitness also must be evaluated in the context of all relevant circumstances. This is not a case in which a person who has had the opportunity to parent a child has failed to do so adequately. Rather, as the [trial court] correctly emphasized in its order, R.M. has been precluded from developing any relationship with this child; in fact, he

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for complying with Section 48-3-601 began, at the latest, when he visibly saw the mother pregnant. *Id.* at \*6. At that point, he had a duty to acknowledge paternity, regularly communicate with the mother, and provide support without knowing whether the child was his. In both *S.K.G.* and *S.D.W.*, the courts obliquely admonish the fathers for relying on the mothers’ statements that they were using birth control. *Id.* at \*5-6 (“respondent left responsibility for birth control solely to the mother” who told him she was “on the shot”); *In re Adoption of S.D.W.*, 367 N.C. at 376 (despite evidence that the mother was using a birth control shot, the court noted that “Johns continued his practice of not wearing a condom”). This language seems to suggest that Mr. Johns was – in a way – contributorily negligent in producing a child and thus should be barred from exercising any inchoate interest he might have had had he only used a condom. *But cf.* In the Matter of the Adoption of S.K.N., 735 S.E.2d 382 (N.C. Ct. App. 2012) (father satisfied the support and communication requirements of the adoption consent statute by living with mother both during and after her pregnancy, even though he was unaware of the pregnancy).

320. See, e.g., *In re Adoption of Tobias D.*, 40 A.3d 990 (Me. 2011) (father’s lack of opportunity to form a relationship with the child precluded a finding by clear and convincing evidence for termination of rights); Matter of Adoption of K.A.S., 499 N.W.2d 558 (N.D. 1993) (there was sufficient state action in stepparent adoption proceedings to trigger protection of equal protection, though parental termination need not be initiated by state); Matter of K.L.J., 813 P.2d 276 (Alaska 1991) (prospective adoptive parent must prove by clear and convincing evidence that biological parent’s failure to communicate with child was “without justifiable cause”); COLO. REV. STAT. § 19-5-203(1)(d)(II) (2019) (a child may be available for adoption if birth parents have failed “without cause” to provide reasonable support).

321. *In re Adoption of Tobias D.*, 40 A.3d 990, 996 (Me. 2011).

322. *Id.* at 992.

323. *Id.* at 993.

324. Justice Gorman of the Supreme Judicial Court of Maine observed, “the father’s lack of an opportunity to form a relationship with the child precluded a finding by clear and convincing evidence that the father was unfit or unable to ‘provide a nurturing parental relationship with his child once the relationship with the child can be re-established.’” *Id.* at 998 (emphasis added) (quoting *In re S.G.*, 879 A.2d 866 (Me. 2005)).

was completely unaware of this child's existence for the first four months of the child's life. Since learning of the child's existence, R.M. consistently has made efforts, albeit unsuccessfully, to contact and develop a relationship with him.<sup>325</sup>

Iowa and Delaware have also had an opportunity to address an unmarried father's burden to discover his progeny. In Iowa, an unwed father did not abandon his rights even though he failed to take immediate action upon learning of the pregnancy.<sup>326</sup> The father, Daniel, did not initially have any indication from the mother that he was the child's father, and the mother was dating another man at the time the adoption was initiated.<sup>327</sup> Justice Larson, writing for the supreme court, observed "[t]he argument that the best interests of the baby are best served by allowing her to stay with [the adoptive parents] is a very alluring argument . . . . Daniel has had a poor performance record as a parent [in the past]."<sup>328</sup> However, the court pointed out that within one month after he first learned that the child might be his, Daniel met with an attorney, requested blood tests, filed a motion to vacate the termination order, and filed a petition to intervene in the adoption case.<sup>329</sup> "In fact, virtually all of the evidence regarding Daniel's intent regarding this baby suggests just the opposite: Daniel did everything he could reasonably do to assert his parental rights, beginning even before he knew that he was the father."<sup>330</sup> Finding that the trial court could not have determined by clear and convincing evidence that Daniel had abandoned his child, the Iowa court elaborated in dicta:

It has been urged that the court should uphold this proposed adoption on the ground that the father had abandoned his rights by failing to protect them, beginning at the time the pregnancy became known. In other words, it is suggested that this father should have acted to protect his parental rights immediately when the pregnancy became known, even though he had no indication from her that he was the father and even though she was dating another man at the time. This, of course, is unrealistic; it would require a potential father to become involved in the pregnancy on the mere speculation that he might be the father because he was one of the men having sexual relations with her at the time in question.

Iowa Code § 600A.8 requires that abandonment be shown by clear and convincing evidence. To hold that Daniel's action was required immediately on knowledge of the pregnancy, at the risk of losing his parental rights, would fly in the face of that standard . . . . More important, a finding of abandonment under these circumstances would

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325. *Id.* at 998.

326. *In the Interest of B.G.C.*, 496 N.W.2d 239 (Iowa 1992).

327. *Id.* at 241.

328. *Id.* at 245.

329. *Id.* at 246.

330. *Id.*

deprive a father of a meaningful right, protected by the Constitution, to develop a parent-child relationship.<sup>331</sup>

The Supreme Court of Iowa set aside the termination for abandonment and affirmed the dismissal of the adoption against Daniel.<sup>332</sup>

The Delaware Family Court cited this same Iowa case in deciding that an unwed father's rights could not be terminated to allow an adoption to go through. In *Matter of Baby Girl T.*, the mother's pregnancy resulted from a single sexual encounter with father, and both parents testified they were certain they used birth control.<sup>333</sup> The adoption agency argued that the father should have acted to assert his parental rights as soon as he heard a rumor that the mother might be pregnant, even though he had no indication from her that he was the father and even though she was living with another man at the time.<sup>334</sup> The court disagreed, stating that such a standard would also require men to force continued contact with women with whom they were no longer involved.<sup>335</sup>

The Supreme Court of Oklahoma found that a birth father was denied the "chance to grasp his parental opportunity interest" when the mother failed to inform him she was pregnant, placed the baby for adoption, and falsely claimed not to know the father's identity or whereabouts.<sup>336</sup> The court stated that the birth father had a right to notice of the fact that the mother was pregnant and had given birth. It had no reservations about ascribing a duty to inform to the mother, especially given the "relative ease with which this could have been accomplished."<sup>337</sup> Similarly, a father's non-support under a South Carolina adoption statute was excused where a mother falsely told the father she had aborted the child and thereafter obtained a no-contact order against him.<sup>338</sup>

As the courts of Maine, Iowa, Delaware, Oklahoma, and South Carolina illustrate, courts have been willing to set aside adoptions and termination proceedings where either a mother has affirmatively deceived a putative father about her pregnancy, where the mother has simply failed to inform the father, or where the father knows about the pregnancy but does not know whether he is the biological father. In doing so, these courts have recognized that adoptions have the same effect of terminating the putative father's rights as any termination proceeding and that putative fathers should be entitled to the same level of notice and opportunity to intervene in adoption actions as in termination proceedings. Moreover, these courts have rightly rejected the

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331. *Id.* at 241 n.1.

332. *Id.* at 246-47.

333. *Matter of Baby Girl T.*, 715 A.2d 99, 101 (Del. Fam. Ct. 1998).

334. *Id.* at 102.

335. *Id.* at 104.

336. *In re Baby Boy W.*, 988 P.2d 1270, 1274 (Okla. 1999) (affirming that father's consent was necessary for adoption).

337. *Id.*

theory that “sex is notice,” whether the pregnancies resulted from one sexual encounter or many, whether protected or unprotected.

There are a significant number of jurisdictions that impliedly or expressly embrace the theory that “sex is notice.”<sup>339</sup> Notably, however, most of these same jurisdictions have putative father registries.<sup>340</sup> In fact, more than half of the states have putative father registries.<sup>341</sup> And states with putative father registries frequently make registration a strict requirement, regardless of a mother’s deceptive acts, in order for a father to receive notice and opportunity to contest an adoption.<sup>342</sup> Thus, sex becomes notice in these jurisdictions even when it is not implied or expressed by statute.

For example, in Indiana, despite the facts that the mother failed to inform the father about her pregnancy, placed the baby for adoption, and falsely claimed not to know the identity or whereabouts of the father, a father’s failure to register was not excused.<sup>343</sup> In Arkansas, a father’s failure to register was not excused when a pregnancy resulted from one isolated sexual encounter, and the mother failed to inform the father due to religious and privacy reasons.<sup>344</sup> The courts deciding these cases seemed focused on the short duration of the sexual relationship and an unwillingness to impose a duty on the mother to inform.

A registration’s “sex is notice” policy may even conflict with other statutory schemes affecting putative fathers. In Georgia, a father is entitled to notice of an adoption proceeding only if he has registered.<sup>345</sup> Further, any man who has engaged in a non-marital sexual relationship with a woman is deemed to be on notice that a pregnancy and adoption proceeding regarding a child might occur and has a duty to protect his own rights and interests in

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339. ARIZ. REV. STAT. ANN. § 8-106.01(F) (2019) (example of express: “... fact that the putative father had sexual intercourse with the mother is deemed to be notice to the putative father of the pregnancy.”); FLA. STAT. ANN. § 63.088(1) (West 2019) (express); GA. CODE ANN. § 19-8-12(a)(6) (West 2019) (express); IDAHO CODE ANN. § 16-1504(5)(c) (West 2019) (example of implied: “Lack of knowledge of the pregnancy is not an acceptable reason for his failure to timely file notice . . . .”); 750 ILL. COMP. STAT. ANN. 50/12.1(g) (West 2019) (implied); MINN. STAT. ANN. § 259.52 (West 2019) (implied); MO. ANN. STAT. § 192.016(6) (West 2019) (implied); OHIO REV. CODE ANN. § 3107.061 (West 2019) (express); UTAH CODE ANN. § 78B-6-110(1)(a)(i) (West 2019) (express); VA. CODE ANN. § 63.2-1250(A) (West 2019) (express); WIS. STAT. ANN. § 48.42(2m)(b) (West 2019) (express).

340. South Dakota, which does not have a putative father registry, is one of the few states that has been presented with a case factually similar to *S.D.W.* In South Dakota, despite the fact the mother lied about the father’s identity to the court, a father’s paternity action was dismissed where the parties had a “fleeting” relationship, and the mother failed to inform the father of the pregnancy. *Matter of Baby Boy K.*, 546 N.W.2d 86, 101 (S.D. 1996). Thus, the same injustice that occurred to Mr. Johns occurs elsewhere where there is no mechanism by which an unwed father may preserve his right to notice and opportunity.

341. U.S. Dept. of Health & Hum. Servs., *supra* note 5.

342. For a discussion of states with putative father registries, including a chart showing how they operate, see generally Mary Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL’Y 1031 (2002).

343. *In re Paternity of Baby Doe*, 734 N.E.2d 281, 287 (Ind. Ct. App. 2000).

344. *In re Adoption of S.J.B.*, 745 S.W.2d 606, 607 (Ark. 1988).

345. *In re V.B.L.*, 703 S.E.2d 127, 129 (Ga. Ct. App. 2010); GA. CODE ANN. § 19-11-9(d)(3)

(West 2019).

that child.<sup>346</sup> In contrast, in a legitimation proceeding in Georgia, the courts are charged with first determining whether a father has abandoned his “opportunity interest”<sup>347</sup> to develop a relationship with a child before granting a petition to legitimate.<sup>348</sup> “[A]nother relevant factor affecting [father’s opportunity interest] would likely include whether the father’s failure to support and develop a relationship with the child was attributable in some part to actions taken by the mother to impede the father’s ability to learn of the child’s existence.”<sup>349</sup> It is not clear why the court might be allowed to inquire into a mother’s deception in the case of legitimation but not in the case of adoption, when denial of the father’s claims in either case effectively terminates any inchoate or constitutional rights the father might otherwise have.

Some of the statutory schemes that promulgate a putative father registry also contain provisions amounting to an “impossibility exception,” – that is, provisions for when strict compliance with the registry will be excused.<sup>350</sup> However, lack of knowledge of the pregnancy or birth is usually stated *not* to be an acceptable reason for failure to register.<sup>351</sup>

Illustrative examples of the “impossibility exception” joined with “sex is notice” provisions can be found in Illinois and Minnesota. Illinois and Minnesota waive strict compliance with their putative father registry requirements if a putative father can prove by clear and convincing evidence: (1) it was not possible for him to register within the period of time specified; (2) his failure to register was through no fault of his own; and (3) he registered within ten days after it became possible.<sup>352</sup> However, both statutory schemes specifically state that a lack of knowledge of the pregnancy or birth is not an acceptable reason for failure to register.<sup>353</sup>

In reviewing Illinois and Minnesota case law, it does not appear that either state has had the opportunity to address the interplay of these provisions where a mother has successfully concealed a pregnancy and birth from a putative father up through the filing of an adoption petition. In the few cases that have addressed exceptions for failing to register, none of the putative fathers have been able to meet the “impossibility exception” because in every case, the father at least knew the mother was pregnant while she was pregnant, as opposed to finding out about the pregnancy after the fact.<sup>354</sup>

Therefore, it is hard to tell what, if any, circumstances would satisfy such a vaguely-worded “impossibility exception” when it is joined with “sex

346. *V.B.L.*, 703 S.E.2d at 129.

347. *Id.* at 130 (noting that putative father’s interest is called either “opportunity interest” or “inchoate interest,” no doubt channeling language from *Lehr*).

348. *Id.* at 128.

349. *Id.* at 129.

350. Beck, *supra* note 102, at 1080-81.

351. See *supra* note 99.

352. 750 ILL. COMP. STAT. § 50/12.1(g) (2019); MINN. STAT. § 259.52(8) (2019).

353. *Id.*

354. *In re K.J.R.*, 687 N.E.2d 113 (Ill. App. Ct. 1997); *Heidbreder v. Carton*, 645 N.W.2d 355 (Minn. 2003); and *Scholarship Digital Archives*, 2004).



is notice.” What does it mean for something to not be “possible” under those statutes? Only extremely debilitating or unusual circumstances that would have nothing to do with a mother’s deception come to mind, for example, if the putative father was deported or comatose during the statutory registration period or if a man was raped while he was unconscious and he unknowingly sired a child. Thus, this seems to be an instance where the exception is, for all practical purposes, swallowed by the rule. These statutory schemes, and others like them, would not provide adequate protection for putative fathers similarly situated with Mr. Johns.

Virginia’s putative father registry scheme includes a specific impossibility exception that excuses fathers from registration in instances where they knew about the pregnancy but were subsequently deceived as to the outcome by the mother.<sup>355</sup> In that instance, the father is excused from having timely registered if the father was led to believe through the birth mother’s misrepresentation that: (1) the pregnancy was terminated or the mother miscarried when in fact the baby was born; or (2) the child died when in fact the child lived.<sup>356</sup> So long as the father registers within ten days of his discovery of the misrepresentation, he may participate in a subsequent adoption proceeding.<sup>357</sup> In fact, he may move to set aside an adoption after it is finalized.<sup>358</sup> Like all states wishing to promote the finality of adoptions, a final order in Virginia is not subject to collateral or direct attack after six months,<sup>359</sup> but there is at least one case which suggests that this six-month limitation is unconstitutional in cases where a putative father can prove an adoption was obtained by fraud.<sup>360</sup> Again, however, this statutory scheme would not provide adequate protection for putative fathers who have no knowledge of the pregnancy or birth.

Thus, it appears that, while North Carolina’s stance to treat “sex as notice” is in line with many other jurisdictions that likewise do so, it is not at all clear that this stance is defensible from a constitutional standpoint since North Carolina has not also promulgated a putative father registry. This is especially true if a reviewing court were to closely scrutinize the complex line of precedents leading up to *In Re Adoption of S.D.W.*<sup>361</sup>

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355. VA. CODE ANN. § 63.2-1250(C) (West 2019).

356. *Id.*

357. *Id.*

358. VA. CODE ANN. § 63.2-1216 (West 2019).

359. *Id.*

360. See *F.E. v. G.F.M.*, 547 S.E.2d 531, 537-38 (Va. Ct. App. 2001); *Cf. Nelson v. Middlesex Dept. of Soc. Servs.*, 820 S.E.2d 400, 407 n.8 (Va. Ct. App. 2018) (constitutional exception of six-month limitation was not implicated where grandparents were challengers of adoption).

361. “Our court has previously considered and rejected the argument that a putative father ‘was unable to take the steps set out in [the termination statutes] because he did not know of’ the existence of the child. The similarity of the requirements between the statute permitting the termination of a putative father’s rights and the statute requiring the consent of a father of a child born out of wedlock to its adoption reflect the intention of the legislature not to make an ‘illegitimate child’s future welfare dependent on whether or not the putative father knows of the child’s existence at the time the petition is filed.’” *A Child’s Hope, LLC v. Doe*, 630 S.E.2d 673, 677 (N.C. Ct. App. 2006) (quoting *Jury v. T.L.B.*, 605 S.E.2d 249, 252 (N.C. Ct. App. 2004), citing

It is enticing to adopt a “sex is notice” policy. Doing so ensures that there is a bright-line test for what a putative father must do and when he must do it in order for him to manifest his commitment to a putative child. However, this position unfairly relieves the mother of any duty to inform, absolves her of any penalty for deceptive conduct, and burdens putative fathers with a plethora of statutory duties to fulfill before the fathers even have a suspicion of a pregnancy.

Once a woman becomes pregnant, the woman and man are no longer similarly situated. Because of her inescapable biology, a mother knows she is pregnant. When a putative father becomes aware of his impending or actual fatherhood is much less clear and usually depends on an admission from the mother, first-hand observation, third-party rumors, or receipt of court process for termination, adoption, custody, or support. Because the mother has this superior knowledge, when she actively hides her pregnancy to fraudulently accomplish an adoption, the statutory scheme becomes unconstitutional where it does not afford a putative father notice and a meaningful opportunity to develop a relationship with his offspring.<sup>362</sup>

## VI. PROPOSED STATUTORY SAFEGUARDS FOR PUTATIVE FATHERS

A putative father must have some unilateral action he can take to grasp his constitutionally protected opportunity irrespective of a mother’s deception. Unlike current compliance with Section 48-3-601, the unilateral action should be something that does not depend on knowledge of the pregnancy or birth, should not be overburdensome to putative fathers, and should allow putative fathers to become involved as early as possible in the proceedings. A putative father registry, together with some amendments to the current adoption code, would ensure putative fathers receive adequate notice and opportunity to participate meaningfully in any proposed adoption. It would provide a notice procedure to the father while minimizing an unwed mother’s duty to inform.

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*In re Adoption of Clark*, 381 S.E.2d 835, 839 (N.C. Ct. App. 1989), *rev’d*, 393 S.E.2d 791 (1990)). The *Clark* opinion from the N.C. Court of Appeals is frequently cited for the proposition that a father’s awareness makes no difference in determining compliance with adoption or termination consent requirements. In finding the father’s consent unnecessary, the Court of Appeals in *Clark* based its decision on the legislative intent that states when the interests of a child and those of an adult are in conflict, such conflict should be resolved in favor of the child. See N.C. GEN. STAT. § 48-1-100 (2017). However, Johns’ appellate counsel pointed out in Respondent-Appellee’s New Brief at 33-34 (*In re Adoption of S.D.W.*, 758 S.E.2d 374 (N.C. 2014) (No. 348PA13)) that a close reading of the N.C. Supreme Court’s opinion in *Clark* shows that it was not reversed on other grounds (as it is so often cited), but instead was reversed because the adoption was procedurally defective. 393 S.E.2d at 795. Thus, one could argue that the Court of Appeals’ reasoning – on which subsequent cases have been based – was not entitled to the precedential value it has enjoyed for the past thirty years. The Supreme Court in *Clark* carefully noted, “[Respondent] argued in his brief that his due process and equal protection rights are violated by these adoption statutes which could allow a biological father to lose parental rights to a child when he did not know he had a child. However, since Mr. Lampe’s consent is necessary for the adoption in this case to proceed, we need not address these constitutional issues.” 393 S.E.2d at 795-96.

## A. PUTATIVE FATHER REGISTRY -- MINIMUM PROVISIONS

## 1. PROVIDE A UNILATERAL MECHANISM FOR PUTATIVE FATHERS

First, while *In re Adoption of S.D.W.* remains good law, the North Carolina General Assembly should promulgate a putative father registry. Putative father registries provide a place for a man to list identifying information about himself *and the mother*, together with an anticipated birth date of a putative child.<sup>363</sup> As a best practice, a man should be allowed to register as early as his first sexual encounter, without regard to the biological parents' marital status, dating relationship, or continued communication. It should not depend on the mother divulging her pregnancy or birth status.

## 2. Allow Early, Ignorant Registration

Any constitutional challenges by unaware putative fathers to North Carolina's current adoption laws would be more defensible where a putative father can take unilateral action to preserve his constitutional opportunity as early as his first incident of unprotected (or protected) sex. In that vein, Montana expressly allows a putative father to register "before a child's birth even though the putative father has no actual knowledge that a pregnancy has occurred or that a pregnancy has continued through gestation."<sup>364</sup> If a statutory scheme is going to require a father to register to receive notice but at the same time proclaim that "sex is notice," then the father should be allowed to register immediately after a sexual encounter if he so chooses.

## 3. Publicize the Putative Father Registry

A putative father registry is only as good as its conspicuousness<sup>365</sup>; its availability, and the effect of non-registration, must be adequately publicized.<sup>366</sup> Virginia's registry scheme charges its Department of Health with publicizing the putative father registry via pamphlet and general public services announcements.<sup>367</sup> The Department must distribute pamphlets at all offices of the Department of Health and all local departments of social services, and it must distribute pamphlets to hospitals, libraries, medical clinics, schools, baccalaureate institutions of higher education, and "other providers of child-related services upon request."<sup>368</sup>

## 4. Make the Registry an Inclusive Scheme, Not an Exclusive Scheme

Failure to file with the registry, by itself, should not waive a father's right to contest a child's adoption where he takes other steps, such as filing

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363. U.S. Dep't of Health & Human Servs., *supra* note 5.

364. MONT. CODE ANN. § 42-2-206(2) (2019).

365. See generally Beck, *supra* note 102 (arguing for a national putative father registry).

366. Alexandra R. Dapolito, Comment, *The Failure to Notify Putative Fathers of Adoption Proceedings: Balancing the Adoption Equation*, 42 CATH. U.L. REV. 979, 1025 (1993).

367. VA. CODE ANN. § 63.2-1253 (West 2019).

368. *Id.*

a paternity action,<sup>369</sup> filing a legitimation action,<sup>370</sup> or otherwise acknowledging paternity. To ensure that it is inclusive, the adoption code should require interested parties to search the registry and provide notice to putative fathers found therein.

Without these minimal safeguards in cases where a putative father has no reason to know of a sexual partner's pregnancy, North Carolina's current qualifications for notice are "beyond the control" of interested putative fathers and thus are "procedurally inadequate."<sup>371</sup>

## B. OTHER STATUTORY PROVISIONS – BEST PRACTICES

### 1. Affirmatively Reject "Sex is Notice" by Including Meaningful Impossibility Exceptions

For a more comprehensive framework<sup>372</sup> that would balance the interests and purposes of adoption, the registry and/or adoption code should include "impossibility exceptions" for instances where a mother deceives a putative father about the *existence* of either the pregnancy or child. This could be accomplished within the adoption code by implementing the North Carolina Court of Appeals' three-pronged analysis set forth in *In Re S.D.W.* In those instances, trial courts should hold a hearing to determine whether the putative father: (1) took affirmative steps to assume parental responsibility; (2) after the point in time when he knew or should have known of the pregnancy; and (3) before the adoption decree was finalized.<sup>373</sup> This third prong might be revised to provide a longer, outer limit if the General Assembly decides that the interests and policies underlying adoption support allowing direct or collateral attacks for some period after the adoption is finalized.<sup>374</sup>

369. See *David C. v. Alexis S.*, 375 P.3d 945 (Ariz. 2016) (father who served a paternity action preserved his right to establish paternity despite his failure to strictly comply with the putative father registration requirement).

370. See *Ex parte S.C.W.*, 826 So.2d 844 (Ala. 2001) (filing with putative father registry was one of several ways in which a putative father could earn the right to consent to an adoption).

371. *Lehr*, 463 U.S. at 264. In *Lehr*, the father could have guaranteed that he would have received notice of the adoption proceedings by registering with New York's putative father registry. *Id.* at 250-51.

372. Note that the National Conference of Commissioners on Uniform State Laws promulgated a revised Uniform Adoption Act in 1994 ("UAA"), which has been endorsed by the American Bar Association. See Joan Heifetz Hollinger, *The Uniform Adoption Act: Reporter's Ruminations*, 30 FAM. L.Q. 345, 356 (1996). For a proposal that North Carolina should adopt the UAA, see generally Erin E. Gibbs, *Preserving Your Right to Parent: The Supreme Court of North Carolina Addresses Unmarried Fathers' Due Process Rights in In re Adoption of S.D.W.*, 94 N.C. L. REV. 723 (2016). The UAA has been criticized for its lack of adequate birthfather notification controls, as well as other reasons. See Audra Behné, *Balancing the Adoption Triangle: The State, The Adoptive Parents and the Birth Parents – Where Does the Adoptee Fit In?*, 15 IN PUB. INTEREST 49, 74-76 (1997). To date only Vermont and Michigan have adopted it in part. VT. STAT. ANN. tit. 15A §§ 1-101-9-101 (West 2019); MICH. COMP. LAWS ANN. §§ 710.21-710.70 (West 2019).

373. *In re S.D.W.*, 745 S.E.2d at 49-50.

374. See discussion of § 16B-3.

## 2. Toll the Time Period for Registration for Unaware Fathers

Where an impossibility exception is implicated and the putative father is able to prove that he satisfies the three prongs of the impossibility exception set forth above, the registry and/or adoption code should toll the time period for registry or waive strict compliance with the registry as other jurisdictions have done. This would minimize any challenge made by a putative father that the state's statutory schemes violate due process by creating a "practical impossibility."<sup>375</sup> After all, "[d]ue process requires adequate notice, a realistic opportunity to appear and the right to participate in a meaningful manner."<sup>376</sup>

## 3. Retain the Current Time Period for Challenging Finalized Adoptions

Assuring the finality of adoptions (as well as protecting children from unnecessary separation from their original parents) is one of the primary purposes of North Carolina's adoption scheme.<sup>377</sup> At some point, a child's interest in a permanent home has to trump her putative father's constitutional rights, whether inchoate or fundamental.<sup>378</sup> In these heart-wrenching cases involving adoptions accomplished by fraud, everyone struggles with the question, "... is the child better off remaining with the adoptive parent who is a biological stranger, or being transferred to the biological parent who is a psychological stranger?"<sup>379</sup> One of the ways to address this concern is to statutorily set some outer time limit for attacking a finalized adoption regardless of the fraud perpetrated.

In most states, those periods of time range from six months to one year.<sup>380</sup> Nebraska and the Indian Child Welfare Act allow challenges up to two years after the adoption order has been entered.<sup>381</sup> New York permits a court to vacate or set aside an order of adoption based on fraud, newly discovered evidence, or other sufficient cause, without stating a definite time

375. *In re S.D.W.*, 745 S.E.2d at 50.

376. *Bailey v. Campbell*, 862 P.2d 461, 469 (Okla. 1991); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (opportunity to be heard must be "granted at a meaningful time and in a meaningful manner").

377. N.C. GEN. STAT. § 48-1-100 (2017).

378. Chief Justice Burger, writing for the majority, observed, "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interest of their children." *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES \*447; 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW \*190).

379. Hollinger, *supra* note 132.

380. ALASKA STAT. ANN. § 25.23.140 (West 2019) (one year); ARIZ. REV. STAT. ANN. § 8-123 (West 2019) (one year); COLO. REV. STAT. ANN. § 19-5-214 (West 2019) (one year); DEL. CODE ANN. tit. 13, § 918 (West 2019) (six months); D.C. CODE ANN. § 16-310 (West 2019) (one year); FLA. STAT. ANN. § 63.182 (West 2019) (one year); LA. CHILD. CODE ANN. art. 1263 (2019) (one year); MISS. CODE ANN. § 93-17-15 (West 2019) (six months); TENN. CODE ANN. § 36-1-122 (West 2019) (one year); TEX. FAM. CODE ANN. § 162.012 (West 2019) (six months).

381. NEB. REV. STAT. ANN. § 43-116 (West 2019); Indian Child Welfare Act, 25 U.S.C.A. § 1913(d) (West 2019) (two years).

limit.<sup>382</sup> The relevant provision directs the court to handle such a motion in the same manner that a court of general jurisdiction would, that is, the movant must use due diligence in seeking relief within a reasonable time or else be barred by the defense of laches.<sup>383</sup> South Carolina has a similar procedure allowing a party to file a motion to set aside an adoption decree based on “extrinsic fraud”<sup>384</sup> within a reasonable time, but it cannot exceed one year from the date of the adoption decree.<sup>385</sup> However, the longer a child is allowed to bond with his adoptive parents, the more devastating a change in placement becomes. Thus, a short, definite time period would afford greater protections to a child who has bonded with adoptive parents.

North Carolina currently allows a parent “whose consent or relinquishment was obtained by fraud or duress” to move to set aside an adoption within six months from the time the fraud or duress ought reasonably to have been discovered.<sup>386</sup> However, *In re Adoption of S.D.W.* makes clear that this provision will currently not provide relief in instances where a putative father was unaware of a pregnancy and birth – even because of a mother’s deceptive acts. It apparently does not apply in those instances because there is no consent or relinquishment to declare void. The reasoning appears to be that a father who has had sex has had notice, so where he fails to afterward develop a relationship with his child (because he does not know about his child), obviously his consent is not necessary. This highlights the inadequacy of North Carolina’s current law and demonstrates why North Carolina needs a putative father registry.

Assuming the other safeguards discussed herein are enacted, there should be a short period of limitation set (six months or less) after any final decree of adoption is ordered, within which a putative father must move to set aside the fraudulent adoption or forever lose his claim. This provision should stand alone and should not be couched in terms of the father’s consent being obtained by fraud or duress. A putative father who has been deceived as to the facts of the pregnancy and existence of a child cannot give consent. Such a statute of limitation would ensure the proper balancing of an innocent putative father’s constitutionally mandated opportunity and an innocent child’s right to stability and finality of family.

#### 4. Provide the Adoption Scheme with the Constitutional Safeguards Found in the Termination Scheme

The ostensible reason for the disparate treatment of fathers in termination versus adoption actions is that a father in a termination action has already been recognized by the state as having a constitutionally protected interest in the care, custody and control of his child, while the putative father in an adoption action merely has an “inchoate” right to pursue

382. N.Y. DOM. REL. § 114(3) and cmt. (LexisNexis 2019).

383. *Id.*

384. S.C. CODE ANN. § 63-9-770 (2019).

385. S.C. R. CIV. P. 60 (2019).

386. N.C. GEN. STAT. § 48-2-607 (2017).

a constitutionally protected interest.<sup>387</sup> This position seems to have little merit. *Lehr* recognized that a putative father has a constitutionally protected opportunity to form a relationship with his child, if not a full-blown, fundamental right.<sup>388</sup> Why should that be enough to give an unwed father in a termination proceeding greater safeguards than an unwed father in an adoption proceeding? Both actions involve a parent and his child. Both actions can result in the severance of the bonds between the parent and child. Both actions involve state action – either by a state agency or through enforcement of a private party’s claim. Perhaps the only real difference among these two actions is the relationship between the child and the parent: Is it somehow more constitutional to deny an ignorant parent the opportunity to form a bond with his child (in an adoption) than to sever an abusive or neglectful parent’s bond with his child (in a termination proceeding)?

Another reason for this disparate treatment might be that in the case of adoptions, there is an identifiable couple ready with an open heart and open home. In contrast, after a termination action, children may be entered into the foster care system with no prospect for a permanent placement.<sup>389</sup> However, “[w]e must remember that the purpose of an adoption is to provide a home for a child, not a child for a home.”<sup>390</sup> Thus, the legislature should strongly consider imposing the same heightened constitutional safeguards found in termination proceedings to adoption proceedings.<sup>391</sup>

##### 5. Include Exercisable Penalties for Birth Mother or Agency Perjury

In North Carolina, committing perjury during sworn proceedings or on sworn affidavits is punishable as a Class F felony,<sup>392</sup> punishable by 10-41 months of incarceration and a fine.<sup>393</sup> To strongly deter birth mothers and adoption agencies from affirmatively and falsely stating that they are unaware of either the birth father’s identity or whereabouts, the legislature should consider adding a provision in the adoption code that such perjury will be prosecuted. Some exceptions to this provision might also be included, for example, when the perjuring party either: (1) recants the lie prior to the finalization of the adoption; or (2) can prove a compelling justification for

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387. *Lehr v. Robertson*, 463 U.S. 248, 265 (1983).

388. *Id.* at 263.

389. As of September 30, 2017, there were almost 3,000 children in foster care in North Carolina awaiting adoption. U.S. Dep’t of Health & Hum. Servs., *Child Welfare Outcomes Report Data by State*, CHILDREN’S BUREAU, <https://cwoutcomes.acf.hhs.gov/cwodatasite/pdf/north%20carolina.html> (last visited Apr. 17, 2019).

390. *In re Petition of Doe*, 638 N.E.2d 181, 190 (Ill. 1994), *cert. denied*, 513 U.S. 994 (1994) (Justice Heiple’s supplemental opinion in the famous “Baby Richard” case).

391. See generally Baylee J. Hapeman, *N.C. Gen. Stat. § 48-3-601 and N.C. Gen. Stat. § 7B-1111: A Putative Father’s Right to Be a Father*, 41 CAMPBELL L. REV. 201 (2019) for a proposal to add “catch-all clauses” to the termination and adoption schemes that would allow a court to inquire into whether a putative father had knowledge of his child before then holding a best interest hearing to determine whether the adoption should proceed.

392. N.C. GEN. STAT. § 14-209 (2017).

393. N.C. GEN. STAT. § 15A-1340.17 (2017).

the deception (e.g., a putative father's domestic violence or other criminal acts).

## VII. CONCLUSION

Absent a putative father registry, a state's statutory adoption and termination schemes should properly view the father's commitment in light of both his knowledge of the pregnancy and a mother's efforts to thwart his legal rights. North Carolina's adoption scheme fails to do this. By failing to offer putative fathers an alternative means to establish a significant relationship with their children when a mother engages in deceptive acts, the State of North Carolina unjustifiably infringes on putative fathers' constitutionally mandated opportunity to establish a significant parent-child relationship.

North Carolina's current adoption scheme, insofar as it deprives a putative father of a mechanism – one within his sole control and one that cannot be thwarted by a deceptive mother – to “grasp the opportunity to develop a relationship with his child,”<sup>394</sup> is procedurally inadequate. As Justice Stevens in *Lehr* observed, “... if qualification for notice were beyond the control of an interested putative father, it might be thought procedurally inadequate.”<sup>395</sup> The current scheme removes the qualification for notice beyond a putative father's control when it essentially gives deceptive mothers unilateral power to bar a father from ever grasping that opportunity.

Therefore, North Carolina's legislature should, at a minimum, promulgate a putative father registry that provides the putative father with a unilateral mechanism to receive qualification for notice of adoption proceedings. Moreover, the registry should allow putative fathers to register as early as their first sexual encounter, without regard for knowledge of whether they have actually sired a child. The registry should be well-publicized and inclusive.

In addition, to pass constitutional muster, North Carolina's General Assembly should consider providing meaningful impossibility exceptions to the adoption code, tolling the time period for registration, and/or waiving strict compliance with the registry. It should continue to bar challenges after an adoption has been finalized or at some short time period thereafter. It should also provide some of the same safeguards to putative fathers in adoption proceedings as it currently does in termination proceedings, such as giving the putative father a right to counsel, holding a hearing to determine when he should have discovered the existence of his child and what affirmative steps he took to assume parental responsibility, or shifting the burden to petitioners to prove by clear and convincing evidence that the father assumed no parental responsibility despite having the knowledge and means to do so. Finally, it should consider constructing some mandatory

394. *Lehr*, 463 U.S. at 262.

395. *Id.* at 264.



penalties for fraud and perjury, with appropriate exceptions, that will deter deceptive conduct.

It is not enough that children are ready for adoption, or that it is in their best interest to be adopted. They must first be available. The child's interest in stability, and the adoptive parents' interest in finality can best be met where an interested, putative father who has been deceived is afforded some unilateral action to make himself known. Fairness and equality for every interested party can be achieved only when a putative father's constitutionally mandated opportunity to develop a relationship with his child has been fully protected.

