Dads Step Up, but Law Knocks Them Down: An Assessment of the Virginia Code, Fourteenth Amendment Rights, and Putative Fathers

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Introduction

An expectant father nervously waits for a phone call that will drastically alter his life. But the call does not come. This was John Wyatt's reality on February 10, 2009.[1] His girlfriend gave birth, turned off her phone, and gave their child to a family in Utah.[2] Mr. Wyatt fought a legal battle spanning the continental United States, but ultimately did not receive custody of his daughter.[3] His parental rights were not protected simply because he did not complete paperwork required by the Commonwealth of Virginia.[4]

Many unwed fathers face the same challenges as John because their rights are not protected in the Constitution or by some states.[5] The Supreme Court has held that parental rights stem from the active involvement of the parent in the child's life.[6] However, this holding does not address the situations when a father is either unaware of his partner's pregnancy or when his partner decides to place the child up for adoption. Because the Court has held that the right to parent is derived from the Fourteenth Amendment, parents theoretically should not be deprived of their right to parent their child without receiving the due process of law guaranteed to them.[7] However, this

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1 *See* Jerry Markon, *'Baby Emma' case puts state adoption laws between father, child*, Wash. Post (Apr. 14, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/04/13/AR2010041302445.html.

2 *See id.*

3 *Id.*

4 *Id.*

5 *See id.*

6 *See* Lehr v. Robertson, 463 U.S. 248, 262 (1983).

7 Troxel v. Granville, 530 U.S. 57, 95 (2000) (Kennedy, J., dissenting) (citing Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923)).

constitutional protection is practically non-existent.[8] In some states, like Virginia, when an unwed mother wishes to put a child up for adoption, the father is only notified if he places his name on the Virginia Birth Father Registry.[9] If his name is not on the registry, his right to parent the child or contest the adoption is effectively waived.[10] No trial takes place; no court makes a ruling; no effective due process occurs, yet his right is revoked.[11]

This Comment contends that a new standard should be adopted in Virginia that equally supports parental rights of both unwed mothers and fathers. This Comment will first discuss the evolution of paternal rights in the United States. Next, it will analyze the various theories pertaining to the nature of parental rights, the necessity of co-parenting consent, and the lack of justice present in the current Virginia statutory scheme. Finally, this Comment will propose a new standard that the Virginia Assembly should adopt, allowing putative fathers[12] to have a say in their children's adoptions and potentially have custody of the children they otherwise would not have the opportunity to parent.

BACKGROUND

I. *LEHR V. ROBERTSON*

The landmark United States Supreme Court decision in *Lehr v. Robertson* contributed to the decline of paternal rights among the states.[13] In *Lehr*, a child, Jessica, was born out of wedlock.[14] Her mother married another man eight months after Jessica's birth.[15] Jes-

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[8] *See, e.g., Lehr*, 463 U.S. at 261 ("[T]he mere existence of a biological link does not merit . . . constitutional protection.").

[9] VA. CODE ANN. § 63.2-1250(B)-(C) (2019).

[10] *Id.*

[11] *See id.*

[12] The Academy of Adoption and Assisted Reproduction Attorneys defines a putative father as "a man whose legal relationship to a child has not been established, but claims to be the father or who is alleged to be the father of a child who is born to a woman to whom he is not married at the time of the child's birth." *Putative Father Registries*, ACAD. OF ADOPTION & ASSISTED REPROD. ATT'YS, https://adoptionart.org/adoption/birth-expectant-parents/putative-father-registries/ (last visited Nov. 19, 2019).

[13] *See* Shirley Darby Howell, *Adoption: When Psychology and Law Collide*, 28 HAMLINE L. REV. 29, 51-53 (2005).

[14] Lehr v. Robertson, 463 U.S. 248, 250 (1983).

[15] *Id.*

sica's mother and stepfather filed a petition in New York to adopt Jessica when she was two years old.[16] However, Jessica's biological father, Johnathan Lehr, was not given advance notice of the adoption proceedings.[17] He contested the adoption, arguing that the court's order was invalid because he was not given advance notice.[18]

Similar to Virginia, New York has a putative father registry where a man must file his intent to claim paternity of a child born out of wedlock.[19] However, Lehr did not enter his name in the putative father registry.[20] Although he lived with Jessica's biological mother prior to the birth and visited them both in the hospital following the birth, Lehr was not listed on Jessica's birth certificate.[21] Consequently, the New York court denied Lehr's request for visitation, holding that his paternity rights were severed when the adoption order was entered.[22]

Lehr appealed to the Supreme Court of the United States, where he argued that New York's statutory framework was unconstitutional for two reasons.[23] First, a putative father's relationship with his child cannot be destroyed without due process.[24] Second, Lehr had a constitutional right stemming from the Equal Protection Clause to receive notice of Jessica's adoption and should have been heard by the court prior to being deprived of that right.[25] After assessing his claims, the Supreme Court determined that a putative father's right to parent his child depends upon the father actively asserting that right.[26] Therefore, if a putative father fails to establish some measure of relationship with his child, the Constitution will not compel a state to protect his right as a parent.[27] As a result, Lehr was not granted visitation rights.[28]

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16 *Id.*

17 *Id.*

18 *Id.*

19 VA. CODE. ANN. § 63.2-1249(A) (2019); *Lehr*, 463 U.S. at 250-51.

20 Lehr v. Robertson, 463 U.S. 248, 251 (1983).

21 *Id.* at 252.

22 *Id.* at 253.

23 *Id.* at 255.

24 *Id.*

25 *Id.*

26 *See id.* at 265.

27 Lehr v. Robertson, 463 U.S. 248, 256 (1983).

28 *See id.* at 267.

The Court's holding in *Lehr* left a precedent indicating that equal protection does not apply to all parties in cases involving parental rights, particularly when the parents are not married.[29] In discussing its rationale, the Court stated: "[t]he intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection *in appropriate cases*."[30] By specifically highlighting "appropriate cases," the Court implied that the Constitution does not provide equal protection of *all* parental parties, and instead focuses on only protecting the rights of parties in certain cases. The Court went on to explain the role of marriage in society and how it plays a crucial role in "defining . . . legal entitlements."[31] The Court asserted that marriage is the "certain case" in which constitutional rights are protected.[32]

Although this particular case is a landmark decision for its assertion that the father's relationship with the child, not biology, determines paternal rights, the groundwork for this revolutionary holding had been laid over the course of several years.[33] A series of cases from the previous decade gradually evolved paternal rights in the United States.[34]

II. EVOLUTION OF PATERNAL RIGHTS

Two major cases that provided the foundation for the *Lehr* decision are *Stanley v. Illinois*[35] and *Caban v. Mohammed*.[36] Prior to the *Stanley* decision, putative fathers in Illinois did not have legal rights to the care and custody of their children.[37] At that time, if an unwed mother passed away, her children automatically became wards of the state regardless of any relationship the children may have had with

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29 *See id.* at 267-68.

30 *Id.* (emphasis added).

31 *Id.* at 257.

32 *See id.*

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

34 *Id.*

35 Stanley v. Illinois, 405 U.S. 645 (1972).

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

37 Erin Green, Note, *Unwed Father's Rights In Adoption: The Virginia Code vs. The Uniform Adoption Act*, 11 WM. & MARY J. WOMEN & L. 267, 269 (2005).

their putative father.[38] Essentially, the Illinois statute presumed unwed fathers unfit to parent their children.[39] In *Stanley*, the parents of three children lived together "intermittently" for eighteen years, but never married.[40] The children's mother passed away and as a result, their father, Peter Stanley, lost his children.[41] Stanley filed suit to regain custody, "claiming that he had never been shown to be an unfit parent," and such a showing was required before an unwed father could be deprived custody of his children.[42]

The Supreme Court ultimately held that putative fathers are entitled to at least a hearing on their fitness to parent before the children become wards of the state.[43] This holding provided putative fathers with some protection of their parental rights; however, it still did not place unwed fathers and unwed mothers on equal standing.[44]

Seven years after *Stanley*, the Supreme Court held in *Caban v. Mohammed* that unwed fathers and mothers have equal standing regarding their fitness to parent their children.[45] Prior to *Caban*, a New York statute allowed unwed mothers to halt adoption proceedings simply by withholding their consent, while unwed fathers could not halt adoption proceedings regardless of the level of relationship established with their children.[46]

The Supreme Court determined that there was no important government interest substantially related to the New York statute; thus, it was struck down as violating the equal protection guaranteed to both parents.[47] Further, the Court noted that a child's relationship with his father can be equally significant as the relationship with his mother.[48] This decision placed unwed parents in the same position regarding their rights as parents of their children.[49] Consequently, a father

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38 *See Stanley*, 405 U.S. at 646; *see also* Green, *supra* note 37, at 269.

39 *Stanley*, 405 U.S. at 647.

40 *Id.* at 646.

41 *Id.*

42 Stanley v. Illinois, 405 U.S. 645, 646 (1972); Green, *supra* note 37, at 269.

43 *Stanley*, 405 U.S. at 658; Green, *supra* note 37, at 269.

44 Green, s*upra* note 37, at 270*; see also Stanley*, 405 U.S. at 651.

45 Caban v. Mohammed, 441 U.S. 380, 394 (1979); Green, *supra* note 37, at 270.

46 *Caban*, 441 U.S. at 385; Green, *supra* note 37, at 270.

47 *Caban*, 441 U.S. at 389; Green, *supra* note 37, at 270.

48 *Caban*, 441 U.S. at 389; Green, *supra* note 37, at 270.

49 *Caban*, 441 U.S. at 389, 394 ("[M]aternal and paternal roles are not invariably different in importance."); Green, *supra* note 37, at 270.

would now be presumed fit to parent his child, and any potential unfitness would need to be proven before his child could be taken away.[50]

Both *Stanley* and *Caban* laid the foundation for the *Lehr* decision. In *Stanley*, the Court held that putative fathers are not automatically deemed unfit to parent their children. Meanwhile, the Court in *Caban* held that both fathers and mothers should have equal opportunity to halt adoption proceedings under the Equal Protection Clause. These holdings laid the groundwork for *Lehr*'s holding that a relationship must exist between parent and child to grant parental rights.[51] However, these collective holdings also led to questions about how to determine the existence of a relationship.

III. THEORIES OF PARENTAL RIGHTS

After the series of Supreme Court decisions culminating in *Lehr*, multiple academic theories developed discussing various potential standards to determine parental rights. These theories include labor-with-consent, best interest of the child, and liberty interests.

A. *Labor-with-Consent*

One prominent theory arising from the *Lehr* decision is the labor-with-consent theory, coined by E. Gary Spitko.[52] Spitko theorizes that a mother is the "initial constitutional parent," because giving birth to the child sufficiently constitutes her labor in her relationship with the child.[53] As the initial constitutional parent, the birth mother enjoys the right to determine the person with whom she will co-parent the child, if she desires to co-parent at all.[54] He further asserts that the Constitution will protect a putative father's right to parent after he "labors" to develop a relationship with his child.[55] However, the

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[50] *Caban*, 441 U.S. at 394; Green, *supra* note 37, at 270.

[51] Lehr v. Robertson, 463 U.S. 248, 263-68 (1983).

[52] E. Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-Parenting of Her Child*, 48 ARIZ. L. REV. 97, 99 (2006).

[53] *Id.* at 104.

[54] *Id.*

[55] *Id.*; *see also* Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U. L. REV. 645, 661 (2014) ("Spitko . . . proposes collapsing biological relationships into functional theories by recognizing the parentage of biological fathers only if the biological mother consents to the relationship.") (internal quotations omitted).

father-child relationship must develop prior to the birth mother's decision to withdraw consent to co-parent the child with the putative father.[56] Thus, according to Spitko, the birth mother has the ultimate decision regarding parentage, regardless of the fitness or unfitness of the putative father.[57]

Spitko asserts that there are two prerequisites or elements necessary for constitutionally protected parentage, neither of them biologically determined.[58] First, there must be labor in the form of either literal labor by the mother in childbirth or relationship labor by the father.[59] Second, there must be consent from any previously determined, constitutionally-protected parent.[60] Biological connection between the parent and child only matters for the mother.[61] Consensual sexual intimacy resulting in conception can be a source of consent for parenting; therefore, the circumstances surrounding conception should be considered when analyzing the paternal right to co-parent.[62] Additionally, if the biological parents have been in a long-term romantic relationship prior to conception, the consent to sexual intimacy supports a relatively strong presumption of consent to co-parent.[63] However, a one night stand or a casual sexual encounter does not create a presumption of consent to co-parent.[64]

In adoption proceedings, attorneys and individuals relying on the labor-with-consent theory assert that if a putative father has not "*performed* sufficient paternal labor and done so *at the invitation* (perhaps implicit) *of the mother* to act as co-parent," he has no right to block the placement of his child for adoption.[65] Ultimately, this theory allows a mother to make the decision of adoption prior to the birth of the child, communicate her decision to the biological father, and the father cannot change the outcome of that decision.[66] By contrast, the birth mother's lack of consent is dispositive over any constitutionally

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56 Spitko, *supra* note 52, at 99.

57 *See id.*

58 *See id.*

59 *Id.*

60 *Id.* at 104.

61 *Id.* at 104-05 ("The constitutional significance of biological paternity is that it serves as a proxy for consent of the biological mother to allow the biological father to co-parent her child.").

62 Spitko, *supra* note 52, at 105.

63 *Id.*

64 *Id.*

65 *Id.* at 124 (emphasis in the original).

66 *Id.* at 124.

protected parental right of the biological father.[67] Furthermore, the birth mother could consent to the father's parentage but later retract her consent.[68] This causes the father to lose his ability to prevent adoption proceedings despite any previous labor on his part to support the mother and establish a relationship with his child.[69] Although this theory could allow for fewer legal battles regarding adoption placements, it leaves the putative father's parental right entirely vulnerable to the will of the birth mother.[70]

B. *Best Interest of the Child*

The "best interest of the child" theory is another parental rights theory which centers on the child's rights rather than those of the parents.[71] Although this theory focuses on the child, its execution involves an increased level of court intervention.[72] In attempting to combat the dichotomy between parental rights and a child's best interest, Annette R. Appell and Bruce A. Boyer write, "When a parent's care falls beneath minimally adequate standards or jeopardizes the well-being of the child, deference to the family must yield to the state's interest in protecting its most vulnerable citizens."[73] The courts have immense power to limit parental rights when deciding what is in the best interest of a child that it barely knows.[74] Although focusing on the well-being of the child seems suitable in theory, it is chaotic in practice.[75] Often times, when a birth mother wants to place her child up for adoption, the child is typically placed with a potential adoptive family until the biological father has relinquished his parental rights or the court finds him unfit to parent.[76] In such situations, legal proceedings are lengthy and could last years.[77] During that time, the child lives with her potential adoptive family and becomes attached to

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67 *Id.*

68 Spitko, *supra* note 52, at 125.

69 *Id.*

70 *See id.* at 124.

71 *See* Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63, 65-66 (1995).

72 *See id.* at 64.

73 *Id.*

74 *Id.*

75 *See id.* at 65.

76 *Id.* at 65.

77 *See* Appell & Boyer, *supra* note 71, at nn. 6-7.

them.[78] Regardless of the end result of the proceedings, the best interests of the child are difficult to determine. The child is either removed from the family the child has come to know and love, or surrendered to the parentage of those she has no biological connection with when there is a birth parent willing to raise her.[79]

This theory is "exceptionally vulnerable to arbitrary decision making."[80] One major flaw is that this theory does not have any jurisdictional or adjudicatory standards, nor does it guarantee the adopted child will benefit from the court's intervention.[81] Moreover, it is unclear what limits could be placed on the court, if any, when determining what is in the child's best interests or whether there is a threshold the court must reach to intervene in the first place.[82] It also fails to provide a method for weighing the changing interests of a child, as a child's biological and psychological attachments become more significant as they age.[83]

Appell and Boyer assert that a different approach to the "best interest of the child" theory dissolves the aforementioned dichotomy between a parent's rights and the child's best interests and allows courts to be less involved with the ultimate decision of childrearing.[84] This different approach shifts the burden of determining what is in the best interest of the child from the court to the parents, so long as the parents are both willing to make such a determination.[85]

C. *Liberty Interest*

A third theory asserted for determining parental rights is the liberty interest of the putative father, which is the theory Johnathan Lehr asserted in *Lehr v. Robertson*.[86] While this theory was extensively narrowed by the Supreme Court, it is still prominently used.[87] A liberty interest is an interest which is protected by the Constitution,

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78 *Id.*

79 *See generally id.* at 65-66.

80 *Id.* at 66.

81 *Id.* at 77.

82 *Id.* ("[T]here would be essentially no limits to court involvement with children.").

83 Appell & Boyer, *supra* note 71, at 80-81.

84 *See id.* at 66.

85 *Id.*

86 *See* Lehr v. Robertson, 463 U.S. 248, 255 (1983).

87 *See id.* at 267-68.

although is it not explicitly enumerated in the Constitution.[88] The interest of parents pertaining to the control, care, and custody of their children is one of the fundamental liberty interests the Supreme Court recognizes.[89] Other liberty interests include the right to raise and nurture children, establish a home, and control a child's education.[90] It follows that a putative father would have a liberty interest in parenting his child.[91]

The liberty interest theory is derived from the Fourteenth Amendment protections to life, *liberty*, and property.[92] Prior to *Lehr*, the Supreme Court acknowledged that a father had a liberty interest in parenting his children.[93] However, there was no existing standard dictating what a putative father must do to protect this liberty interest, nor was there a distinctive standard between substantive and procedural due process protections.[94] Ultimately, in *Lehr*, the Court held that Lehr had a minimal liberty interest in parenting his child and denied him the ability to do so.[95] Justice White's dissent, however, asserted that a liberty interest arises directly from the biological connection between the parent and child.[96] Justice White further stated that the majority's interpretation created a subjective and uncertain precedent.[97] Essentially, the majority's decision in *Lehr* burdens a putative father with proving his liberty interest in parenting his child before the state is required to provide him with a notice of an adoption proceeding.[98]

The liberty interest theory likely affords putative fathers with the most protections. However, Virginia's statutory framework does not reflect this theory.

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88 *See id.* at 256.

89 Troxel v. Granville, 530 U.S. 57, 65 (2000).

90 *Id.* at 65-66.

91 *See id*. at 65; *Lehr,* 463 U.S. at 255.

92 U.S. CONST. amend. XIV, § 1; Jannis E. Goodnow, *Lehr v. Robertson: Procedural Due Process and Putative Fathers' Rights*, 33 DEPAUL L. REV. 393, 394 (1984).

93 Lehr v. Robertson, 463 U.S. 248, 270 (1983) (White, J., dissenting).

94 Goodnow, *supra* note 92, at 401.

95 *Id.* at 403.

96 *Id.* at 406; Lehr v. Robertson, 463 U.S. 248, 272 (1983) (White, J., dissenting).

97 Goodnow, *supra* note 92, at 407.

98 *Id.*

IV. VIRGINIA'S STATUTORY FRAMEWORK

The United States Constitution, especially the Fourteenth Amendment, provides protections for fundamental rights. The Fourteenth Amendment states, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[99] All state statutes must respect this constitutional framework, including parental rights statutes.

Virginia established a putative father registry under Virginia Code § 63.2-1249(A).[100] If a putative father wishes to be notified of any adoption proceedings or parental rights termination proceedings regarding his child, he must place his name on the putative father registry either before the child is born or within ten days after the child's birth.[101] A man who does not register will not be prejudiced by his lack of registration if paternity has already been established through genetic tests, sworn statements by both parents, or other similar methods, or he commences paternity proceedings before a petition to adopt is filed.[102]

A man who does not place his name on the putative father registry or establishes paternity in one of the above-listed methods waives any right to withhold consent to adoption proceedings.[103] The statute provides for a narrow exception to this waiver. If the birth mother misleads the putative father to believe that she terminated her pregnancy, miscarried, or had a stillbirth when, in fact, the child is alive, the putative father has ten days from the time he learns the truth to place his name on the putative father registry.[104]

The Virginia Department of Social Services is not required to locate and inform the birth mother if or when the father places his name on the registry.[105] However, if the father provides an address for the mother in his registration, the birth mother will receive a copy of the notice.[106] Essentially, the Commonwealth of Virginia's position

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99 U.S. CONST. amend. XIV, § 1.

100 *See* VA. CODE. ANN. § 63.2-1249(A) (2019) ("A Virginia Birth Father Registry is hereby established in the Department of Social Services.").

101 VA. CODE ANN. § 63.2-1250(A) (2019).

102 VA. CODE ANN. § 63.2-1250(B) (2019).

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

104 *Id.*

105 VA. CODE ANN. § 63.2-1251(A) (2019).

106 *Id.*

is that there is no excuse for a putative father to be unaware of his statutory requirements, as the Department of Social Services must distribute pamphlets informing fathers of the registry.[107] Such pamphlets are made available at all offices of the Virginia Department of Health, as well as local social services offices. Additionally, the Virginia Department of Social Services provides the pamphlets to hospitals, libraries, medical clinics, and schools upon request.[108]

The passage of the putative father registry statute resulted in many cases where putative fathers attempted to adjudicate their rights.

V. VIRGINIA CASE LAW

A. Chollette v. Keeling

In 2015, the Virginia Court of Appeals upheld the Commonwealth's putative father registry statute.[109] In *Chollette v. Keeling*, the putative father, Orel Jordan Chollette, wished to block the adoption of his son by the adoptive parents, Robert and Kristin Keeling.[110] Months before the child was born, the birth mother had her attorney mail Chollette information about the putative father registry and a notice of adoption proceedings for their child.[111] Despite Chollette providing the birth mother with his address over the phone, the information was returned to the sender as "Attempted-Not-Known."[112] Ten days after the child was born, the court transferred legal custody to his adoptive parents.[113] The Juvenile and Domestic Relations Court determined that Chollette's consent to the adoption was not required by statute.[114]

After the court entered the final order of adoption, Chollette challenged the decision.[115] The Court of Appeals reasoned that a

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107 VA. CODE ANN. § 63.2-1253(B) (2019).

108 *Id.*

109 Chollette v. Keeling, No. 0018-15-4, 2015 Va. App. LEXIS 279, at *6 (Va. Ct. App. Oct. 6, 2015).

110 *Id.* at *2.

111 *Id.*

112 *Id.*

113 *Id.*

114 *Id.* at *3.

115 Chollette v. Keeling, No. 0018-15-4, 2015 Va. App. LEXIS 279, at *3 (Va. Ct. App. Oct. 6, 2015).

putative father has standing in adoption proceedings only when: (1) the parents concede paternity, (2) paternity is adjudicated, (3) the putative father is the presumptive father, or (4) the putative father is registered.[116] Chollette did not put his name on the putative father registry within ten days of his son's birth.[117] The court was not persuaded that Chollette did not receive the registry information mailed to him by the birth mother's attorney.[118] Ultimately, the Court of Appeals affirmed the adoption proceeding, denying Chollette the ability to parent his son, simply because he did not place his name on a list.[119]

B. Wyatt v. McDermott

In *Wyatt v. McDermott*, John Wyatt conceived a child with his long-term girlfriend, Colleen Fahland.[120] Wyatt and Fahland planned to raise the child together, and Wyatt attended Fahland's doctors' appointments.[121] While Wyatt was aware that Fahland's parents wanted her to speak to an adoption attorney, Fahland assured him that their family of three would remain intact.[122]

Despite her reassurance, Fahland met with the adoption attorney her parents preferred, and the attorney told Fahland to fraudulently state on her paperwork that she did not know Wyatt's address.[123] The attorney further encouraged Fahland to keep Wyatt "in the dark."[124] One week before the child was born, and after a Utah adoption agency was enlisted, Fahland notified Wyatt that she was considering adoption.[125] Fahland did not inform Wyatt when she went into labor or when she gave birth to the child.[126] After the birth, Fahland signed paperwork stating that Wyatt was the father and that she had informed him of her desire to work with the Utah adoption agency.[127]

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116 *Id.* at *4.

117 *Id.* at *6.

118 *See id.* ("[T]he statute specifically states that mailing, not receipt, triggers the ten-day deadline to register, nor does it impose any receipt requirements.").

119 *See id.*

120 Wyatt v. McDermott, 725 S.E.2d 555, 556 (Va. 2012).

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.* at 557.

125 *Id.*

126 Wyatt v. McDermott, 725 S.E.2d 555, 557 (Va. 2012).

127 *Id.*

Fahland continued to state that she did not know Wyatt's address.[128] A lengthy and intense legal battle for custody of the child ensued in both Virginia and Utah courts.[129]

Part of this legal battle consisted of a lawsuit in Virginia, in which Wyatt filed a claim against Fahland's attorney and his legal team for tortious interference with parental rights.[130] Prior to this suit, it was unclear if Virginia recognized such a claim.[131] The Virginia Supreme Court reasoned that because the Fourteenth Amendment protects parental rights, and the court protects foundational liberties such as parental rights, it follows that a parent should have a cause of action against those who interfere with this right.[132] However, the court also recognized that the best remedy for such a cause of action would be the restoration of the parent-child relationship, which likely cannot happen in cases where an adoption has already occurred.[133]

Ultimately, the Virginia Supreme Court found it "astonishing and profoundly disturbing" that a biological father who was fit to parent was unable to establish his parental right.[134] The court allowed Wyatt's cause of action in an effort to deter cases like his from arising in the future.[135] This allowance could mean that putative fathers in Virginia receive greater protections concerning their paternal and parental rights. However, a formal restructuring of the statutory framework must also occur.

ANALYSIS

I. THE FOURTEENTH AMENDMENT AND VIRGINIA STATUTES

The Fourteenth Amendment's right to due process does not guarantee a hearing in every "conceivable case" of government intrusion.[136] Rather, courts attempt to balance the interests of the

128 *Id.*

129 *See id.* at 557.

130 *Id.* at 557.

131 *Id.*

132 Wyatt v. McDermott, 725 S.E.2d 555, 558 (Va. 2012).

133 *See id.* at 559.

134 *Id.* at 564.

135 *Id.*

136 Tracy Cashman, *When Is a Biological Father Really a Dad?*, 24 PEPP. L. REV. 959, 968 (1997).

government with the interests of the individual.[137] In adoption proceedings, the government has an interest in ensuring children are placed in stable homes, while many fathers have a personal interest in parenting their children.[138] These two interests should not conflict, as biological parents not only have a fundamental right to raise their children, but presumably will also provide a proper home for their children.[139] When applied to putative fathers, a court should interpret the Fourteenth Amendment to ensure a father cannot be deprived of the right to parent his child without the due process of law.[140]

Furthermore, the Fourteenth Amendment's Equal Protection Clause asserts that any gender-based discrimination must serve a "substantially related" government objective.[141] In terms of adoptions, the government's interest is to promote the best interest of the child and protect the rights of any interested third parties.[142] Yet, most state statutes, including those in Virginia, allow unwed mothers to block adoptions for a variety of reasons, but unwed fathers may only block adoptions if they can show they have established relationships with the children.[143] Gender is a protected class; therefore, unwed fathers should receive greater protection against discrimination because they are disproportionally impacted by the unilateral decisions of the woman who mothered their child.[144] Many unwed, biological fathers argue that parental classifications based on gender violate the Equal Protection Clause both because they provide fewer rights to fathers than mothers, and because they are based on irrelevant differences.[145] Therefore, under the Equal Protection Clause, putative fathers legally receive the same rights and privileges afforded to biological mothers.[146]

State statutes must ensure that they do not run afoul of the constitutional protections contained in the Equal Protection Clause.

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137 *Id.*

138 *Id.* at 969.

139 *See* Troxel v. Granville, 530 U.S. 57, 65 (2000); *see also* Cashman, *supra* note 136, at 968-69.

140 *See* Lehr v. Robertson, 463 U.S. 248, 276 (1983) (White, J., dissenting).

141 Cashman, *supra* note 136, at 970.

142 *Id.* at 971.

143 *Id.*

144 *Id.*; United States v. Virginia, 518 U.S. 515, 555 (1996) (holding that gender-based discrimination is subject to a form of heightened intermediate scrutiny).

145 Cashman, *supra* note 136, at 971.

146 *See id.* at 970-71.

However, Virginia's statutory framework regarding putative fathers does. Under the language of the current Virginia statutory framework, there are three parties' rights at play: the child's, the biological parents', and the adoptive parents'.[147] When these rights are in conflict, the court must intervene and interpret the governing statutes to "determine whose rights will prevail."[148] While other states' statutes favor adoptive parents, Virginia's code favors the rights of the child, centering around the child's best interests.[149]

The Virginia statutes, however, create undue burdens for putative fathers.[150] Not only does the father have to place his name on a registry, but he is at the mercy of the birth mother to receive any additional information.[151] A putative father's consent is not necessary if the birth mother cannot "reasonably ascertain" the father's identity.[152] The mother does not have to prove that she cannot ascertain the father's identity, which discourages the mother from even attempting to do so.[153] If a mother does not include the father's information, the adoption process is much smoother as there is no one to contest the adoption.[154]

A mother also has an advantage over the putative father in issues of fraud.[155] A father only has six months to challenge an adoption order in cases involving fraud, and only ten days to place his name on the putative father registry after learning of any fraud involved with the birth itself.[156] Courts have even found this time restraint to be unconstitutional, and some do not always strictly adhere to the statutory six months.[157]

The Virginia Code's use of the best interest of the child standard further burdens putative fathers regarding consent.[158] Specifically, this standard infringes on the father's rights—both when his consent is

147 Green, *supra* note 37, at 282.

148 *See id.*

149 *Id.* at 268.

150 *Id.* at 275.

151 *Id.* at 275-76.

152 *Id.* at 275.

153 Green, *supra* note 37, at 275.

154 *See id.* at 275-76.

155 *Id.* at 279.

156 *See* VA. CODE ANN. §63.2-1250(C) (2019); Green, *supra* note 37, at 279.

157 *See* F.E. v. G.F.M., 547 S.E.2d 531, 535 (Va. Ct. App. 2001); Green, *supra* note 37, at 279.

158 *See* Green, *supra* note 37, at 276.

needed and when it is not.[159] When the father's consent is needed, a court can simply override his refusal by asserting the adoption is in his child's best interests.[160] The problem, however, lies with the speculative nature of such an assertion. Who is to determine what is in the child's best interest?[161] This theory of parental rights is not favorable to most parents, especially putative fathers. The liberty interest theory is much more conducive to protecting putative fathers' rights and may ultimately be better at protecting the interests of the child as well.

II. THE *LEHR* DISSENT AND LIBERTY INTERESTS

As previously discussed, the majority in *Lehr v. Robertson* denied the existence of putative fathers' liberty interest in parenting their children.[162] The dissent, however, makes a powerful argument that the liberty interests of a putative father should be protected, regardless of the state statutory framework.[163] Justice White, writing for the dissent, noted that the New York statute did not protect Lehr or any other father in Lehr's position.[164] Lehr was not given the opportunity to establish a relationship with his child, and this lack of relationship precluded him from asserting any right to her.[165] True liberty interest should result from biology, as Justice White's dissent asserted.[166] His view stressed the absolute nature of putative fathers' rights.[167] The liberty interest a putative father has in parenting his child is a fundamental right that cannot be removed without substantial due process.[168] From this perspective, the majority decision in *Lehr* was unconstitutional.[169]

The dissent went on to assert that focusing on the liberty interests of all involved parties does not detrimentally change the adoption process; while the focus of the court shifts, the paperwork and require-

159 *See id.* at 277.

160 *See id.*

161 *Id.* at 282-83.

162 *See* Goodnow, *supra* note 92, at 403.

163 *See* Davida S. Scher, *Lehr v. Robertson: A Constricted View of the Rights of Putative Fathers*, 4 PACE L. REV. 477, 493 (1984).

164 *See id.* at 487.

165 *See id.*

166 *See* Lehr v. Robertson, 463 U.S. 248, 271-72 (1983) (White, J., dissenting).

167 Scher, *supra* note 163, at 488.

168 *Id.*

169 *Id.*

ments for future adoptive parents remains the same.[170] The dissent further reasoned that Lehr's failure to place his name on the putative father registry should be irrelevant to the Court's ruling.[171] Lehr's efforts to have his paternity legitimated should have been sufficient.[172] He did not ignore that he had a child, but rather, he attempted to assert his right to parent her and claimed his right to custody.[173] Justice White reasoned that Lehr followed the intent of the statutory framework in his petition.[174] The fact that Lehr did not follow the exact "empty formalism" of the statute should not be held against him.[175]

Beyond the challenges Justice White's dissent laid out in *Lehr*, there are also stare decisis implications with the *Lehr* majority opinion. Principally, the majority in *Lehr* violates the precedent the Court set in *Stanley* rather than continuing its legal tradition.[176] The *Stanley* opinion struck down the presumption that a putative father is unfit to parent his children, and held that putative fathers are entitled to a hearing on their parental fitness.[177] A court that considered *Stanley* as the precedential case on the matter should have concluded a putative father is entitled to a hearing on his fitness and that a putative father's lack of registration as a putative father should not preclude him from such a hearing.[178] Although the presumptions in both *Lehr* and *Stanley* were identical, the Court seems to contradict its prior *Stanley* holding to rule the way it did in *Lehr.*[179]

III. POTENTIAL CHANGES TO THE VIRGINIA STANDARD

The current Virginia legal system allows for paternal rights to be removed without due process. Whether due process rights attach should not depend on a father submitting or not submitting a document for registration. Yet, this is the current standard for determining protection of putative fathers' rights in Virginia. If the right to parent

170 *See id.* at 493.
171 *See id.*
172 *See id.*
173 *See* Scher, *supra* note 163, at 493.
174 *See id.*
175 *See id.*
176 *See id.*
177 Stanley v. Illinois, 405 U.S. 645, 658 (1972); Green, *supra* note 37, at 269.
178 *See* Scher, *supra* note 163, at 493.
179 *See id.*

a child is, in fact, fundamental—as the Supreme Court asserts it is—then every instance of improper government intrusion into the rights of unwed fathers should be litigated. The very purpose of government is to protect the rights of its citizens, yet unwed fathers' rights are not protected or respected by the Virginia legislature.

Those in favor of the *Lehr* majority assert that putative father registries serve two purposes.[180] First, fathers who register are required to receive proper notice so that they may assert their rights and contest any adoption proceedings.[181] Second, the registries protect the privacy of the mother, as she is not required to identify every potential father of her child.[182]

While putative father registries may accomplish the second of these purposes, they certainly do not accomplish the first. The rights of the father are sacrificed to benefit the convenience of the mother.[183] The registry may be promoted as a way for men to protect their rights, but statistics do not support this notion.[184] In the first year of the registry, only sixty-four men put their names on the list of putative fathers.[185] In the same year, 33,681 children were born out of wedlock.[186] If the registry was truly protecting the rights of putative fathers, more than .0019% would have registered.

If men do not place their names on the putative father registry, the state assumes they do not exist.[187] Despite the fact that it takes both a man and woman to conceive a child, the state only guarantees the rights of the woman. There is absolutely no incentive for the mother to inform the father that a child was conceived from their union, nor is there an incentive for the state to seek out the father.[188] Placing such a burden on the mother or the state could "gum up" the adoption process, which no one desires to do more than necessary.[189]

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180 Michelle Kaminsky, *Excessive Rights for Putative Fathers: Heart of Adoptions Jeopardizes Rights of Mother and Child*, 57 CATH. U. L. REV. 917, 919-20 (2008).

181 *Id.*

182 *Id.*

183 *See Virginia's Anti-Father Putative Father Registry, One Year After Enactment*, NAT'L PARENTS ORG. (Sep. 11, 2008), https://www.nationalparentsorganization.org/blog/868-virginias-anti-fath-868 (last visited Nov. 19, 2019).

184 *See* Marc Fisher, *Virginia to Lovers: Let's Get Cynical*, WASH. POST (Sep. 2, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/09/01/AR2008090102844.html.

185 *Id.*

186 *Id.*

187 *Id.*

188 *Id.*

189 *Id.*

Further, ". . . just because some, even many, of these guys may be scoundrels doesn't mean the state should be able to use a legal trick to strip all putative fathers of their parental rights without making some effort to find and contact the fathers."[190] It is highly unlikely that a man will register with the state every time he sleeps with a different woman.[191] However, Virginia law requires him to do so if he wishes to be notified of any adoption proceedings. Yet, there is no requirement in place for a woman to do the same once she becomes pregnant. Virginia can protect every party involved in creating and raising a child, while accomplishing the same proposed goals that the putative father registry tries to achieve.[192]

Currently, one of the better alternatives available to the putative father registry is to use the Federal Parent Locator Service (FPLS).[193] The FPLS is already used by many states to enforce child support payments, locate kidnapped children, and enforce visitation and custody arrangements.[194] State and local agencies predominantly run this service, which allows it to accomplish the same purposes as the putative father registry.[195] However, rather than requiring the father to register, the FPLS would locate the putative father and inquire about his wishes to be involved with his children. The FPLS already practices this locating function by locating noncustodial parents who fail to pay child support or violate a court order.[196] The information contained within the FPLS is secure, as the law requires states to protect confidential information of this nature.[197]

Using the FPLS is a better alternative to the putative father registry for multiple reasons. First, the FPLS is already set up to function as a locator for putative fathers.[198] In fact, the Office of Child Support Enforcement (OCSE) under the U.S. Department of Health and

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190 *See* Fisher, *supra* note 184.

191 *Id.*

192 This Comment is prepared to discuss only one alternative solution to paternity registration. While other solutions exist, the author found the proposed solution to be the most viable solution at this time.

193 NAT'L PARENTS ORG., *supra* note 183.

194 *Id.*

195 *See Federal Parent Locator Service: Information for Families*, OFF. OF CHILD SUPPORT ENFORCEMENT (Dec. 29, 2011), https://www.acf.hhs.gov/css/resource/federal-parent-locator-service-information-for-families.

196 *Id.*

197 *Id.*

198 *Id.*

Human Services lists locating putative fathers as one of the FPLS's purposes.[199] According to the OCSE, "[t]he FPLS is an assembly of systems operated by OCSE to assist states in locating noncustodial parents, *putative fathers*, and custodial parties for the establishment of paternity and child support obligations, as well as enforcement of orders for child support, custody and visitation."[200]

Moreover, the FPLS has much broader location resources than the resources of a putative father registry.[201] While Virginia's putative father registry is specific to Virginia and, thus, cannot help an out-of-state putative father, the FPLS has locating ability through the Social Security Administration, Department of Veterans Affairs, Internal Revenue Service, National Security Agency, Department of Defense, and Federal Bureau of Investigation.[202] Regardless of where the putative father may be located, it is much more likely that FPLS can find him than a state registry would be able to.

Most importantly, using the FPLS does not require a putative father to take action to protect his rights to parent his child. Because the father would not have to proactively place his name on a list, using this service would not violate his due process rights. In practice, if a child was born to unwed parents, the mother would notify the state through social services prior to the child's birth.[203] This gives the mother up to nine months to attempt to identify the child's father.[204] Once the father is identified, social services would take responsibility to locate him. Through the vast resources available to the FPLS, it is highly likely that the father would then be successfully located. Next, the social services agency that found the putative father would issue an affidavit for the father to sign either declaring his intention to parent the child or surrendering his rights to the child. If he opts to surrender his rights, then any adoption proceedings may take place. If

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199 *Id*.

200 *Id.* (emphasis added).

201 OFF. OF CHILD SUPPORT ENFORCEMENT, *supra* note 195.

202 *Id*.

203 This Comment is not prepared to discuss the parameters that would be in place if the mother is unable to identify the putative father.

204 If the mother must identify the father of the child, the burden is shifted from him to her. Currently, the mother is not required to actually identify the father, she is only required to make an effort. *See* VA. CODE ANN. § 63.2-1250 (2019). Shifting the burden alone would drastically change how putative fathers are treated in the eyes of the law, because they would have to be recognized rather than simply ignored or viewed as an inconvenience.

the father intends to invoke his rights, he may parent the child.[205] There is the potential for a mother to name a man who is not the actual father of the child. If this were to occur, and the genuine father comes to light, paternity testing and possible litigation could ensue.

Currently, putative father registries are used for the purpose of adoption proceedings in Virginia.[206] When the mother wishes to have the child placed up for adoption, a father would be notified of the adoption proceedings if he is registered.[207] Under the FPLS, putative fathers would not only be located for adoptions, they could also be located for custody and support arrangements.[208]

There are three main benefits to using the FPLS in this manner. First, the liberty interests of all parties are best protected. Under this proposed use of FPLS, the liberty interests of the father are protected because his right to parent is not waived by his lack of action, which occurs under the current Virginia statutory framework.[209] Second, the legal standard established by *Caban* would be restored. In *Caban,* the Supreme Court asserted that putative fathers and mothers have equal standing.[210] By using the FPLS, both parents would have the opportunity to assert or terminate their parental rights, giving them equal standing under the law. Third, the adoption process would be streamlined to not only protect the rights of putative fathers, but to ensure the child's interests are protected as well. The interests of the child would be better protected because no adoption proceedings would take place until the father completed an affidavit which would effectively terminate his parental rights.

Further, this new system would not drastically change anything for the mother, as the only difference for her would be her requirement to identify the child's father.[211] The issues that arise in the current system—especially those faced by putative fathers in dealing with the best interests of their children after they are placed with adoptive parents for a substantial amount of time pending litigation[212]—would

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205 A father's lack of response may be deemed as a surrendering of parental rights. VA. CODE ANN. § 63.2-1250(C) (2019).

206 VA. CODE ANN. § 63.2-1250(A) (2019).

207 *Id.*

208 OFF. OF CHILD SUPPORT ENFORCEMENT, *supra* note 195.

209 *See* VA. CODE ANN. § 63.2-1250(C) (2019).

210 Caban v. Mohammed, 441 U.S. 380, 389 (1979).

211 Again, this Comment is not prepared to address the issues which would occur if the mother cannot identify the child's father.

212 *See* Wyatt v. McDermott, 725 S.E.2d 555, 556-57 (Va. 2012).

not occur under this new system. While this system may prolong the adoption process for some, it has the potential to drastically decrease the amount of adoption proceedings in Virginia. Because adoptive parents would be required to wait until the putative father voluntarily terminates his rights, courts would have fewer controversies to settle.[213] This would also decrease the cost of adoption for many, given that adoptive parents would not run the risk of a putative father contesting the proceedings, and prove the adoptive parents with certainty that their new child is uncontestedly theirs.

Lastly, the FPLS streamlines the adoption process. Currently, putative fathers can contest adoption proceedings.[214] This sometimes leads to children being placed in the homes of adoptive parents only to be later removed after becoming attached to their adoptive families.[215] Using the FPLS ensures that an identified father makes his decision prior to any adoption proceedings even taking place. The purpose of adoption is to place a child in a stable home as quickly as possible.[216] In using the FPLS to locate the father and allow him the opportunity to assert or surrender his rights, the child could be placed in her adoptive home upon birth and remain there without the threat of a father later challenging the proceedings.

CONCLUSION

After a lengthy legal battle, John Wyatt won compensation for his loss, yet he lost the ability to parent his daughter. A flawed statutory standard that attempted to simplify and streamline adoption proceedings failed Wyatt in many other important respects. However, other putative fathers do not need to face the same result.

The Virginia standard currently requires putative fathers to take active steps toward ensuring their right to parent, but it does not require the same of mothers. This lack of equal protection creates undue burdens on fathers, while simultaneously allowing mothers to

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213 The legislature, in abolishing paternity registries and adopting the use of the FPLS could establish a reasonable time period for a father respond to the affidavit. If the father does not respond, then he forgoes the right to parent the child.

214 *See Wyatt*, 725 S.E.2d at 558 ("[A] parent has a cause of action against third parties who seek to interfere with this right.").

215 *See* Karen C. Wehner, *Daddy Wants Rights Too: A Perspective on Adoption Statutes*, 31 HOUS. L. REV. 691, 716-17 (1994).

216 *Id.* at 716.

have the ultimate say for the child. The right to parent should be protected at the moment of conception, not at the moment of registration. There is no reason the state should act as though a father does not exist simply because he does not place his name on a registry.

To solve these problems, Virginia should abolish the putative father registry and replace it with the already existing FPLS. This would solve the existing lack of due process in adoption proceedings where fathers are unaware of the existence of the child. The FPLS would help to locate the father, shifting the burden to the state, rather than leaving the burden on the father. The father, being made aware of the child and the foregoing situation, could determine if he wants to assert his parental rights or surrender them. This process places the mother and father on a level playing field and establishes the same standard for both parents.

By changing statutes to allow mothers and fathers to have an equal opportunity to raise their children—thus giving them an equal responsibility to parent—rights will be protected, and there is a chance that even more fathers will step up to parent their children.