# YOU SHALL ALWAYS BE MY CHILD: THE DUE PROCESS IMPLICATIONS OF PATERNITY AFFIDAVITS UNDER INDIANA CODE SECTION 16-37-2-2.1

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## INTRODUCTION

The phone rang. From hundreds of miles away, Jason[1] learned that he was going to be a father. Kendra was born a few months later, and Jason's life changed forever. This father and daughter share a special bond, one that no law should sever.

Jason is one of the lucky ones. Many unwed fathers will never know their children. Indiana denies all fathers who do not marry the mother, or execute a paternity affidavit, the protections of legal paternity.[2] Whether the father knew of the pregnancy or attempted to have contact during or shortly after the pregnancy is immaterial.[3] His failure to act, regardless of whether he knew he had a duty to act, serves as an implied waiver of his interest in his child.[4] The law shows no sympathy for the plight of many unwed fathers.

Indiana denies nonmarital fathers fundamental due process rights. Indiana's paternity laws ensnare some unwitting fathers into assuming paternity of children without full disclosure of what they are signing.[5] Worse still, Indiana denies many unwed fathers the opportunity to ever develop a relationship with their children because those fathers never learn the mother was pregnant.[6] Speedy determination of paternity cannot justify such a high cost. With approximately forty percent of births occurring outside of marriage,[7] Indiana urgently needs to

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1. Names have been changed, but the depicted story is true.

2. *See* IND. CODE §§ 31-14-7-1, -2-1 (2008).

3. *See In re* Paternity of Baby Doe, 734 N.E.2d 281, 287 (Ind. Ct. App. 2000) (placing the burden on the putative father to inquire about pregnancy or risk forfeiture of right to object to the adoption).

4. *See, e.g.*, IND. CODE § 31-19-9-15(a) (2008) (noting that the "father's consent to adoption . . . is irrevocably implied" if he fails to file a paternity action).

5. *See, e.g.*, *In re* Paternity of M.M., 889 N.E.2d 846, 849 n.1 (Ind. Ct. App. 2008).

6. *See, e.g.*, *In re Paternity of Baby Doe*, 734 N.E.2d at 287.

7. PUB. HEALTH SYS. DEV. & DATA COMM'N, DATA ANALYSIS TEAM, IND. STATE DEP'T OF HEALTH, INDIANA NATALITY REPORT—2006, tbl. 25 (2008), http://www.in.gov/isdh/reports/natality/2006/tbl25a.htm (showing that Indiana's birth rate among unmarried women was 41.2% in 2006); *see* BRADY E. HAMILTON ET AL., CTR. FOR DISEASE CONTROL, NATIONAL VITAL

reexamine the state's approach to paternity determinations.

Indiana must approach paternity in a new way, and this Note offers new framework to that effect. This Note references three different categories of men in discussing this sensitive issue. "Biological fathers" are men who are biologically related to the child in question. "Legal fathers" are men who have completed a paternity affidavit,[8] but may not be biological fathers. "Putative fathers" are potential fathers.[9]

Part I of this Note provides an overview of the legal developments for unwed fathers and specifically focuses on how the U.S. Supreme Court has defined the rights of the unwed father. Part II describes the social and legal background in which Indiana's paternity law has developed. Part III outlines Indiana's approach to voluntary acknowledgement of paternity and Indiana's public policy regarding nonmarital children. Part IV explores the constitutional problems with Indiana's treatment of unwed fathers. Part V proposes a new framework for Indiana's approach to paternity, including increased notice prior to execution of the paternity affidavit and encouragement of genetic testing, legal recognition of dual paternity, and enhanced putative father registries.

## I. THE EVOLUTION OF THE RIGHTS OF UNWED FATHERS

Under the common law, "an illegitimate child is *filius nullius* [the son of nobody[10]], and can have no father known to the law."[11] The law denied illegitimate children many rights available to marital children, such as the rights to inherit, to receive support from the father, and to bring certain tort actions.[12] The U.S. Supreme Court has since rejected blanket discriminations against nonmarital children.[13] Nevertheless, public policy still generally disfavors illegitimacy.[14]

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STATISTICS REPORT 4 (2007), http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56_07.pdf (indicating that the national birth rate for unmarried women was 38.5% in 2006).

8. *See* discussion *infra* Part III.

9. Indiana defines a putative father as a man who is neither the presumed biological father nor the legal father. IND. CODE § 31-9-2-100 (2008).

10. *In re* Paternity of E.M.L.G., 863 N.E.2d 867, 870 (Ind. Ct. App. 2007) (citing *In re* Paternity of H.J.B., 829 N.E.2d 157, 160 (Ind. Ct. App. 2005)).

11. Lessee of Brewer v. Blougher, 39 U.S. 178, 198 (1840).

12. Mary Kay Kisthardt, *Of Fatherhood, Families and Fantasy: The Legacy of* Michael H. v. Gerald D., 65 TUL. L. REV. 585, 588 (1991).

13. *See* Gomez v. Perez, 409 U.S. 535, 538 (1973) ("[A] State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally."); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175-76 (1972) (holding that Louisiana may not deny equal recovery from workmen's compensation claims for illegitimate children); Levy v. Louisiana, 391 U.S. 68, 71-72 (1968) (holding that denying recovery for the mother's wrongful death based solely on the child's illegitimacy is invidious discrimination in violation of the Equal Protection Clause).

14. *See In re Paternity of E.M.L.G.*, 863 N.E.2d at 869.

Although the Supreme Court rejected the unequal treatment of nonmarital children under the U.S. Constitution, it has hesitated to extend such protection to the unwed fathers.[15] On several occasions, the Court has addressed the nature of an unwed father's interest in his child.[16] The unanswered questions left by its opinions indicate the Court's unwillingness to define the precise interest an unwed father has in his child.[17] The states retain the discretion to define a nonmarital father's interest in his child.[18]

### *A. 1972:* Stanley v. Illinois[19]

Joan and Peter Stanley lived together intermittently as unwed romantic partners for eighteen years and had three children together.[20] When Joan died, Illinois took the children into custody.[21] Under state law, nonmarital children became wards of the state if the mother died.[22] Whether Peter was unfit to be a father was irrelevant under the statute.[23] He was unfit simply because he had never married the mother.[24]

Peter challenged the statute under the Equal Protection Clause of the Fourteenth Amendment.[25] The State presumed that all married fathers were fit, but all unmarried fathers were unfit.[26] The Court held that this type of "procedure by presumption" violated Peter's due process rights.[27] As a matter of due process, he was entitled to a fitness hearing before he lost custody of his children.[28] Denying a hearing for unmarried fathers while allowing for a hearing for all other parents who risk losing custody of their children violated the Equal Protection Clause.[29]

The Court emphasized the strong interest a parent has in the child that he has "sired and raised."[30] The decision also displays the Court's discomfort with "procedure by presumption," noting that when "the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present

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15. *See infra* Parts I.A-E.

16. *See infra* Parts I.A-E.

17. *See infra* Parts I.A-E.

18. Rebeca Aizpuru, Note, *Protecting the Unwed Father's Opportunity to Parent: A Survey of Paternity Registry Statutes*, 18 REV. LITIG. 703, 708 (1999).

19. 405 U.S. 645 (1972).

20. *Id.* at 646.

21. *Id.*

22. *Id.*

23. *Id.* at 647.

24. *Id.* at 646-47.

25. *Id.* at 647.

26. *Id.*

27. *Id.* at 656-57.

28. *Id.* at 658.

29. *Id.*

30. *Id.* at 651.

realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child."[31] State convenience or the government's interest in "prompt efficacious procedures"[32] was insufficient to overcome Peter's "substantial"[33] interest in the custody of his children.[34]

### *B. 1978:* Quilloin v. Walcott[35]

Randall Walcott wanted to adopt his stepson, a nonmarital child.[36] Randall had lived with his stepson for seven years.[37] The biological father, Leon Quilloin, never sought custody or legitimated the child and "had provided support only on an irregular basis."[38] The child was eleven years old when Randall filed the adoption petition,[39] and the child expressed his desire for Randall to adopt him.[40] The child also wanted to continue visitation with his biological father after the adoption.[41] He had visited his biological father "on 'many occasions,'" but the mother concluded that the visits were having a negative impact on her family,[42] including her younger son.[43]

Georgia statutorily provided only the mother of the nonmarital child with the right to veto an adoption, unless the biological father legitimates the child.[44] The mother, in this case, consented to Randall's adoption of her son.[45] Leon subsequently filed an objection to the adoption proceeding and a petition for legitimation.[46]

The trial court ruled that the adoption was in the child's best interests.[47] The court never ruled that Leon was unfit, but it did determine that neither legitimation nor visitation rights were in the best interests of the child.[48] The Georgia Supreme Court affirmed the trial court relying on "the strong state policy of rearing children in a family setting, a policy which . . . might be thwarted if

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31. *Id.* at 656-57.
32. *Id.* at 656.
33. *Id.* at 652.
34. *See id.* at 656-57.
35. 434 U.S. 246 (1978).
36. *Id.* at 247.
37. *See id.*
38. *Id.* at 251.
39. *Id.* at 249.
40. *Id.* at 251.
41. *Id.* at 251 n.11.
42. *Id.* at 251.
43. *Id.* at 251 n.10.
44. *Id.* at 248-49 (citations omitted).
45. *Id.* at 247.
46. *Id.* at 249-50.
47. *Id.* at 251.
48. *Id.*

unwed fathers were required to consent to adoptions."[49]

The U.S. Supreme Court found that the best interests of the child standard adequately protected Leon's interests.[50] The adoption would "give full recognition to a family unit already in existence, a result desired by all concerned, except [Leon]."[51] The Court ignored the child's desire to have continued visitation with Leon because the state adoption statute required full termination of the biological father's rights.[52]

Randall and the mother contended that the procedure did not violate Leon's due process rights because "any constitutionally protected interest appellant might have had was lost by his failure to petition for legitimation during the [eleven] years prior to [the] filing of Randall Walcott's adoption petition."[53] The Court was wary of resting its decision on that assertion because Leon was not aware of the legitimation process until after Randall filed his adoption petition.[54]

The Court also noted that the states could grant an unwed father "less veto authority" than a married father.[55] The dispositive factor for the Court was the unwed father's level of "commitment to the welfare of the child."[56] Leon had never taken full responsibility for the daily care of his child,[57] but Randall had been an active, custodial father for nine years.[58]

*Quilloin v. Walcott* is a landmark case because it is the first time the Court suggested that "a biological connection alone is insufficient to obtain full, constitutionally protected, parental rights."[59] This suggestion is troubling because the Court ignored the conflicting desire of the child to visit his biological father and the desire of the mother to restrict Leon's access to his child. Leon's restricted access denied him the opportunity to establish the type of relationship the Court was willing to protect. It is also unreasonable to compare a stepfather who has custody of the child by virtue of his marriage to the mother to an unmarried, noncustodial father who does not reside with the mother. The unmarried father cannot become part of the existing family unit, and the Court seemingly punishes him for a situation he cannot realistically rectify.

### *C. 1979:* Caban v. Mohammed[60]

Abdiel Caban and Maria Mohammed never married, cohabited for five years,

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49. *Id.* at 252.
50. *Id.* at 254.
51. *Id.* at 255.
52. *Id.* at 251 n.11.
53. *Id.* at 254.
54. *Id.*
55. *Id.* at 256.
56. *See id.*
57. *Id.*
58. *See id.* at 247, 251.
59. Kisthardt, *supra* note 12, at 600.
60. 441 U.S. 380 (1979).

and had two children together.[61] After the couple split, Maria married Kazin Mohammed. Maria's mother, Delores, took the two children with her to Puerto Rico, where Maria and Kazin planned to move.[62] Abdiel remained in contact with the children while they were in Puerto Rico.[63] One year later, Abdiel went to Puerto Rico to visit the children.[64] The grandmother let him take the children for a few days, but he returned with them to New York.[65] Maria learned that the children were in Abdiel's custody, and she enlisted the help of the police to get the children back.[66] Maria then instituted custody proceedings and the court granted her temporary custody.[67] Abdiel received visitation rights.[68] Maria and Kazin filed an adoption proceeding, and Abdiel cross-petitioned for adoption.[69]

Under the New York adoption statute, an unwed mother may block the adoption of her child "simply by withholding [her] consent."[70] To prevent the termination of his parental rights, an unwed father must establish that the adoption of his biological child would not be in the best interests of the child.[71] Abdiel alleged that this statutory scheme violated his equal protection and due process rights.[72]

The trial court granted Kazin's adoption petition, terminating Abdiel's parental rights.[73] The appellate court affirmed, and Abdiel appealed to the U.S. Supreme Court.[74] The Court held that the New York's statute's "distinction . . . between unmarried mothers and unmarried fathers . . . does not bear a substantial relation to the State's interest in providing adoptive homes for its illegitimate children."[75] The Court's holding seemed to be limited to established parent-child relationships in which the mother and father are similarly situated in the degree of their relationship with the child.[76]

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61. *Id.* at 382.
62. *Id.*
63. *Id.* at 383.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 385-86.
71. *Id.* at 386-87.
72. *Id.* at 384.
73. *Id.* at 383-84.
74. *Id.* at 384-85.
75. *Id.* at 391.
76. *See id.* at 389.

### *D. 1983:* Lehr v. Robertson[77]

Jessica was born out of wedlock in November 1976.[78] Her mother married Richard Robertson eight months after her birth.[79] In December 1978, Jessica's stepfather filed an adoption petition.[80] One month later, Jessica's biological father, Jonathon Lehr, filed for a determination of paternity, support order, and visitation rights.[81] The Robertsons filed for a change of venue, and Lehr first received notice of the pending adoption proceeding when he received the motion for change of venue.[82]

New York law required that certain classes of putative fathers receive notice of a pending adoption proceeding:

> [T]he persons whose names are listed on the putative father registry, . . . those who have been adjudicated to be the father, those who have been identified as the father on the child's birth certificate, those who live openly with the child and the child's mother and who hold themselves out to be the father, those who have been identified as the father by the mother in a sworn written statement, and those who were married to the child's mother before the child was six months old.[83]

Lehr did not fit into any of these categories.[84] He lived with Jessica's mother prior to Jessica's birth and visited her in the hospital after the birth.[85] However, his name did not appear on her birth certificate, and he never filed with the state putative father registry.[86] As a result, he never received notice of the adoption proceeding.[87] Knowing of the pending paternity determination action, the judge granted the stepfather's adoption petition.[88]

Lehr moved to vacate the adoption order.[89] The Ulster County Family Court denied his motion and found that it did not have to give him notice of the adoption.[90] The Appellate Division of the Supreme Court held that Lehr's paternity action did not give him the right to receive notice of the adoption, and the notice provisions of the New York statute were constitutional.[91] The New

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77. 463 U.S. 248 (1983).
78. *Id.* at 250.
79. *Id.*
80. *Id.*
81. *Id.* at 252.
82. *Id.* at 252-53.
83. *Id.* at 251.
84. *Id.* at 251-52.
85. *Id.* at 252.
86. *Id.* at 251-52.
87. *See id.* at 253.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 253-54 (citing *In re* Adoption of Jessica "XX," 434 N.Y.S.2d 772 (App. Div.

York Court of Appeals acknowledged that "it might have been prudent to give notice," but it nevertheless concluded that the trial court had not abused its discretion by granting the adoption petition without giving Lehr notice.[92]

Lehr appealed to the U.S. Supreme Court on due process and equal protection grounds.[93] The Court emphasized that when a nonmarital father participates in his child's life and assumes the responsibilities of fatherhood, then the parent-child relationship "acquires substantial protection under the Due Process Clause."[94] A biological link alone, the Court recognized, is not enough to acquire constitutional protection.[95] The Court did not completely disregard the significance of a biological connection:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.[96]

The Court suggested that the ideal scenario is for the biological father to assume parental responsibilities, as opposed to any other man willing to assume the responsibilities.

The Court rejected Lehr's due process claim because he had not assumed parental responsibilities,[97] and his right to receive notice was fully within his control.[98] New York had adequately protected his interest in forming a relationship with Jessica by allowing him to register as a putative father.[99] The Court found irrelevant Lehr's possible lack of knowledge of the putative father registry.[100]

The Court also found that the statute satisfied the Equal Protection Clause because the mother and father were not "similarly situated with regard to their relationship with the child."[101] Jessica's mother established a full parental relationship with her child, while Lehr had not.[102] Therefore, New York could

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1980)).

92. *Id.* at 254-55 (citing *In re* Adoption of Jessica "XX," 430 N.E.2d 896 (N.Y. 1981)).
93. *Id.* at 255.
94. *Id.* at 261.
95. *Id.*
96. *Id.* at 262.
97. *Id.*
98. *Id.* at 263-64.
99. *Id.* at 262-64.
100. *Id.* at 264.
101. *Id.* at 267.
102. *Id.*

treat the two parents differently.[103]

The different views of the majority and the dissent of three Justices illustrate the divergence of opinions that has developed over the last four decades with regard to the rights of unwed fathers. Justice White described the "'nature of the interest' at stake . . . is the interest that a natural parent has in his or her child, one that has long been recognized and accorded constitutional protection."[104] In this view, the biological relationship alone creates the liberty interest.[105] The degree of development in the parent-child relationship relates to the weight of the interest, not whether the interest is cognizable.[106] Because the State did not provide the putative father adequate notice, the State deprived Lehr due process of law, according to Justice White.[107]

The dissent also noted that Lehr alleged a different version of the facts. According to Lehr, the mother concealed her location from him after the child's birth, and she refused his financial support of the child.[108] The mother also threatened to have Lehr arrested if he tried to visit his daughter.[109] Justice White contended that based on the lack of a developed factual record, the Court must assume that Lehr would have had "the kind of significant relationship that the majority concedes is entitled to the full panoply of procedural due process protections" if it were not for the actions of the mother.[110] The majority denied Lehr full constitutional protection as a result of a situation that was largely out of his control.

### *E. 1989:* Michael H. v. Gerald D.[111]

Victoria was born of an "adulterous affair."[112] Carole, her mother, was married to Gerald, but Victoria's biological father was Michael.[113] At different points during the first three years of Victoria's life, both men held her out as their child.[114] After Carole's presumably permanent reconciliation with Gerald, Michael and Victoria, through a guardian ad litem, sued for visitation.[115] Gerald moved for summary judgment because California state law provided that a married woman's child was presumptively her husband's, as long as the couple

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103. *Id.* at 267-68.
104. *Id.* at 270 (White, J., dissenting).
105. *Id.* at 272.
106. *Id.*
107. *Id.* at 276.
108. *Id.* at 269.
109. *Id.*
110. *Id.* at 271.
111. 491 U.S. 110 (1989).
112. *Id.* at 113.
113. *Id.* at 113-14.
114. *Id.* at 114-15.
115. *Id.* at 115.

was cohabitating, and the husband was not impotent or sterile.[116]

The state courts denied relief for Michael and Victoria, and they appealed to the U.S. Supreme Court.[117] The Court denied Michael's claim of procedural and substantive due process violations.[118] First, the Court found that the presumption within the state law did not violate procedural due process.[119] Second, Michael did not have a substantive due process claim because his asserted liberty interest was not "rooted in history and tradition."[120] According to the majority, relationships like Michael and Victoria's have not been treated as a "protected family unit."[121] History has favored the "marital family."[122]

The Court rejected Victoria's claims of due process and equal protection violations. Her due process claim "is the obverse of Michael's and fails for the same reasons."[123] Victoria contended that her equal protection claim should receive strict scrutiny because the state statute discriminates against her because of her illegitimacy.[124] The Court refused to apply strict scrutiny because Victoria is not legally illegitimate.[125] Under rational basis review, Victoria's claim failed because the state interest in enacting the statute was to preserve marital families, and allowing unwed fathers to interfere would disrupt the family.[126] The Court found that the statute was rationally related to legitimate governmental interests, and it therefore denied Victoria's equal protection claim.[127]

In dissent, Justice Brennan argued that the plurality should not rely on history and tradition to determine whether the Constitution protects a liberty interest.[128] The dissent argued that the Constitution should have the ability to adapt to changing social mores:

> We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellent practice because the same tolerant impulse protects our own [idiosyncrasies]. . . . The document that the plurality construes today is unfamiliar to me. It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past. *This* Constitution does not recognize that times change, does not see that

116. *Id.*
117. *Id.* at 115-17.
118. *Id.* at 121, 127.
119. *Id.* at 121.
120. *Id.* at 123.
121. *Id.* at 124.
122. *Id.*
123. *Id.* at 131.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 131-32.
128. *Id.* at 136-41 (Brennan, J., dissenting).

> sometimes a practice or rule outlives its foundations.[129]

The liberty interest involved in this case is the parent-child relationship.[130] The Court already recognized that this interest must receive constitutional protection.[131] The Court previously prevented any state "from denying important interests or statuses to those whose situations do not fit the government's narrow view of the family."[132]

Justice White's dissenting opinion noted that the State's interest in preventing illegitimacy was no longer relevant.[133] Blood tests can provide proof of paternity, and fathers like Michael are not trying to repudiate fatherly responsibilities.[134] It is relatively commonplace for children to live apart from their biological father but continue to maintain a relationship with him.[135]

Justice White also noted the disconnect between the plurality's holding and *Lehr v. Robertson*.[136] In *Lehr*, the Court required that an unwed father must "grasp" the opportunity to develop a relationship with his child to have a constitutionally protected interest.[137] Michael did exactly that, yet the plurality refused to recognize his interest in a relationship with his daughter.[138] The result rendered Michael "a stranger to his child."[139]

## II. "DEADBEAT DAD": THE SCARLET LETTER[140] OF THE MODERN UNWED FATHER

> "Speak, woman!" said another voice, coldly and sternly, proceeding from the crowd about the scaffold. "Speak; and give your child a father!"
>
> "I will not speak!" answered Hester, turning pale as death, but responding to this voice, which she too surely recognized. "And my child must seek a heavenly Father; she shall never know an earthly one!"[141]

Scholars generally regard Hester Prynne as a courageous heroine, while many

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129. *Id.* at 141.

130. *Id.* at 141-42.

131. *Id.* (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

132. *Id.* at 145 (citing Moore v. E. Cleveland, 431 U.S. 494 (1977); Gomez v. Perez, 409 U.S. 535 (1973); Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968); Loving v. Virginia, 388 U.S. 1 (1967)).

133. *Id.* at 161-62 (White, J., dissenting).

134. *Id.*

135. *Id.* at 162.

136. *Id.* at 163.

137. Lehr v. Robertson, 463 U.S. 248, 262 (1983).

138. *Michael H.*, 491 U.S. at 163 (White, J., dissenting).

139. *Id.*

140. *See* NATHANIEL HAWTHORNE, THE SCARLET LETTER (Penguin Books 2003) (1850).

141. *Id.* at 63.

think of her lover, Dimmesdale, as the weak, egotistical father, who selfishly refuses to confess his sins and support his child and her mother.[142] He is an unsympathetic character, and readers generally feel little sorrow upon his death.[143]

In modern society, Dimmesdale is the character who would wear the letter of shame. Rather than a scarlet "A," he would bear the stigmatized label "Deadbeat Dad."[144] He would likely receive even less sympathy in current American society than he did in seventeenth-century Puritanical Boston.

Modern society recognizes two types of deadbeat dads. The first category is the father who does not pay his child support.[145] The second category is the unwed father who never establishes his paternity.[146] Although fathers who choose to abandon their families or refuse to support their children likely deserve little sympathy, many fathers may appear to fit into the definitions of deadbeat dad without even knowing of the child's birth.[147]

Public focus with regard to deadbeat dads has been on stigmatizing those men and reducing the government's financial burden of caring for the single mothers and their children.[148] The legislative focus has similarly been on reducing welfare costs.[149] Chapter 7, Title IV, Part D of the Social Security Act ("Title IV-D") established a child support enforcement program as part of welfare reform.[150] The goal of Title IV-D is to improve the effectiveness of child support programs, with paternity determinations as its primary means of accomplishment.[151]

The states must comply with the legislative goals of Title IV-D in exchange for federal funding.[152] In addition to the appropriations provided to states for Title IV-D enforcement,[153] states also receive "incentive payments" based on the

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142. *See, e.g.*, NINA BAYM, *Introduction* to NATHANIEL HAWTHORNE, THE SCARLET LETTER, at vii, xviii-xx (Penguin Books 2003) (1850).

143. *Id.* at xx.

144. *See* William J. Doherty et al., *Responsible Fathering: An Overview and Conceptual Framework*, 60 J. MARRIAGE AND FAM. 277, 279 (1998) (describing the moral undertone of the term "deadbeat dad").

145. *See* Drew D. Hansen, Note, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law*, 108 YALE L.J. 1123, 1123-24 (1999) ("The villain in the child support reform story is the 'deadbeat dad' who does not pay child support. . . . Americans today conceptualize child support in terms of preventing dependency and in terms of punishing those who 'cause' dependency.").

146. *See* Doherty et al., *supra* note 144, at 279 (noting that "[d]eclaring legal paternity is the sine qua non of responsible fathering").

147. *See supra* notes 3-4 and accompanying text.

148. *See* Hansen, *supra* note 145, at 1123-24.

149. *See id.*

150. 42 U.S.C. § 666 (2006).

151. *Id.* § 651; *see* Jayna Morse Cacioppo, Note, *Voluntary Acknowledgments of Paternity: Should Biology Play a Role in Determining Who Can Be a Legal Father?*, 38 IND. L. REV. 479, 486 (2005).

152. Cacioppo, *supra* note 151, at 486.

153. *See* 42 U.S.C. § 651 (2006).

state's performance pursuant to Title IV-D's goals.[154] Specifically, Title IV-D bases the state's incentive payments on its paternity establishment, support order, current payment, arrearage payment, and cost-effectiveness performance levels.[155]

Under Title IV-D, states must establish "[e]xpedited administrative and judicial procedures . . . for establishing paternity and for establishing, modifying, and enforcing support obligations."[156] States must also establish procedures for voluntary paternity acknowledgement.[157] The voluntary paternity acknowledgement procedures in each state must include a "simple civil process" in which the mother and father can sign an acknowledgement of paternity as long as they receive notice "of the alternatives to, the legal consequences of, and the rights . . . and responsibilities that arise from, signing the acknowledgement."[158] The states must also establish a "hospital-based program . . . focusing on the period immediately before or after the birth of a child."[159]

The voluntary acknowledgement of paternity is a "legal finding of paternity."[160] The signor may only rescind the acknowledgment "within the earlier of – (I) 60 days; or (II) the date of an administrative or judicial proceeding relating to the child (including a proceeding to establish a support order) in which the signatory is a party."[161] After the sixty-day period, the signor may challenge the acknowledgement only on the basis of "fraud, duress, or material mistake of fact."[162] Title IV-D therefore provides a non-judicial, cost-effective means to "receive a final paternity judgment."[163]

## III. INDIANA'S TREATMENT OF UNWED FATHERS

Indiana has gone further than Title IV-D mandates. In the gap between Indiana's current procedures and the mandates of Title IV-D lurk problems under the U.S. Constitution. To see the constitutional issues under Indiana law, one must first understand the procedures used in Indiana.

### *A. Indiana's Public Policy*

In accordance with Title IV-D, Indiana has a public policy for establishing paternity of nonmarital children.[164] Indiana law emphasizes identifying the "correct" father in paternity determinations, which shows the importance of a

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154. *Id.* § 658a.
155. *Id.* § 658a(b)(4)(A)-(E).
156. *Id.* § 666(a)(2).
157. *Id.* § 666(a)(5)(C).
158. *Id.* § 666(a)(5)(C)(i).
159. *Id.* § 666(a)(5)(C)(ii).
160. *Id.* § 666(a)(5)(D)(ii).
161. *Id.*
162. *Id.* § 666(a)(5)(D)(iii).
163. *See* Cacioppo, *supra* note 151, at 486.
164. *See In re* Paternity of E.M.L.G., 863 N.E.2d 867, 869 (Ind. Ct. App. 2007) (quoting IND. CODE § 31-14-1-1 (1998)).

biological relationship in Indiana.[165] The Indiana Supreme Court recognized a "substantial public policy in correctly identifying parents and their offspring."[166] Indiana also "disfavors a support order against a man who is not the child's father."[167]

Indiana's paternity establishment statutory scheme also illustrates the state's preference for the biological father's assumption of parental obligations.[168] The statute provides that the mother and "a man who reasonably appears to be the child's biological father" may execute the paternity affidavit at the hospital.[169] The affidavit also includes a sworn statement by the mother that the man signing the affidavit is the child's biological father,[170] and the man must declare within the affidavit that he believes he is the biological father.[171]

### *B. The Result of Executing a Paternity Affidavit*

A paternity affidavit "conclusively establishes the man as the legal father,"[172] making it equivalent to a paternity determination by a court.[173] The mother or the Title IV-D agency may seek child support from the father based solely on the affidavit.[174] The affidavit also provides that "there will be no hearing related to the paternity of the child(ren) included in the affidavit."[175]

### *C. Valid Revocation of a Paternity Affidavit*

The statute strictly limits the revocation of a paternity affidavit.[176] Beyond

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165. *In re* Paternity of S.R.I., 602 N.E.2d 1014, 1016 (Ind. 1992).

166. *Id.*; *see In re* Paternity of Davis, 862 N.E.2d 308, 313 (Ind. Ct. App. 2007) (noting the "strong public policies in favor of identifying the correct biological father and allocating the child support obligation to that person").

167. *In re Paternity of S.R.I.*, 602 N.E.2d at 1016 (citing Fairrow v. Fairrow, 559 N.E.2d 597 (Ind. 1990)).

168. *See* IND. CODE § 16-37-2-2.1 (2008) (requiring mother and putative father to complete sworn statements within paternity affidavit that the man is the biological father); *id.* § 31-14-10-1 (requiring "[u]pon finding that a man is the child's biological father, the court shall, in the initial determination, conduct a hearing to determine the issues of support, custody, and parenting time"); *id.* § 31-14-11-1.1 (providing "[i]n a paternity proceeding, the court shall issue a temporary order for child support if there is clear and convincing evidence that the man involved in the proceeding is the child's biological father").

169. *Id.* § 16-37-2-2.1(b)(1)(B).

170. *Id.* § 16-37-2-2.1(e)(1).

171. *Id.* § 16-37-2-2.1(e)(2).

172. *Id.* § 16-37-2-2.1(m).

173. *See id.* § 31-14-2-1 ("A man's paternity may only be established: (1) in an action under this article; or (2) by executing a paternity affidavit. . . .").

174. Paternity Affidavit, State Form 44780, Ind. State Dep't of Health (on file with author).

175. *Id.*

176. IND. CODE § 16-37-2-2.1 (h), (i), (k) (2008).

the importance of finality in judgments,[177] the legislative limitation on revocation is based on the best interests of the child.[178] The Indiana Supreme Court has noted the significance of stability and finality in family relationships.[179] The court tempered the importance of that state objective by noting, "[p]roper identification of parents and child should prove to be in the best interests of the child for medical or psychological reasons."[180]

A court may revoke an affidavit if the legal father files an action with the court to request a genetic test within sixty days of the date of the affidavit, and the test establishes that he is not the biological father.[181] The revocation may occur outside of the sixty day period only for "fraud, duress, or material mistake of fact" in the execution of the affidavit or if a court-ordered genetic test excludes the legal father as the biological father.[182]

Even if the father and mother sign a false paternity affidavit with the mutual knowledge that the man is not the biological father, the court may not rescind the affidavit.[183] There is no fraud or mistake in the execution of such paternity affidavits because both parties were aware that he was not the biological father at the time of signing.[184] Therefore, no valid statutory reason exists for setting aside the paternity affidavit outside of the sixty days.[185] The Indiana Court of Appeals has ruled that filing a petition to disestablish paternity is contrary to public policy, and the Indiana Code does not provide for such an action.[186] Indiana strives to avoid disestablishment of paternity until paternity has been established in another man to prevent creating an illegitimate child in the eyes of the law.[187]

Despite the paternity affidavit acknowledging legal paternity, another man

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

178. *In re* Paternity of H.H., 879 N.E.2d 1175, 1178 (Ind. Ct. App. 2008) (refusing to change the legal status of a father who signed the paternity affidavit with the knowledge that he was not the biological father because it would not be in the best interests of the child to remove the only father the child had known).

179. *In re* Paternity of S.R.I., 602 N.E.2d 1014, 1016 (Ind. 1992).

180. *Id.*

181. IND. CODE § 16-37-2-2.1(h), (k) (2008).

182. *Id.* § 16-37-2-2.1(i), (k).

183. *See In re Paternity of H.H.*, 879 N.E.2d at 1176.

184. *See id.* at 1177-78 (finding no fraudulent execution if both parties knew he was not the biological father); *In re* Paternity of R.C., 587 N.E.2d 153, 155 n.2 (Ind. Ct. App. 1992) (defining extrinsic fraud as the mother's false statement to the father, thereby procuring his signature attesting that he is the biological father).

185. *See* IND. CODE § 16-37-2-2.1(i) (2008).

186. *See In re* Paternity of H.J.B., 829 N.E.2d 157, 159-60 (Ind. Ct. App. 2005); *In re* Paternity of B.W.M., 826 N.E.2d 706, 708 (Ind. Ct. App. 2005) (expressing strong disapproval of legal father's petition to vacate his child support order after learning he was not the child's biological father).

187. *See In re Paternity of H.J.B.*, 829 N.E.2d at 160.

may file an action to establish his own paternity.[188] For example, imagine Mary and Pete complete a paternity affidavit in Indiana. Both Mary and Pete know that Pete is not the biological father when they execute the affidavit. David learns of the birth of Mary's child, and he believes that he is the biological father. David may file a paternity action.[189] Establishing that Pete is not the biological father will not revoke the paternity affidavit unless Pete requests genetic testing for himself within sixty days of the execution of the affidavit.[190] David will not become the legal father if Pete does not want to rescind his affidavit.[191] "A paternity affidavit may not be rescinded unless the court, at the request of the legal father, has ordered a genetic test, and the court-ordered test indicates that the man is excluded as the father of the child."[192] Particularly if Pete signed the affidavit with the knowledge that he was not the biological father, he may be unwilling to voluntarily give up his legally protected relationship with the child. As long as Pete wants to continue to be the legal father, David seems to have no recourse under the current law.

Some courts will find that David is the biological father, but he still is not the legal father.[193] First, the court will consider whether it is in the best interests of the child to adjudicate the biological father's existence.[194] The court considers the child's age, whether the child knows that David is his biological father, and whether it is in his best interests to visit with David.[195] The court makes this determination on a case-by-case basis,[196] and the biological father has no guarantee that the court will recognize his biological connection.

## IV. PROBLEMS WITH INDIANA'S CURRENT STATUTORY FRAMEWORK

Indiana denies many unwed fathers their right to due process. The current

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188. *See In re* Paternity of N.R.R.I., 846 N.E.2d 1094, 1097 (Ind. Ct. App. 2006).

189. IND. CODE § 31-14-4-1 (2008).

190. *Id.* § 16-37-2-2.1 (Subsection (k) provides, "The court may not set aside the paternity affidavit unless a genetic test ordered under subsection (h) or (i) excludes the person who executed the paternity affidavit as the child's biological father." Subsection (h) only allows rescission if the male signor requests a genetic test within sixty days of the signing of the affidavit. Subsection (i) permits rescission of the affidavit past sixty days for "fraud, duress, or material mistake of fact" and if the male signor requested a genetic test, and the results indicate that he is not the biological father.). *But see N.R.R.I.*, 846 N.E.2d at 1097 n.3 (suggesting that if genetic tests prove another man is the biological father and exclude the legal father as the biological father, then the court may set aside the paternity affidavit).

191. *See* IND. CODE § 16-37-2-2.1 (2008).

192. *In re* Paternity of M.M., 889 N.E.2d 846, 849 (Ind. Ct. App. 2008).

193. Interview with Master Comm'r Alicia Gooden, Presiding Judicial Officer over Paternity Div. of Marion Circuit Court, in Indianapolis, Ind. (Feb. 6, 2009).

194. *Id.*

195. *Id.*

196. *Id.*

procedure for paternity determination has a high risk of error,[197] and the interests at stake for the father outweigh the government's interests. The Due Process Clause of the Fourteenth Amendment[198] requires more accurate procedures.[199] Biological fathers also do not receive notice that another man is assuming legal paternity of their biological child.

Indiana's current paternity system also violates the biological father's substantive due process rights by allowing state interference with the development of the constitutional right to parent. The current procedures interfere with the biological father's ability to establish a relationship with his child, and according to U.S. Supreme Court precedent, Indiana may deny the biological father's interest in his child for failure to establish a relationship with his child.[200]

### *A. Procedural Due Process*

Procedural due process requires at a minimum "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[201] When determining whether a state's procedures violate a person's right to due process, the courts must consider whether the Fourteenth Amendment protects the interests at stake.[202] If the Fourteenth Amendment protects the interests, then the court must consider what procedures will satisfy due process.[203] Additionally, if the outcome of a proceeding is to be final, due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[204]

*1. Procedural Requirements*.—The U.S. Supreme Court in *Mathews v. Eldridge* laid out three factors to determine "the specific dictates of due process":[205]

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest,

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197. *See supra* Part III.C.

198. U.S. CONST. amend. XIV, § 1.

199. *See* Mathews v. Eldridge, 424 U.S. 319, 336-40 (1976) (discussing the complex administrative procedures for discontinuing Social Security payments and finding them inadequate).

200. Lehr v. Robertson, 463 U.S. 248, 262 (1983).

201. *Mathews*, 424 U.S. at 333 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

202. Ingraham v. Wright, 430 U.S. 651, 672 (1977).

203. *Id.*

204. Armstrong v. Manzo, 380 U.S. 545, 550 (1965); *see Lehr*, 463 U.S. at 273 (White, J., dissenting) (noting that "the right to be heard is one of the fundamentals of that right [due process], which 'has little reality or worth unless one . . . can choose for himself whether to appear or default, acquiesce or contest'" (quoting Schroeder v. City of New York, 371 U.S. 208, 212 (1962))).

205. *Mathews*, 424 U.S. at 335.

> including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[206]

First, a putative father has both liberty and property interests at stake in a paternity determination.[207] Indiana courts have indicated that public policy is in favor of allocating child support obligations to the biological father.[208] The signor of a paternity affidavit has an interest in ensuring that he is the biological father prior to paying the child support that is likely to result from a paternity adjudication. Even if the mother chooses not to pursue child support obligations,[209] if a man is the legal father, it may affect his obligation to pay birthing expenses,[210] to provide health coverage,[211] and the intestate distribution of his property upon his death.[212] The putative father also has an interest in the parent-child relationship that will result.[213]

Second, Indiana's current paternity procedures pose a high risk of "erroneous deprivation"[214] of the father's interests. If a man, believing he is the biological father, completes the paternity affidavit at the hospital, and genetic tests later prove a different man is the biological father, the court may set the affidavit aside for fraud or mistake of fact.[215] The court, however, can never remedy the man's loss of property in child support payments and the emotional toll on the child and father.[216] With neither genetic testing nor any evidence beyond the parties' statements of the signor's biological relation required, the risk of erroneous deprivation is extremely high.

Due process also requires that any additional procedural safeguards justify

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206. *Id.*

207. *See* Rivera v. Minnich, 483 U.S. 574, 583-84 (1987) (Brennan, J., dissenting).

208. *See In re* Paternity of Davis, 862 N.E.2d 308, 313-14 (Ind. Ct. App. 2007) (quoting *In re* S.R.I., 602 N.E.2d 1014, 1016 (Ind. 1992)).

209. *See* IND. CODE § 16-37-2-2.1(g)(2)(A) (2008) (indicating that the execution of a paternity affidavit gives the mother the right—not the obligation—to pursue a child support order).

210. *See In re* Paternity of A.R.S.A., 876 N.E.2d 1161, 1164-65 (Ind. Ct. App. 2007) (requiring unmarried legal father to reimburse Medicaid for one-half of mother's birthing expenses).

211. IND. CODE § 16-37-2-2.1(g)(2)(A) (2008).

212. *See id.* § 29-1-2-7(b)(5) (2004) (providing that a court shall treat a nonmarital child for purposes of intestate inheritance as if the father had married the mother if the father executes a paternity affidavit); *id.* § 29-1-2-1(d)(1) (establishing the intestate share for children of the intestate).

213. *See* Troxel v. Granville, 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.").

214. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

215. *See, e.g.*, *In re* Paternity of R.C., 587 N.E.2d 153, 157 (Ind. Ct. App. 1992) (overturning paternity judgment because of fraud in the context of an adjudication of paternity).

216. IND. CODE § 16-37-2-2.1(i) (2008); *see In re Paternity of R.C.*, 587 N.E.2d 157 (overturning a paternity judgment because of fraud by the mother).

the cost.[217] States must follow the mandates of Title IV-D, or the state will lose federal funding.[218] The state must provide for non-judicial, "expedited"[219] procedures to establish paternity, including a hospital-based program "focusing on the period immediately before or after the birth of the child."[220] Despite the security mandatory genetic testing would provide, the Office of Child Support Enforcement declared that states must allow for voluntary acknowledgements of paternity to establish paternity without any further proceedings.[221] States cannot require mandatory genetic testing under Title IV-D. Consequently, the state may not discontinue the expedited procedures completely or require mandatory genetic testing. Indiana must balance the need to protect the putative father's right to due process against the need to receive federal funding.

The third *Mathews* factor is the "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[222] The state's interest in "efficacious procedures to achieve legitimate state ends" is a recognizable state interest.[223] However, the Supreme Court has recognized "higher values than speed and efficiency."[224] In *Stanley v. Illinois*, the Supreme Court noted: "[T]he Bill of Rights in general, and the Due Process Clause in particular, . . . were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy . . . ."[225] The procedures used to establish paternity in a hospital reflect the need for constitutional protection from the "overbearing concern for efficiency and efficacy."[226] The days and hours following the birth of a child are likely to be stressful and emotional. The state's process for immediate paternity acknowledgement in order to allow child support payments to flow as swiftly as possible seems to be the precise type of governmental action the Due Process Clause protects against. Despite the state's need to increase child support payments, due process concerns require a more balanced and thoughtful procedure to ensure all parties' rights are protected.

A marriage certificate or a paternity affidavit should not trump a genome. The law should not underplay the importance of a biological connection. The Supreme Court has recognized the significance of a biological link and an established relationship.[227] This connection is one of the most unique of a child's life. No piece of paper should outweigh the magnitude of this connection. Indiana law should allow the biological father and the child the opportunity to

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217. *See* Ingraham v. Wright, 430 U.S. 651, 680 (1977).
218. Cacioppo, *supra* note 151, at 481.
219. 42 U.S.C. § 666(a)(2) (2006).
220. *Id.* § 666(a)(5)(C)(ii).
221. *See* Cacioppo, *supra* note 151, at 503-04 & n.152.
222. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
223. Stanley v. Illinois, 405 U.S. 645, 656 (1972).
224. *Id.*
225. *Id.*
226. *See id.*
227. Lehr v. Robertson, 463 U.S. 248, 262 (1983).

develop a relationship before labeling him deadbeat and unfit.[228] Due process demands that the biological father receives the opportunity to be heard before depriving him of his child.[229] A later paternity suit, after another man is the legally established father, that has minimal hope of giving the biological father a legally recognized position in the child's life will not satisfy the deprivations of the current law. The Fourteenth Amendment demands more.[230]

*2. Notice.*—One of the fundamental requirements of due process is notice.[231] Title IV-D requires that the state procedures for administration of voluntary acknowledgement of paternity must include notice to the mother and putative father "orally, or through the use of video or audio equipment, and in writing, of the alternatives to, the legal consequences of, and the rights . . . and responsibilities that arise from, signing the acknowledgment."[232] Indiana's paternity affidavit statute requires hospital personnel to "verbally explain . . . the legal effects of an executed paternity affidavit,"[233] namely, that executing the paternity affidavit "establishes paternity"[234] and "gives rise to parental rights and responsibilities," including possible child support obligation.[235] The form does not disclose the sixty day deadline to request genetic testing.[236] The form also does not disclose any of the alternatives to signing this document, such as going to the health department[237] after a genetic test establishes his biological paternity or filing an action to establish paternity under Indiana Code section 31-14-4-1.[238]

Hospital personnel will generally inform the signor that the document is a legal document that is legally enforceable and may give rise to child support obligations.[239] The hospital personnel will not place his name on the birth certificate without an executed paternity affidavit,[240] and most fathers present at

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228. This Note does not suggest that women must disclose all of their sexual partners to prevent a father from not knowing about the child. This Note suggests that the father should receive more opportunity to come forward if he learns of the birth before the state severs the biological relationship. *See infra* notes 279-328 and accompanying text.

229. *See* Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (describing the hearing requirement in the context of deprivation of a property interest).

230. *See* U.S. CONST. amend. XIV, § 1; *Mathews*, 424 U.S. at 333.

231. *See* Armstrong v. Manzo, 380 U.S. 545, 550 (1965).

232. 42 U.S.C. § 666(a)(5)(C)(i) (2006).

233. IND. CODE § 16-37-2-2.1(b)(2) (2008).

234. *Id.* § 16-37-2-2.1(g)(1).

235. *Id.* § 16-37-2-2.1(g)(2)(A).

236. Paternity Affidavit, State Form 44780, Ind. State Dep't of Health. (on file with author).

237. *Id.*; *see* IND. CODE § 16-37-2-2.1(a)(2) (2008).

238. IND. CODE § 31-14-4-1 (2008) (providing procedure to file a judicial paternity action).

239. Telephone Interview with Becky Stull, Birth Registrar, Postpartum Dep't, Home Hospital, in Lafayette, Ind. (Nov. 19, 2008); Telephone Interview with Betty Judd, Birth Registrar, Dep't of Newborn Records, Clarian Health Partners: Methodist Campus, in Indianapolis, Ind. (Nov. 19, 2008).

240. 42 U.S.C. § 666(a)(5)(D)(i) (2006).

birth will choose to complete an affidavit.[241] As a result, the father is completing a legally binding document in the hospital within seventy-two hours of the birth of the child without full disclosure of his rights.[242]

Current Indiana law requires a more complete disclosure of rights to waive a spousal elective share under a will[243] or to borrow money from a bank[244] than to assume full, complete parental obligations.[245] In *In re Paternity of E.M.L.G.*,[246] the Indiana Court of Appeals held that not knowing the legal effects of the paternity affidavit is not a valid reason to revoke the affidavits.[247] Additionally, a court will not revoke a paternity affidavit for failure of the hospital to provide the statutorily dictated verbal explanation of the legal effects of the document.[248] Despite the fact that Title IV-D, Indiana Code section 16-37-2-2.1(b)(2), and the Fourteenth Amendment require explanation of the legal effects of a document prior to signing it, Indiana courts will not set aside a paternity affidavit for the failure to explain the legal ramifications[249] or for the signor's lack of understanding of the effects.[250]

Indiana courts have justified upholding paternity affidavits when the signor knew he was not the biological father because the signor has voluntarily assumed the obligations of financial and emotional support for the nonmarital children.[251] Given Title IV-D's goal of reducing welfare costs and Indiana's strong policy of establishing paternity for nonmarital children,[252] the State is logically eager to allow any man to assume paternity. However, the State should not codify procedures that encourage people to assume lifelong obligations without full disclosure of the ramifications of the document he is signing. Even if the signor knows generally what it means to become a parent, he may assume that if he is

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241. Telephone Interview with Becky Stull, *supra* note 239.

242. IND. CODE § 16-37-2-2.1(c)(1) (2008).

243. *See* Taylor v. Taylor, 643 N.E.2d 893, 897 (Ind. 1994) ("The right of election of a surviving spouse given under [Indiana Code section 29-1-3-1 (Burns 1989)] . . . may be waived . . . after full disclosure of the nature and extent of such right . . . .") (citing IND. CODE § 29-1-3-7 (Burns 1989)).

244. *See* 15 U.S.C. § 1601(a) (2006) (requiring the "meaningful disclosure of credit terms"); IND. CODE § 24-4.5-2-301 (2007) (adopting the requirements of the Federal Consumer Credit Protection Act, 15 U.S.C. § 1601-1693r).

245. *See* Rivera v. Minnich, 483 U.S. 574, 583-84 (1987) (Brennan, J., dissenting) ("What is at stake for a defendant in such a [paternity] proceeding . . . is the imposition of a lifelong relationship with significant financial, legal, and moral dimensions. . . . A paternity determination therefore establishes a legal duty whose assumption exposes the father to the potential loss of both property and liberty.").

246. 863 N.E.2d 867 (Ind. Ct. App. 2007).

247. *Id.* at 869.

248. *In re* Paternity of M.M., 889 N.E.2d 846, 849 n.1 (Ind. Ct. App. 2008).

249. *Id.*

250. *See In re Paternity of E.M.L.G.*, 863 N.E.2d at 869.

251. *See In re* Paternity of H.H., 879 N.E.2d 1175, 1177-78 (Ind. Ct. App. 2008).

252. *See In re Paternity of E.M.L.G.*, 863 N.E.2d at 869.

not the biological father, the affidavit is no longer valid. He may also assume that if he and the mother end their relationship, his child support obligations would end if he is not a biological parent.

### *B. Substantive Due Process*

The Due Process Clause of the Fourteenth Amendment "includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'"[253] The interest at stake in paternity determinations is a father's right "to 'the companionship, care, custody, and management of his . . . children.'"[254] This interest comes within the purview of the Fourteenth Amendment's protection.[255] However, a biological relationship alone will generally not rise to the level of a fundamental liberty interest protected by the Fourteenth Amendment.[256] Courts give some weight to the biological relationship between a father and child, but biology alone is not enough.[257] The father must have acted to create a relationship with his child.[258] The courts have sought to protect the familial relationship that develops between parent and child.[259] Until the biological father substantively enters the child's life as a parental figure and establishes a relationship with the child, he has no constitutionally protected interests in that child.[260]

The impermissible infringement on the biological father's right to parent occurs when the state prevents the father from establishing a parental relationship that a court will recognize. If any man may voluntarily assume the obligations of fatherhood within hours of a child's birth at the hospital, then a biological father may lose the prospect of a relationship with his biological child because the mother chose not to tell him that she was pregnant. He cannot reasonably act on something he did not know existed.

The mother may also act as a gatekeeper[261] by restricting the father's access to the child.[262] Like the father in *Quilloin v. Walcott*, the law will deprive this

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253. Troxel v. Granville, 530 U.S. 57, 65 (2000) (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

254. M.L.B. v. S.L.J., 519 U.S. 102, 118 (1996) (quoting Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981)).

255. *See id.* at 119; Santosky v. Kramer, 455 U.S. 745, 753 (1982).

256. *Lehr*, 463 U.S. at 259-61.

257. *Id.* at 262.

258. *Id.*

259. *See id.*

260. *Id.* at 261.

261. Lawrence M. Berger et al., *Parenting Practice of Resident Fathers: The Role of Marital and Biological Ties*, 70 J. MARRIAGE & FAM. 625, 627 (2008) (defining maternal gatekeeping as "regulation of fathers' access to and time with children").

262. *See* Natasha J. Cabrera et al., *Why Should We Encourage Unmarried Fathers to Be Prenatally Involved?*, 70 J. MARRIAGE & FAM. 1118, 1120 (2008) ("[M]other's gatekeeping may help to alienate the father from her and the child and reduce his level of involvement over time.");

biological father of his interest in his child because he failed to establish a relationship with the child,[263] but the mother may have been a significant factor in his inability to assume the parental role.[264] The only reason for his loss of constitutional protection is the fact that the mother and father were no longer intimately involved, a situation that is now commonplace.[265]

The Indiana Court of Appeals justified the interference with the biological father's rights using the best interests of the child standard:

> In short, the decisions of this state reveal the "best interests" standard has not been employed to make vague moral judgments about alternative lifestyles and parental fitness. Instead, the process of effecting that which is "in the best interests of the child" has in fact been an effort by our courts to preserve, and in some instances create, an environment conducive to the mental and physical development of the child—an environment which, to the extent possible, meets the "need of every child for unbroken continuity of affectionate and stimulating relationships with an adult." As such, the "best interests" test without question forwards a compelling state interest which justifies the resultant interference with the rights of the biological parents.[266]

Using the best interests of the child standard to deny the father the opportunity to develop a relationship is in fact making the "vague moral judgments about alternative lifestyles and parental fitness" that the Indiana Court of Appeals denied applying.[267] If the mother and father are married at the time of birth, even if the father is living apart from the mother and has done nothing to contribute to the pregnancy, he is the presumed father under the law.[268] If the parents are unmarried, then the father must take proactive steps to establish a parental relationship.[269] The law is making moral judgments about the ideal family

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Rebecca M. Ryan et al., *Longitudinal Patterns of Nonresident Fathers' Involvement: The Role of Resources and Relations*, 70 J. MARRIAGE & FAM. 962, 965 (2008) ("[S]ome mothers insists fathers pay formal or informal child support to gain access to the child, suggesting either that fathers' motivation to remain involved may drive financial investment or simply that fathers' ability and *willingness* to pay child support may determine his *ability* to be involved." (citation omitted)).

263. *See* Quilloin v. Walcott, 434 U.S. 246, 254 (1978).

264. *See* Interview with Master Comm'r Alicia Gooden, *supra* note 193 (noting that the mother is often the reason why everyone is in "this mess").

265. Berger et al., *supra* note 261, at 625 (noting a 2005 study found that about thirty-seven percent of births were to unmarried women, and "few unmarried parents will marry each other after their baby's birth").

266. *In re* Joseph, 416 N.E.2d 857, 861 (Ind. Ct. App. 1981) (quoting J. GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 6 (1973)).

267. *Id.*

268. *See* IND. CODE § 31-14-7-1 (2008); *see also* Michael H. v. Gerald D., 491 U.S. 110, 115 (1989).

269. Lehr v. Robertson, 463 U.S. 248, 261-62 (1983).

structure and is punishing those who do not fit.[270] People cannot have the liberty secured to them by the Fourteenth Amendment if the courts interpret the Constitution based on its view of the ideal family.[271]

A state may only interfere with a fundamental right if it is advancing a compelling state interest.[272] Few would deny that the state has a compelling interest in protecting children. If the father were abusing or neglecting his children, then the state would have a compelling interest in removing the children from the father's custody.[273] In most cases where the unmarried father loses his right to his children, the state has not shown that it is in the best interests of the child to terminate his rights.[274] The state assumes the father is unfit and deprives him of his children. In *Quilloin v. Walcott*, the U.S. Supreme Court found that state interference with a "natural family" without a showing of unfitness would violate the Due Process Clause.[275] Modern society no longer has a prototypical natural family model.[276] Continuing to use the justification that the biological father is not a part of the "protected family unit"[277] is a blatant refusal to consider social reality, and it is certainly not a sufficiently compelling state interest to justify denying a father the right to parent or to even know his child.[278]

## V. PROPOSED SOLUTIONS

Indiana must do more to protect father's rights. Indiana should balance the interests of everyone involved while staying within the mandates of Title IV-D. Due to the potentially harsh outcome that can result if another man voluntarily signs a paternity affidavit for a child that is not biologically his own, Indiana must

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270. *See generally* Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 496 (1992) (describing how the law "promotes social institutions" such as marriage and parenthood).

271. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (finding a statute prohibiting interracial marriage unconstitutional).

272. *In re Joseph*, 416 N.E.2d at 859.

273. *Id.* at 860.

274. His rights are terminated by another man's execution of the paternity affidavit or by his failure to learn of the pregnancy. *See infra* Parts III.B-C.

275. Quilloin v. Walcott, 434 U.S. 246, 255 (1978).

276. *See* Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Marking: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 259 (2009) (describing the "radically changing conceptions of family and of the relationships possible between children and parents").

277. Michael H. v. Gerald D., 491 U.S. 110, 124 (1989).

278. *See id.* at 156-57 (Brennan, J., dissenting) (noting the majority's opinion is surrounded by an atmosphere of "make-believe" and does not reflect social reality); Berger, *supra* note 276, at 259 ("Though family structure is undergoing 'a sea-change,' family law remains tethered to culturally embedded stories and symbols. While so bound, family law will fail to serve individual families and a society whose family structures diverge sharply by education, race, class, and income." (quoting WILLIAM SHAKESPEARE, THE TEMPEST act 1, sc. 2 (1623)).

put in place increased procedural safeguards to ensure the biological father has the opportunity to assume the rights if he should choose to do so. Emphasizing genetic testing prior to execution of a paternity affidavit, ensuring proper notice prior to signing, providing for dual fatherhood, and creating an enhanced putative father registry will help Indiana continue to hold men financially responsible for their children while allowing every member of the modern family's constitutional rights to survive.

### *A. Greater Emphasis on Genetic Testing in the Hospital and Increased Notice Prior to Signing*

Indiana's paternity statutes have established the state's preference for biological fathers to assume the responsibilities of their nonmarital children.[279] The U.S. Supreme Court has also suggested that the ideal situation for a nonmarital child is for her biological father to have an emotional relationship with her.[280] Indiana should make every effort to ensure that only the biological father signs the paternity affidavit.

Using modern technology, a father can definitively determine whether he is a child's biological father.[281] Mandatory genetic testing at birth would virtually eliminate later paternity suits and the threat of future paternity disestablishment.[282] However, Congress chose not to require mandatory genetic testing under Title IV-D to keep the paternity acknowledgement process simple, and states cannot require mandatory genetic testing under Title IV-D.[283] Nevertheless, hospital personnel can strongly encourage genetic testing prior to signing the paternity affidavit without compromising the goals of Title IV-D.[284]

Many fathers may feel reluctant to question their paternity in the hospital room with the new baby and its mother present. These fathers may feel that the mother and hospital personnel will assume that they are trying to shirk their responsibility if they request genetic testing.[285] Talking confidentially to the father outside of the hospital room and informing him of the advantages of genetic testing may ease some of his discomfort.

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279. *See supra* notes 168-71 and accompanying text.

280. *See supra* note 96 and accompanying text.

281. *See* Paternity Test, http://www.dnacenter.com/paternity/legal-testing.html (guaranteeing 99.99% probability of paternity for inclusions and 100% probability of exclusion) (last visited Mar. 1, 2009).

282. *See* Cacioppo, *supra* note 151, at 503.

283. *See id.* at 503-05.

284. *See id.* at 488 & n.58 (noting that the Office of Child Support Enforcement "strongly recommended" including "[a]n advisory to parents that they may wish to seek legal counsel or obtain a genetic test before signing").

285. *See* Rivera v. Minnich, 483 U.S. 574, 585 (1987) (Brennan, J., dissenting) (emphasizing that "the losing defendant in a paternity suit is subject to characterization by others as a father who sought to shirk responsibility for his actions"). Though a paternity suit and the execution of a paternity affidavit are procedurally distinct, the concerns for the father are similar.

Fathers currently receive minimal notice of the effect of signing the affidavit, beyond the fact that it is a legal document.[286] The affidavit itself does not disclose the sixty-day window for requesting a genetic test.[287] The key to rectifying the current procedure is to require full disclosure, promote consultation with an attorney prior to signing, and encourage genetic testing.

Prior to signing the paternity affidavit, the father must either request genetic testing or sign that he is waiving genetic testing prior to executing the affidavit. Such a procedure would not require genetic testing in contravention of federal requirements,[288] but would notify the father that genetic testing is available and recommended. The affidavit and the hospital personnel or attorney must notify the father of his right to request genetic testing within sixty days and the resulting waiver of that right outside of the sixty day period. Hospital personnel or an attorney must make the detailed effects of the document clear to him at the time of signing. Without full disclosure, his consent is not truly informed. The law should not bind a man for two decades based on a one page document that does not fully explain the ramifications of signing it.

### *B. Recognition of Dual Fatherhood*

The idea of one mother and one father is a remnant of the past.[289] The modern family has evolved into numerous varieties.[290] The modern reality is "[O]nly one-quarter of American households fit the marital family ideal of married parents with children."[291] Many children have had some kind of "social parent"[292] prior to reaching the age of majority.[293] The state should consequently recognize dual fatherhood in certain situations. Dual fatherhood might appear unworkable and unduly complicated. However, social reality reflects that modern families are complicated, and the law should strive to reflect modern reality.[294]

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286. *See supra* notes 231-42 and accompanying text.

287. *See supra* note 236 and accompanying text.

288. *See supra* notes 217-22 and accompanying text.

289. *See* Berger et al., *supra* note 261, at 625-26 (discussing the changing "family demography" within the last fifty years).

290. *See* Troxel v. Granville, 530 U.S. 57, 63-64 (2000) (noting the difficulty in describing the "average American family").

291. Berger, *supra* note 276, at 281.

292. *See* Berger et al., *supra*, note 261, at 625-26 (defining a social parent as "a married or cohabitating partner of a child's biological parent (usually mother) to whom the child is not biologically related").

293. *Id.* at 625 ("[E]stimates from the mid-1990s show that approximately one third of children in the United States will spend time living with a social parent during childhood[.]"). This figure is likely higher now due to the increased nonmarital birth rate and divorce rate. *See supra* note 7 and accompanying text.

294. *See* Kisthardt, *supra* note 12, at 599-600 (noting in the context of a step-parent adoption, "The law's refusal to afford parental-type rights to more than one 'father' sets up a situation in which 'rights' may be vindicated, but 'interests' are not necessarily accommodated and

Indiana already recognizes a form of dual paternity in some situations. In *Schaffer v. Schaffer*,[295] the Indiana Court of Appeals allowed visitation by the stepfather who was the named father on the birth certificate.[296] The mother and stepfather divorced, and the stepfather received visitation rights.[297] One year later, the biological father also received visitation rights and a child support order.[298] The appellate court allowed the visitation rights of both fathers, neither of whom were currently in a romantic relationship with the mother.[299]

Dual fatherhood is in the best interests of the child and the state. The child in *Quilloin v. Walcott* wanted his stepfather to adopt him, but he also wanted visitation with his biological father.[300] Dual paternity would have resolved this issue and protected the interests of both fathers and the child. The only danger is the conflict that may arise over child support obligations and visitation rights. Proper planning and a clear statement of each parent's rights will resolve any ambiguity as to parental rights.

Under a dual paternity scheme, the law would recognize a primary and a secondary father.[301] The primary father would be the dominant paternal figure in the child's life. The biological father should be the primary father if he asserts his rights early. Allowing the biological father to be the primary father reflects Indiana's preference for the biological father to establish his paternity.[302] It also conforms to the Supreme Court's holding in *Lehr v. Robertson*, whereby the biological father has a constitutionally recognized interest in his child only if he develops a relationship with the child.[303]

If the biological father has a genetic test performed at the hospital that establishes his paternity, and he signs the paternity affidavit, then he is unquestionably the primary father. If the father waives a genetic test at the hospital, the paternity affidavit should stipulate that he will be the primary father only if the biological father does not come forward within six months of the execution of the paternity affidavit. If the biological father comes forward after six months, then the biological father will be the secondary father. The legal father would remain the primary father despite his lack of biological connection. In this scenario, the best interests of the child demand recognition of the established social relationship over biology.

Regardless of when the biological father comes forward, he should have a cognizable legal interest in a relationship with the child, unless it is clearly not in

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relationships are not fostered.").

295. 884 N.E.2d 423 (Ind. Ct. App. 2008).

296. *Id.* at 424-25.

297. *Id.* at 424.

298. *Id.* at 425.

299. *Id.* at 425, 429.

300. Quilloin v. Walcott, 434 U.S. 246, 251 n.11 (1978).

301. This discussion presumes the mother has physical custody of the child. The legislature would need to address the parental rights if the primary father had physical custody of the child.

302. *In re* S.R.I., 602 N.E.2d 1014, 1016 (Ind. 1992).

303. Lehr v. Robertson, 463 U.S. 248, 262 (1983).

the child's best interest to grant visitation. The determination of whether it is in the best interests for the child to have a legal relationship with the biological father must involve similar considerations as any parental rights termination proceeding.[304] The biological father will therefore always have a protected interest in the child at any time, unless he is abusive or neglectful.[305] His failure to come forward immediately after the birth will not result in a blanket denial of a relationship with the child.

For dual paternity to work effectively, the court must carefully assign the rights of each parent involved, particularly in regard to child support, parenting time, and decision-making regarding the child's life. The proposed scheme is only one possible breakdown.[306]

*1. Child Support.*—If there is no secondary father, the primary father would pay one hundred percent of the child support. If there are two legal fathers, the primary father would pay seventy-five percent of the child support obligation.[307] A non-residential secondary father would pay the remaining twenty-five percent. If the secondary father resides with the mother, then his gross income would factor into the mother's gross income for purposes of Indiana's child support guidelines rather than forcing him to pay a given amount to the mother every week.[308] The state should base child support payments on the percentage of the total parental bundle that the father receives, including the right to make decisions regarding his child's life. If the father has joint custody and is an equal decision-maker regarding his child, he should pay more child support than a secondary father who receives only visitation.

*2. Parenting Time.*—The primary father should receive more parenting time with the child than a non-residential secondary father. If the secondary father resides with the mother, then he will not receive any rights to parenting time beyond what the mother receives. If the secondary father does not reside with the mother, then he will only get a portion of what the mother receives. The primary father would have parenting time on every other weekend and for six weeks during the summer.[309] The mother would therefore have custody for the remaining time. A non-residential secondary father, presumably a legal father

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304. *See* Bester v. Lake County Office of Family & Children, 839 N.E.2d 143, 147-48 (Ind. 2005) (describing the requisite showing prior to termination of parental rights).

305. *See id.*

306. This Note does not address all possible legal issues that may arise with two legal fathers, such as intestate distribution and wrongful death actions. State statutes can easily resolve these issues. The purpose of this section is to illustrate that dual paternity is a workable solution to a complicated problem.

307. This Note refers to child support as court-mandated child support. This Note presumes that child-related expenditures by the mother are voluntary and therefore do not come into the equation.

308. IND. CHILD SUPPORT GUIDELINES, IND. R. OF CT. 1-6, *available at* http://www.in.gov/judiciary/rules/child_support.

309. The state could adjust this if the primary father and mother do not live close to one another. The alternative could be one weekend a month and eight weeks in the summer.

who is now divorced from the mother, would get one weekend a month and three weeks during the summer. The secondary father's share must not decrease the primary father's share.

*3. Decisionmaking*.—The mother and the primary father make all decisions regarding the child's welfare, including religion, education, and health decisions. The secondary father would not get a vote.

This scenario is more equitable than the current law. Under Indiana's current paternity system, a biological father will never be a legally recognized father unless he both knows about the pregnancy and knows how to exert his rights.[310] If another man executes a paternity affidavit without a genetic test, the biological father has no rights unless the now legal father decides to request a genetic test within sixty days of the paternity affidavit execution.[311] Even if the biological father registers with the current putative father registry—which most fathers likely have no idea exists[312]—he will still not have the right to challenge the paternity affidavit of another man.[313] The biological father therefore may have only a seventy-two hour window to exert his right to parent his child.[314] If the biological father never discovers the pregnancy, he will never have the opportunity to develop the relationship that the Court in *Lehr* demanded.[315] Therefore, through no fault of his own, a father will never know his child. Worse still, an innocent child will never know her father. The justification for this deprivation is that the biological mother and father were no longer intimately involved. Father and child lose out due to circumstances beyond their control.

This system also serves the interests of Title IV-D and the state. Title IV-D's goal is to receive the maximum amount of child support to reduce the welfare toll on the state and federal budgets.[316] With two possible fathers to contribute financially to the child's development, this system doubles the likelihood the child will receive the full child support obligation, possibly more. Two fathers also would give the mother more social resources to aid in the rearing of the child. Having more parents means more extended family to help baby-sit and provide emotional support to the mother.

Title IV-D also demands a "simple civil process" for the voluntary acknowledgement of paternity.[317] If a man wants to be the child's father, then the state may reasonably allow him to do so. This system allows the legal father to acknowledge paternity under a simple civil process without violating the biological father's interests in establishing a relationship with his child and his potential right to parent in the process.

The state may desire to have the traditional family structure composed of one

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310. *See supra* notes 188-96 and accompanying text.
311. *See supra* notes 188-95 and accompanying text.
312. *See* Lehr v. Robertson, 463 U.S. 248, 264 (1983).
313. *See supra* notes 188-96 and accompanying text.
314. *See* IND. CODE § 16-37-2-2.1(c)(1) (2008).
315. *See Lehr*, 463 U.S. at 262.
316. *See* 42 U.S.C. §§ 651, 666(a) (2006).
317. *Id.* § 666(a)(5)(C)(i).

father and one mother, but the state's most important goal should be to provide the child with the most resources possible. Shuffling the child between homes is not ideal, but giving the child the greatest opportunities possible ensures the child will not suffer the "consequences of illegitimacy," such as poverty.[318] Few children will suffer from too much love and attention. As Indiana has adopted the best interests of the child approach to most of its family determinations, this approach certainly makes more sense than the current system.[319] The current system protects the mother and the state more than the child and fathers. The proposed system balances the interests of everyone involved, while protecting the best interests of the child to the maximum extent possible. It also does this without trampling the rights of the fathers.

### *C. Enhanced Putative Father Registries*

When a mother and father knowingly complete a false paternity affidavit, they circumvent the adoption proceedings that the law would otherwise require to assume legal parenthood.[320] Under Indiana's adoption laws, if the father has filed with the putative father registry, he will receive notice of the adoption.[321] Registry provides notice so that he may intervene in the adoption proceeding and present his objections.[322] No similar provision for paternity affidavits exists, even if the father knew of the pregnancy and was able to file with the putative father registry.

The imperfections of the current putative father registry usually prohibit the registry from protecting the biological father's rights. These flaws usually result from the biological father's lack of information. He often does not know of the pregnancy and will likely not know of the registry unless he has consulted with an attorney. Failure to register results in the biological father's implied consent to proceed with the adoption.[323] Lack of knowledge is no defense.[324]

Indiana places the burden of discovery of the pregnancy on the biological

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318. Berger, *supra* note 276, at 281.

319. *See, e.g.*, *In re* Paternity of H.H., 879 N.E.2d 1175, 1178 (Ind. Ct. App. 2008) (applying the best interests of the child standard).

320. A woman who knowingly provides a false name as the biological father commits a Class A misdemeanor. IND. CODE § 16-37-2-2.1(f) (2008). There is no equivalent provision for a man who completes a false paternity affidavit, likely due to the difficulty in proving actual knowledge of the man.

321. *Id.* § 31-19-5-4.

322. *See* Kimberly Barton, Comment, *Who's Your Daddy?: State Adoption Statutes and the Unknown Biological Father*, 32 CAP. U. L. REV. 113, 128 (2003) (noting the purpose of putative father registries is to protect the father's interest by giving him notice, the mother's privacy, and the child's and adoptive parent's interest in a "secure adoption").

323. IND. CODE § 31-19-9-15.

324. *See id.* § 31-19-9-16 (establishing that a putative father may not contest the validity of his implied consent).

father.[325] The mother usually has no duty to reveal her pregnancy to any potential fathers.[326] The assumption behind this is that a father who does not care enough to discover whether a child resulted from his sexual encounter with the mother will likely be an unfit father. The state labels the biological father a deadbeat dad because of his failure to call all former sexual partners to inquire whether a pregnancy resulted. This is an unfair assumption, one that Indiana should certainly not endorse. It is unrealistic to assume that sexual partners who are no longer intimately involved will contact each other to inquire whether a pregnancy has resulted. Failure to do something that few people actually do should not constitute implied abandonment of his child.

If Indiana continues to place the burden of discovery on the biological father, then it must work more diligently to protect the father's rights. The legislature should adopt an expanded version of the putative father registry. This expanded model will give the putative father notice of adoption proceedings or execution of paternity affidavits related to a child born to the mother. The registration process must be simple, such as registry via phone or by the submission of an online document. To register as a putative father, the father would need to have the mother's first and last name in addition to at least one unique identifier, such as middle initial, birth date, or social security number. The putative father may provide as much information as possible to ensure proper notice. The state would link the registry to the health department database of all live births. If the mother has a live birth within twelve months of the registration, the putative father will receive notice, allowing him to inquire further if he desires to pursue legal paternity. The registration will expire at twelve months from the date of the registration. If the mother and putative father have another sexual encounter in that time period, he will have the option to renew his registration. Upon a live birth by the mother, the hospital or health department will strongly encourage a genetic test by the putative father. If more than one putative father comes forward, the fathers will have to submit to a genetic test before either can complete the paternity affidavit. The registration will also include a time restraint to respond to the notice provided. Thirty days would strike the fairest balance between the state's interest in prompt adoption and expeditious paternity determinations of nonmarital children as well as the nonmarital father's right to pursue a relationship with his child.

The key to an enhanced putative registry's success is advertisement. Fathers must know that they must take affirmative steps to ensure legal rights to their children and that filing with the registry is the easiest means to guarantee the biological father will have access to his child. The state must advertise the registry as much as possible. Reasonably accessible means of advertisement would include posting information online, at high schools and universities, at fatherhood initiative centers, and in government facilities.

Advertisement will necessarily expend state resources. However, the cost of printing flyers or running television or radio advertisements is minuscule

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325. *See In re* Paternity of Baby Doe, 734 N.E.2d 281, 285 (Ind. Ct. App. 2000).

326. *See id.*

compared to the cost of litigation that results when the biological father does not know his rights. The damage to the child when she must endure endless paternity suits is immeasurable.[327] Advertisement may also identify fathers who would not have otherwise known how to come forward, thereby resulting in more child support going to the child. This would certainly further the goals of Title IV-D. The importance of the putative father registry must become public knowledge. Only then will putative father registries actually protect fathers' rights, rather than punishing the fathers for their inability to maneuver a system they did not know existed.

This proposed solution does not ignore the reality that some fathers do not want to assume the responsibilities of fatherhood. However, the majority of fathers will attempt to remain involved in their children's lives,[328] and the behavior of a few should not justify depriving the fathers who want to be involved the opportunity to do so. Indiana must still give them the chance to make that decision. The biological father must have the right of first refusal before any other man may take his place.

## CONCLUSION

Indiana cannot change existing Supreme Court precedent, and Title IV-D is likely here for the foreseeable future. However, Indiana can change the unjust, and often unconstitutional, treatment of the unwed father. The Indiana legislature must adopt the dual paternity structure as well as the enhanced, heavily advertised putative father registry to protect nonmarital father's constitutionally protected rights. Additionally, hospital personnel and the health department must promote genetic testing and the right to an attorney prior to the execution of a paternity affidavit. The paternity affidavits must disclose the sixty-day deadline to request a genetic test and provide a full explanation of the legal ramifications of signing the document. If the father wants to sign the affidavit in the hospital, an independent third party should consult with him in a neutral environment away from the mother and child.

If Indiana adopts all of these suggestions, fewer fathers will suffer the consequences of ignorance of the law. Fewer children will have their biological heritage stripped from them. It is easy to say that fathers should know better, and if they really wanted to be involved in a potential pregnancy, they would have stayed connected to the mother. It is easy to stereotype the deadbeat dad and assume that all fathers who do not reside with the mother do not care about their children. That could not be farther from the truth. The law itself drives a wedge into one of the most precious bonds a person can ever experience. This must not

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327. *See* David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 137 (2006).

328. *See* Natasha J. Cabrera et al., *Explaining the Long Reach of Fathers' Prenatal Involvement on Later Paternal Engagement*, 70 J. MARRIAGE & FAM. 1094, 1096 (2008) (noting that "[m]any men who become fathers commit to 'being there' for their children and vow to make significant changes" and describing several variables that often impact the father's involvement).

continue.

When the Indiana legislature next convenes to discuss child support enforcement with the "Let's get those deadbeats" vigor, each legislator should consider what it would feel like to know you have a child that you never even had the chance to get know. Someone else made the choice for you. Someone else decided you were not good enough to be a parent. Perhaps then, Indiana's perspective would change. No one deserves less than a chance to get to know their children or their fathers.