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Preserving Your Right to Parent: The Supreme Court of North Carolina Addresses the Unmarried Fathers' Due Process Rights in In re Adoption of S.D.W.

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Preserving Your Right To Parent: The Supreme Court of North Carolina Addresses Unmarried Fathers' Due Process Rights in *In Re Adoption of S.D.W.*[*]

INTRODUCTION

The prototypical nuclear family is on the decline.[1] Between forty and fifty percent of marriages end in divorce,[2] and more than forty percent of all births in the United States are to unmarried women.[3] Yet, courts still regard marriage as "[t]he most effective protection of [a] father's opportunity to develop a relationship with his child."[4] It was not until the early 1970s that the United States Supreme Court officially recognized that unmarried fathers had parental rights protected under the Constitution.[5] Since the 1970s, family structures have changed rapidly,[6] and as a result, the Supreme Court has had to refine its position on biological fathers' rights. It is now settled law that biological fathers have a due process right to notice of any adoption proceeding and may withhold consent to the adoption under certain circumstances.[7]

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1. *See* Jennifer R. Johnson, *Preferred By Law: The Disappearance of the Traditional Family and Law's Refusal To Let It Go*, 25 WOMEN'S RTS. L. REP. 125, 128–29 (2004).

2. *Marriage & Divorce*, AM. PSYCHOL. ASS'N (2014), http://www.apa.org/topics/divorce/ [http://perma.cc/W3ZU-JTCE].

3. *Unmarried Childbearing*, CDC, http://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm (last updated Sept. 30, 2015) [http://perma.cc/C7K4-9PK9].

4. Lehr v. Robertson, 463 U.S. 248, 263 (1983).

5. *See* Stanley v. Illinois, 405 U.S. 645, 649 (1972) (holding that an unmarried father was denied due process of law under the equal protection clause of the Fourteenth Amendment when the state took his children from his custody after the death of their mother because of a statutory scheme that excluded unmarried fathers from the definition of "parent").

6. *See generally* TOM W. SMITH, NAT'L OP. RESEARCH CTR., UNIV. CHI., CHANGES IN FAMILY STRUCTURE, FAMILY VALUES, AND POLITICS, 1972–2006 (2008), http://publicdata.norc.org:41000/gss/documents/scrt/sc53%20changes%20in%20family%20structure,%20family%20values,%20and%20politics,%201972-2006.pdf [http://perma.cc/3QHK-7GW8] (describing how "[f]amily structure and family values have undergone tremendous changes over the last generation").

7. *See, e.g.*, *Lehr*, 463 U.S. at 267–68 (holding that a putative father was not entitled to notice under the Due Process Clause or Equal Protection Clause of the Fourteenth Amendment); Caban v. Mohammed, 441 U.S. 380, 401 (1979) (holding that a New York law that allowed natural mothers but not fathers to block an adoption by withholding consent violated the Equal Protection Clause of the Fourteenth Amendment); *Stanley*, 405 U.S. at 645 (holding that an unmarried father was denied due process of law under the

What happens when an unmarried biological father is unaware that he has become a father until after the adoption is already in progress, however, is anything but clear. Should the father's consent be required before the adoption can be finalized? Does not knowing about the child excuse a putative father's noninvolvement, or should he bear the responsibility for keeping track of any children he may have fathered? Complicating the matter even further is the fact that some women will either actively thwart a father's attempts to develop a relationship with his child or outright lie about the child's existence and the father's identity.[8]

Many states have not yet adequately addressed these realities, either through legislation or through the courts,[9] and North Carolina is no exception. In June 2014, the Supreme Court of North Carolina was forced to confront these issues in *In re Adoption of S.D.W.* ("*S.D.W.*").[10] In *S.D.W.*, after hiding her pregnancy from her former paramour, a woman placed her child for adoption and actively misrepresented the father's identity both on an affidavit of parentage and to the adoption agency.[11] When the father later found out about the child, he attempted to intervene in the adoption proceeding, but a trial court ruled that his consent was not required to proceed under North Carolina law.[12] A long and expensive[13] legal battle ensued, and

Equal Protection Clause of the Fourteenth Amendment when the state took his children from his custody after the death of their mother because of a statutory scheme that excluded unmarried fathers from the definition of "parent"). *But see* Quilloin v. Walcott, 434 U.S. 246, 256 (1978) (holding that the consent of an unmarried father who had never sought actual or legal custody of his child was not required for adoption).

8. *See, e.g.*, *In re* Adoption of A.A.T., 196 P.3d 1180, 1205 (Kan. 2008) (Nuss, J., dissenting) (discussing a biological father's consent to adoption where the biological mother lied about having had an abortion); *In re* Baby Boy K, 546 N.W.2d 86, 88 (S.D. 1996) (discussing an affidavit where a biological mother admitted to lying about the identity of the child's biological father); Robert O. v. Russell K., 604 N.E.2d 99, 100–01 (N.Y. 1992) (discussing a biological mother who did not inform the biological father of the pregnancy or birth until ten months after the adoption was finalized).

9. *See, e.g.*, Laura Oren, *Thwarted Fathers or Pop-Up Pops?: How To Determine When Putative Fathers Can Block the Adoption of Their Newborn Children*, 40 FAM. L.Q. 153, 175 (2006) ("Although in the last ten years many state legislatures have devised evermore explicit schemes to clearly and timely sort the 'thwarted father' with the right to withhold consent from the 'pop-up pop' who has forfeited his opportunity interest in a relationship with his child, much uncertainty remains.").

10. 367 N.C. 386, 758 S.E.2d 374 (2014).

11. *Id.* at 388, 758 S.E.2d at 376.

12. *Id.* at 390–91, 758 S.E.2d at 377–78.

13. The father, Gregory Johns, claimed to have spent over $100,000 on legal fees, well before his case even made it before the Supreme Court of North Carolina. *See* Alyssa Rosenberg, *Dad Spends Father's Day Alone, with Hopes To Meet His Son*, WWAY (June 16, 2013), http://www.wwaytv3.com/2013/06/16/dad-spends-fathers-day-alone-hopes-to-meet-his-son [http://perma.cc/QX97-2TU5].

eventually, the Supreme Court of North Carolina upheld the trial court's determination that the father's constitutional rights were not violated.[14] While the facts in this case are unique and, to some extent, sensational, the court's decision could nonetheless have broad implications for future adoptions throughout North Carolina.

This Recent Development contends that *S.D.W.* was wrongly decided, but not just for the reasons the dissent identifies. Part I begins by laying out the constitutional and statutory frameworks for biological fathers' rights in adoptions in North Carolina. Part II then examines *S.D.W.* in detail, ultimately concluding that it was wrongly decided. Part III addresses both the majority's and the dissent's concerns, as well as certain implications of the court's decision that both opinions fail to contemplate. Finally, Part IV recommends a new statutory scheme that would more effectively handle adoption placements—in cases both similar to and dissimilar to *S.D.W.*—in the future.

I. CONTEXTUALIZING THE DEBATE—THE CONSTITUTIONAL AND STATUTORY FRAMEWORK FOR BIOLOGICAL FATHERS AND ADOPTION IN NORTH CAROLINA

A. The Constitutional Framework

Although nearly half of all births in the United States are now to unmarried women,[15] less than fifty years ago, the legal rights and obligations of fathers and children were almost exclusively tied to marriage.[16] In the early twentieth century, marriage was the prevailing way for parents to take responsibility for their children.[17] In fact, at common law, nonmarital children were considered *filius nullius*—the children of no one.[18] Nonmarital children did not have the same inheritance rights as marital children, and wrongful death claims and

14. *See In re Adoption of S.D.W.*, 367 N.C. at 396, 758 S.E.2d at 381.

15. *See* CDC, *supra* note 3.

16. *See* Lehr v. Robertson, 463 U.S. 248, 263 (1983) ("The most effective protection of the putative father's opportunity to develop a relationship with his child is provided by the laws that authorize formal marriage and govern its consequences.").

17. *See* David T. Ellwood & Christopher Jencks, *The Spread of Single-Parent Families in the United States Since 1960*, at 6 (John F. Kennedy Sch. of Gov't, Harvard Univ., Working Paper No. RWP04-008, 2004), https://research.hks.harvard.edu/publications/workingpapers/citation.aspx?PubId=2069&type=WPN [http://perma.cc/G4H8-KXXD] ("In 1960 most men and women who engaged in premarital sex assumed that if the woman became pregnant they would marry and raise the child together. As a result, premarital pregnancies were fairly common, but premarital births were rare.").

18. Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 350 (2011).

government benefits relating to the death of a parent were available only to marital children.[19] It was not until 1968 that the United States Supreme Court explicitly recognized the rights of nonmarital children under the Equal Protection Clause,[20] prompting a series of opinions throughout the 1970s that eliminated distinctions between marital and nonmarital children.[21]

Similarly, unmarried fathers had limited rights in regard to child rearing until the 1970s. Before 1972, in a vast majority of states, an unwed mother had the sole authority to place a child for adoption with no input from the child's father required.[22] However, in 1972, the Supreme Court extended constitutional protections to unmarried biological fathers for the first time,[23] affirming that "[t]he right[] to conceive and to raise one's children"[24] is a "basic civil right[]."[25] Over the next several years, coinciding with the rapid rise in availability of technology that could easily and accurately identify a biological link between father and child,[26] the Supreme Court completely transformed the way courts view the constitutional rights of biological fathers.[27] This development was grounded in the Due Process and Equal Protection clauses of the Fourteenth Amendment.[28]

This transformation started in 1972 with *Stanley v. Illinois*.[29] In *Stanley*, the Court held that an unmarried father who was raising his children had a due process right to a hearing on parental fitness before the state could take the children from his custody.[30] The Court stopped short, however, of extending those rights to biological fathers

19. *See id.* at 350–51.

20. *See* Levy v. Louisiana, 391 U.S. 68, 70 (1968) ("We start from the premise that illegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment." (internal footnotes omitted)).

21. *See, e.g.*, Jimenez v. Weinberger, 417 U.S. 628, 636 (1974) (invalidating a blanket ban on nonmarital children receiving social security disability benefits); N.J. Welfare Rights Org. v. Cahill, 411 U.S. 619, 621 (1973) (striking down a statute denying welfare benefits to nonmarital children); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175–76 (1972) (overturning a law denying worker's compensation benefits to unacknowledged nonmarital children).

22. *See* Robert Rausch, *Unwed Fathers and the Adoption Process*, 22 WM. & MARY L. REV. 85, 85 (1980).

23. *See* Stanley v. Illinois, 405 U.S. 645, 658 (1972).

24. *Id.* at 651.

25. *Id.* (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

26. *See* Oren, *supra* note 9, at 154.

27. *See id.* at 154–55.

28. *See supra* note 7.

29. 405 U.S. 645 (1972).

30. *See id.* at 658.

who had not played a part in raising their children.[31] Later, in 1978, the Court clarified in *Quilloin v. Walcott*[32] that fathers do not have a due process right to consent to or veto an adoption when they have failed to take actual or legal custody of the child.[33] In that case, the Court allowed a stepfather to adopt a child over the biological father's objections because it was in the child's best interest.[34] Even though the father in *Quilloin* did have a relationship with his child—visiting with the child and giving gifts on occasion[35]—he had "never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."[36]

The following year, the Supreme Court went even further, declaring that a New York statute giving the right to consent to an adoption to unwed mothers but not to unwed fathers, regardless of their actual involvement with the child, violated the Constitution.[37] In *Caban v. Mohammed*[38] the Court held that, because the children had previously lived with their father and because he had maintained regular contact with them,[39] he was similarly situated to the children's mother.[40] The statute allowing an adoption to proceed without his consent was thus overturned as a violation of the Equal Protection Clause.[41]

Finally, in *Lehr v. Robertson*,[42] the Court clarified that biological fathers do have an incipient interest in raising their children, noting that "[biology] offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring."[43] The Court then went on to say that a father who "grasps that opportunity and accepts some measure of responsibility for the child's future . . . may enjoy the blessings of the parent-child relationship[,]"[44] but that when "he fails to do so, the Federal Constitution will not

31. *See id.*
32. 434 U.S. 246 (1978).
33. *Id.* at 255.
34. *See id.*
35. *See id.* at 251.
36. *Id.* at 256.
37. *See* Caban v. Mohammed, 441 U.S. 380, 394 (1979).
38. 441 U.S. 380 (1979).
39. *See id.* at 382–83.
40. *See id.* at 399 (Stewart, J., dissenting).
41. *See id.* at 394 (majority opinion).
42. 463 U.S. 248 (1983).
43. *Id.* at 262.
44. *Id.*

automatically compel a State to listen to his opinion of where the child's best interests lie."[45]

Lehr established that a putative father's due process rights are layered. First, he has an "inchoate" interest in developing a relationship with his child,[46] but by itself, "the mere existence of a biological link does not merit . . . constitutional protection."[47] Instead, the biological father's inchoate interest must be accompanied by an active parenting effort and/or financial support because "[t]he importance of the familial relationship . . . stems from the emotional attachments that derive from the intimacy of daily association."[48] So while a putative father's inchoate interest must be protected, that interest may be forfeited if he fails to avail himself of the opportunity biology has afforded him.[49] Procedurally, this amounts to an entitlement to notice and the right to withhold consent to an adoption proceeding, but again, that right is not absolute.[50] The right hinges not only on biology, but also on the father having taken responsibility for and actively participated in a child's life.[51] Still, the dividing line between an active and involved father who has earned constitutional protection of his rights and an uninvolved father who has forfeited his rights remains unclear.

North Carolina courts have followed the Supreme Court's application of *Lehr*.[52] Not only is the state bound by the Federal Constitution, but the North Carolina Constitution's law of the land clause[53] has been interpreted as the state's equivalent of the Due Process Clause.[54] State courts' interpretation of biological fathers' rights within the North Carolina Constitution has been largely indistinguishable from federal courts' interpretations of the analogous clauses under the United States Constitution.[55] Still, what constitutes

45. *Id.*

46. *Id.* at 248.

47. *Id.* at 261.

48. *Id.* (quoting Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 844 (1977)).

49. *See id.* at 250–51.

50. *See id.*

51. *See id.* at 250–51, 262.

52. *See, e.g.*, *In re* Baby Boy Dixon, 112 N.C. App. 248, 251, 435 S.E.2d 352, 354 (1993) (asserting that constitutional rights to due process do not "spring full-blown from the biological connection" (quoting *Lehr*, 463 U.S. at 262)).

53. N.C. CONST. art. I, § 19.

54. City of Asheville v. State, 192 N.C. App. 1, 44, 665 S.E.2d 103, 133 (2008).

55. *See, e.g.*, *In re* Adoption of S.D.W., 367 N.C. 386, 392, 758 S.E.2d 374, 378 (2014) ("Because Johns has not argued that the Law of the Land Clause of the Constitution of North Carolina and the Due Process Clause of the Constitution of the United States are to be interpreted differently here, we will not distinguish between them in our analysis.").

active participation in a child's life—in particular a very young child's life—is hard to define, and the responsibility of unwitting fathers proves even harder to define.

B. The Statutory Framework

The federal and state constitutions provide only a loose framework for biological fathers' rights. States are left to fill in the blanks for themselves when it comes to providing a workable statutory scheme for adoptions that, among other things, protects the due process rights of unmarried fathers.[56] The statutes should not exclude too many responsible fathers from their protection,[57] but beyond that, the only requirement for a statutory scheme to meet bare-minimum procedural requirements under the Constitution after *Lehr* is that whatever criteria an interested putative father must meet in order to qualify for an entitlement to notice must not be "beyond [his] control."[58]

With regard to notice and consent in adoption proceedings, North Carolina's statute gives a virtual veto power over an adoption to several categories of people.[59] Those whose consent is required before an adoption can proceed include the birth mother;[60] the birth mother's husband[61] or very recent ex-husband;[62] any man who has attempted to marry the mother before the child's birth;[63] and any man who has otherwise legitimated the child, taken on an obligation of support for the child, or accepted the child into his home and held himself out as the child's father *before* the filing of the adoption petition.[64] Notably, the statutes do not require that a man in the above-mentioned categories also be the biological father of the child in question.[65] Additionally, even when a putative father is entitled to notice because of his inclusion in one of these categories and is required to give consent to the adoption proceeding, if he fails to

56. *See* United States v. Windsor, 133 S. Ct. 2675, 2680 (2013) ("Subject to certain constitutional guarantees, 'regulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States.' " (quoting Sosna v. Iowa, 419 U.S. 393, 404 (1975) (internal citation omitted)).

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

58. *Id.*

59. *See* N.C. GEN. STAT. § 48-3-601 (2013).

60. § 48-3-601(2)(a).

61. § 48-3-601(2)(b)(1).

62. *Id.*

63. § 48-3-601(2)(b)(2).

64. § 48-3-601(2)(b)(3)–(5).

65. § 48-3-601(2)(b).

respond to the notice in a timely manner, his consent will no longer be required.[66]

There are glaring omissions in North Carolina's statutes. The statutory framework does not address fathers who are actively thwarted from establishing relationships with their children, nor does it protect fathers who may be interested but are unaware that they have fathered children. Moreover, the statutes do not seem to recognize the possibility of a mother having purposefully lied or misrepresented the identity of the child's father. Though the statutes do not confront these scenarios, they are unfortunate realities—realities that the court faced in *S.D.W.* and will likely have to face again in the future.

II. UNDERSTANDING *IN RE ADOPTION OF S.D.W.*

A. Factual Background and Procedural History

The factual record in *S.D.W.* describes an unfortunate situation and a close call. In *S.D.W.*, Laura Welker and Gregory Johns became parents as a result of their "mostly physical"[67] relationship, which lasted from May 2009 until February or March 2010.[68] During that time period, the two had sex between ten and twenty times a week.[69] Johns was aware that Welker was fertile—she already had a child who was living with her mother.[70] During the summer of 2009, Welker once again became pregnant and notified Johns.[71] They mutually decided that Welker would have an abortion.[72] After the pregnancy was terminated, Johns testified that Welker informed him she was using another form of birth control that he identified as either a patch—though he had never seen a patch on her body despite having sex with her more than ten times a week—or an "IUD band."[73] Though Johns was inadequately informed about the birth control methods they were using, he and Welker continued to have sex regularly and without condoms for the next several months.[74]

66. *Id.* § 48-3-603(a)(7)–(8).
67. *In re* Adoption of S.D.W., 367 N.C. 386, 387, 758 S.E.2d 374, 375 (2014).
68. *Id.*
69. *Id.*
70. *Id.*, 758 S.E.2d at 375–76.
71. *Id.*, 758 S.E.2d at 376.
72. *Id.*
73. *Id.*
74. *Id.*

Welker eventually cut contact with Johns in March of 2010,[75] at which point she was, unbeknownst to Johns, already pregnant with his baby. Welker gave birth on October 10, 2010, and the next day, filed an affidavit of parentage, misnaming the father as "Gregory Thomas James" instead of "Gregory Joseph Johns" and listing no last known address.[76] She then relinquished custody of the newborn to an adoption agency called Christian Adoption Services.[77] The adoption agency placed the child with his prospective adoptive parents, Benjamin and Heather Jones, on October 12, 2010, a mere two days after his birth.[78] Two weeks later, on October 27, Welker signed a form for the adoption agency once again misidentifying Gregory Johns as "Gregory Thomas James."[79]

On November 2, 2010, the Joneses filed a petition to legally adopt the child, while the agency, relying on the false name Welker had given, set out to find and notify Johns.[80] When the agency predictably failed to find Johns, the adoption proceeding was stayed,[81] and the agency filed a motion to terminate the father's parental rights on November 16, 2010.[82] Meanwhile, on November 26, 2010, a mere six weeks after giving birth, Welker visited Johns on his birthday and engaged in sexual intercourse.[83] Even then, she still declined to inform him of the child he had fathered.[84] Nonetheless, by late April of 2011, Johns finally learned that Welker had given birth.[85] After hearing the news from an acquaintance, Johns confronted Welker on April 25, 2011, and she eventually admitted that she had indeed given birth to a son, Johns's biological child, and had placed him for adoption.[86]

Johns expressed his intent to obtain custody of the baby, leading Welker to confess Johns's true identity to the adoption agency.[87] Subsequently, counsel for the adoption agency voluntarily dismissed its action to terminate parental rights on May 2, 2011. As a result, the court removed the temporary stay on the adoption proceeding, and

75. *Id.*
76. *Id.* at 399, 758 S.E.2d at 383 (Jackson, J., dissenting)
77. *Id.* at 388, 758 S.E.2d at 376 (majority opinion).
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *In re* S.D.W., __ N.C. App. __, __, 745 S.E.2d 38, 40–41 (2013).
83. *In re Adoption of S.D.W.*, 367 N.C. at 387, 758 S.E.2d at 376.
84. *See id.*
85. *Id.* at 388, 758 S.E.2d at 376.
86. *Id.* at 399, 758 S.E.2d at 383 (Jackson, J., dissenting).
87. *Id.* at 388, 758 S.E.2d at 376 (majority opinion).

three days later, the Joneses gave notice of their intention to proceed with the adoption.[88] Johns retained counsel and, after several months of back and forth, on January 6, 2012, a district court judge held that North Carolina's adoption statutes did not require Johns's consent to the adoption and denied all his motions, thereby allowing the adoption to move forward.[89]

The case then moved to the North Carolina Court of Appeals, which held that the district court judge correctly interpreted North Carolina's statutes as not requiring Johns's consent.[90] The court held that, even though Johns did not know of his child's existence until after the adoption petition was filed, his consent was not required by statute because he had not sought to establish a relationship with the child prior to its filing.[91] However, the court held that:

> [A] biological father who, prior to the filing of the petition was unaware that the mother was pregnant and *had no reason to know*, promptly takes steps to assume parental responsibility upon discovering the existence of the child, has developed a constitutionally protected interest sufficient to require his consent where the adoption proceeding is still pending.[92]

The court explained that, even though his consent was not required by statute, if the facts were as Johns described them, his constitutional due process rights were violated when the adoption was allowed to proceed despite his objections.[93] The court then remanded the case for further factual determinations.[94]

B. The Supreme Court of North Carolina's Analysis

When the case made its way to the Supreme Court of North Carolina, the court clarified the applicable legal standard as that established by the United States Supreme Court in *Lehr*.[95] Johns conceded that he did not fit the statute's definition of a responsible

88. *Id.*
89. *Id.* at 388–90, 758 S.E.2d at 376–77.
90. *In re* S.D.W., __ N.C. App. __, __, 745 S.E.2d 38, 43 (2013).
91. *Id.* at __, 745 S.E.2d at 50 (citing N.C. GEN. STAT. § 48-3-601(2)(b) (2013)).
92. *In re S.D.W.*, __ N.C. App. at __, 745 S.E.2d at 51 (emphasis added).
93. *See id.* at __, 745 S.E.2d at 44.
94. *See id.*
95. *See In re* Adoption of S.D.W., 367 N.C. 386, 391–92, 758 S.E.2d 374, 378 (2014); *see also* Lehr v. Robertson, 463 U.S. 248, 263–64 (1983) (noting that statutes that "omit many responsible fathers" and have qualifications for notice that are "beyond the control of an interested putative father" are procedurally inadequate).

parent entitled to notice,[96] and he did not challenge the statute's validity.[97] Accordingly, the only plausible basis for his due process claim was the possibility that the statutory qualifications for notice were "beyond his control."[98] The court then set about applying this exceptionally vague standard to the facts at hand.[99] Unsurprisingly, the seven justices did not agree.[100]

Justice Edmunds, writing for the majority, acknowledged Welker's behavior as "troubling,"[101] but condemned Johns's behavior as well.[102] Welker not only provided a false name, thereby "obstructing official efforts to locate the father,"[103] she also visited Johns less than two months after giving birth and kept the news of their child to herself.[104] Still, Justice Edmunds insisted that while Welker's behavior was less than admirable, nothing she did put Johns in the position where meeting the qualifications for notice under the statute were no longer within his control.[105] Instead, the majority blamed the fact that Johns did not qualify for notice on his "incuriosity and disinterest."[106]

The majority focused heavily on Johns's irresponsibility with regard to birth control. Though the court stopped short of implementing a rule saying that the act of having sex is enough to put a man on notice that he has fathered a child,[107] the majority still faulted Johns for not finding out about his child sooner. Johns knew that Welker was fertile because he was aware that she had had a child before they met,[108] and he had already impregnated her once.[109] But even after the abortion, Johns took on no additional responsibility for birth control.[110] Johns assumed Welker's birth control would be

96. *In re Adoption of S.D.W.*, 367 N.C. at 394–95, 758 S.E.2d at 380; *see also supra* notes 59–66 and accompanying text for a list of the categories of people entitled to notice and an opportunity to consent before an adoption proceeding begins.

97. *See In re Adoption of S.D.W.*, 367 N.C. at 394, 758 S.E.2d at 380; *see also* N.C. GEN. STAT. § 48-3-601(2)(b) (2013).

98. *See In re Adoption of S.D.W.*, 367 N.C. at 395, 758 S.E.2d at 379 (citing Lehr v. Robertson, 463 U.S. 248, 263–64 (1983)).

99. *See id.*

100. *See id.* at 396, 758 S.E.2d at 381.

101. *Id.* at 395, 758 S.E.2d at 380.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 396, 758 S.E.2d at 381.

106. *Id.* at 395, 758 S.E.2d at 380.

107. *See id.*

108. *Id.*

109. *Id.*

110. *See id.* at 395, 758 S.E.2d at 380–81.

effective, despite the fact that her birth control had already failed once during their relationship,[111] and he did not use condoms, even after the abortion.[112]

Moreover, when Johns finally did confront Welker in April of 2011, she eventually admitted to having given birth to his child.[113] The majority interpreted this as evidence that the burden on Johns to find out that Welker had been pregnant was low—all he had to do was ask.[114] Meanwhile, while Johns was oblivious to his son's existence, S.D.W. had already been living with and bonding with his prospective adoptive parents, the Joneses.[115] To the majority, Johns's passivity amounted to his having had the opportunity to establish himself as a responsible father but failing to grasp it.[116] Accordingly, the court held that he did not have a liberty interest in developing a relationship with his child, and therefore allowing an adoption to move forward without his consent was not a violation of his due process rights.[117]

Three justices, however, saw it differently. Writing for the dissent, Justice Jackson chastised the majority for failing to give sufficient deference to a biological father's "inchoate" interest, described in *Lehr*.[118] Instead of narrowly focusing on whether opportunity for notice was "beyond [his] control,"[119] the dissent focused on whether Johns was afforded sufficient opportunities to protect his inchoate interest in developing a relationship with his child and concluded that he was not.[120] Though the dissent agreed with the majority's retelling of the facts of the case, in Justice Jackson's reasoning, several of the facts the majority cited actually undermined its ultimate conclusion.[121] The dissent identified and rebutted four of the reasons the majority gave for ruling against Johns.[122]

First, with regard to the use of birth control in *S.D.W.* and its implications, the dissent posited that the majority's position on birth control essentially requires couples to use "multiple, redundant forms of contraception or risk losing any rights [the putative father] might

111. *See id.* at 387, 758 S.E.2d at 376.
112. *Id.* (describing Johns's testimony about Welker's birth control methods).
113. *Id.* at 399, 758 S.E.2d at 383 (Jackson, J., dissenting).
114. *See id.* at 395, 758 S.E.2d at 381 (majority opinion).
115. *Id.*
116. *See id.* at 396, 758 S.E.2d at 381.
117. *Id.*
118. *Id.* at 397, 758 S.E.2d at 381(Jackson, J., dissenting).
119. *Id.* at 394, 758 S.E.2d at 380 (majority opinion) (citing Lehr v. Robertson, 463 U.S. 248, 263–64 (1983)).
120. *See id.* at 398, 758 S.E.2d at 382 (Jackson, J., dissenting).
121. *See id.*
122. *See id.*

have to raise and care for any children that result from this (protected) sexual activity."[123] Because Welker told Johns that she was on birth control, the dissent argued, the majority opinion effectively requires men to wear condoms in addition to any other forms of birth control the couple might be using.

Second, the majority took the fact that Johns had already impregnated Welker once before and that he was involved in her decision to have an abortion as evidence that he knew that she was fertile.[124] The dissent, however, interpreted this to mean that Johns had no reason to believe that Welker would hide any future pregnancies from him.[125] Given that history, the dissent saw no reason that Johns should have had "to remain in contact with Welker and affirmatively inquire whether she was pregnant with his child, even after their romantic relationship ended."[126]

Third, instead of focusing on Johns's responsibility to inquire about Welker's pregnancy, the dissent emphasized the relative ease with which Welker could have notified Johns.[127] His contact information had not changed at all during the pregnancy or after the birth of the child. In fact, Johns lived in the same apartment he had lived in for several years, the same place where Welker had visited him more than a hundred times.[128] He also kept both the same home and cell phone numbers.[129]

Finally, even though Welker could have easily contacted Johns, she chose to deceive him—and others—instead.[130] Welker told the adoption agency that she did not know the address or phone number of the father and that she had no way to contact him,[131] even though Johns had neither moved nor changed his number.[132] Welker also misidentified Johns on the affidavit of parentage and the adoption agency forms[133] and failed to list him on the child's birth certificate.[134] Additionally, Welker chose not to tell Johns about the pregnancy or the birth, even though they slept together just a few weeks after

123. *Id.*
124. *See id.* at 395, 758 S.E.2d at 380 (majority opinion).
125. *See id.* at 398, 758 S.E.2d at 382 (Jackson, J., dissenting).
126. *Id.*
127. *See id.* at 398–99, 758 S.E.2d at 382.
128. *See id.*
129. *Id.*
130. *See id.* at 399, 758 S.E.2d at 383.
131. *See In re* S.D.W., __ N.C. App. __, __, 745 S.E.2d 38, 40 (2013).
132. *See In re Adoption of S.D.W.*, 367 N.C. at 398–99, 758 S.E.2d at 382.
133. *See id.* at 399, 758 S.E.2d at 383.
134. *See id.*

Welker gave birth.[135] And when Johns eventually did confront her directly, she initially denied that the baby was his before ultimately relenting and admitting that he was, in fact, the father.[136] In the dissent's eyes, these four factors, taken together, amounted to no meaningful opportunity for Johns to develop his relationship with his child and acquire an entitlement to notice to the adoption under the statutes. Therefore, he did not relinquish his constitutional right to develop a relationship with his child, and the adoption should not have proceeded without his consent.

III. WHERE THE COURT WENT WRONG

While both the majority and dissent raise valid points, this Recent Development takes the position that the dissent was correct: Johns's missed opportunity to develop a relationship with his son was beyond his control.[137] That he did not know of his son's existence until the child had already been placed with his adoptive family[138] meant that Johns had no meaningful opportunity to develop a relationship with his son. Rather, Johns could not step up as a father because Welker did not inform him of his son's existence. Once he learned of his son, he acted swiftly to assert his rights.[139] The majority and dissent both discuss the potential implications of this decision on the use of birth control in future cases, but it would have been more useful to analyze which party was responsible for Johns's ignorance of his child's existence. Moreover, both the majority and dissent overlooked another potential implication of this decision—that it fosters suspicion and distrust between current and former romantic partners.

A. The Court's Misplaced Focus on Birth Control

Both the majority and dissenting opinions discuss birth control in some detail, but that focus, in this case, is misguided. What kind of birth control the parties did or did not use should not be the deciding factor in this case, and furthermore, the court's focus on contraception necessitates confronting its potential implications in

135. *See id.* at 387, 758 S.E.2d at 376.

136. *Id.* at 399, 758 S.E.2d at 383 (Jackson, J., dissenting).

137. *See id.* at 396, 758 S.E.2d at 381.

138. *See id.* at 387, 758 S.E.2d at 376 (majority opinion).

139. Johns attempted to intervene in the adoption proceeding less than a month after finding out about the child. *See id.* at 388, 758 S.E.2d at 376. He also prepared a nursery in his home, *In re* S.D.W., __ N.C. App. __, __, 745 S.E.2d 38, 50 (2013), and expended considerable resources pursuing this case. *See supra* note 13.

future cases. The majority was compelled to clarify that its holding does not mean that the act of sex itself effectively puts a man on notice as to possibly having fathered a child[140]—one possible reading of this decision. The dissent also worried that the majority's decision essentially requires men to use multiple forms of redundant birth control lest they be considered on notice of a potential pregnancy.[141]

The dissent's characterization of using multiple forms of birth control as redundant may be true in some cases, but it is not accurate in this case. Welker and Johns had two unplanned pregnancies in less than a year,[142] so using additional birth control would not necessarily have been superfluous. Still, the court's emphasis on birth control is unseemly in this case. Decisions relating to family, children, and contraception are both personal and private and should be free from governmental intrusion as much as possible.[143] Even the most foolproof birth control methods fail on occasion.[144] Moreover, romantic partners need to be able to trust one another since most forms of birth control are in the woman's exclusive control and it would be unreasonable to require men to constantly supervise their partner's use of contraception.

In other cases with different facts, such as cases where reproductive coercion is alleged, it may be necessary to look into the birth control methods a couple used. In this case, however, the emphasis on birth control is unnecessary. Both parties were cavalier about contraception, but only Welker actively concealed the pregnancy and misidentified the child's father.[145] Determining whether Johns's ignorance of his son's existence was or was not within his control should not amount to speculating as to hypothetical scenarios where, had Johns done everything differently, he might have known about the pregnancy. Instead, the court should try to determine who held the control in such a situation and, consequently, who was responsible for Johns's ignorance.

That is not to say that Johns was a completely blameless party here. To an extent, the majority is correct when it accuses Johns of

140. *See In re Adoption of S.D.W.*, 367 N.C. at 395, 758 S.E.2d at 380.

141. *See id.* at 398, 758 S.E.2d at 382 (Jackson, J., dissenting).

142. *See id.* at 387, 758 S.E.2d at 375–76 (majority opinion).

143. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

144. *See Effectiveness of Family Planning Methods*, CDC, http://www.cdc.gov/reproductivehealth/UnintendedPregnancy/PDF/Contraceptive_methods_508.pdf [http://perma.cc/E7YF-KEQ2].

145. *See In re Adoption of S.D.W.*, 367 N.C. at 398, 758 S.E.2d at 383 (Jackson, J., dissenting).

"incuriosity."[146] In a perfect world, couples would all take shared responsibility for contraception and be able to talk openly and honestly about what to do in the event of an unplanned pregnancy. Johns, though, was content to let Welker take responsibility for birth control and not insist on the use of condoms.[147] However, Johns is hardly the first person to have taken a fast and loose approach to contraception, and Welker is just as responsible as Johns in that respect.

B. The Court's Failure To Consider the Parties' Unequal Control

In lieu of its in-depth examination of the parties' use of birth control, the court should have devoted more attention to the question of who in this situation had the most control over the outcome. In this case, Johns was ignorant not because of his passivity, but because Welker actively worked against him, thus depriving him of any control over his relationship with his child. She knew that he was the father of her child.[148] She knew where he lived and how to contact him.[149] Based on their history, having already gone through an unplanned pregnancy, Johns had no reason to believe that Welker would not tell him about any other pregnancies.[150] She held the knowledge and power in this situation, and not only did she fail to inform him of the pregnancy, but she actively worked against his constitutional interest in developing a relationship with his child.[151] Johns was at Welker's mercy as to whether she would share this life-altering information with him. Though Welker likely had the child's best interest at heart, she was not entitled to unilaterally decide to place him for adoption when the father was neither unfit nor disinterested.

Moreover, the tryst between Johns and Welker in November of 2010[152] proves that he was not as disinterested as the majority portrays him. It is difficult to reconcile that visit in November with the idea that Johns should have known about the pregnancy. That Welker could visit Johns less than two months after having given birth to their child and have sex with him, all without telling him about their child, is not something a reasonable person would have anticipated.

146. *Id.* at 395, 758 S.E.2d at 380 (majority opinion).
147. *See id.*, 758 S.E.2d at 380–81.
148. *See id.* at 398, 758 S.E.2d at 382 (Jackson, J., dissenting)
149. *See id.* at 398–99, 758 S.E.2d at 382.
150. *See id.* at 398, 758 S.E.2d at 382.
151. *See id.* at 395, 758 S.E.2d at 380 (majority opinion).
152. *See supra* note 83 and accompanying text.

Besides, prior to November 2010, Johns and Welker had last seen each other in late February or early March. Since the average gestation period is forty weeks,[153] their November rendezvous was well within the average gestation period, counting from late February or early March. Johns reasonably could have concluded from that November visit that Welker had not been pregnant.

Though the dissent is concerned with the majority's opinion effectively imposing a standard requiring all couples to use multiple forms of contraception,[154] the majority opinion *actually* imposes a standard of extreme skepticism towards current and former romantic partners. Ruling that it was within Johns' control to learn about his child means that a man's responsibility to learn about the children he has fathered extends beyond just maintaining or establishing contact with his former lovers. Johns would have had to be in steady contact with Welker after their breakup, affirmatively asking her to confirm that she was not pregnant. It is unreasonable to expect anyone to keep in contact with any and all of his exes on the off chance that one might have become pregnant and failed to notify him of the pregnancy. It is even more unreasonable to expect a man to presume that a romantic partner would come to visit and even be intimate with him and still not tell him about a child he fathered. That level of skepticism is unreasonable and unhealthy, undermining trust in a relationship.

Beyond encouraging an unhealthy level of skepticism, the court essentially gave Welker a free pass to behave badly. Arguably, Welker perjured herself by lying on the affidavit of parentage.[155] Furthermore, her misrepresentations and omissions resulted in Johns being deprived of his fundamental constitutional right to develop a relationship with his child. The majority admits that Welker's behavior was troubling,[156] but she faced no consequences for that troubling behavior and, in fact, received a verdict in her favor. There are many contexts in which safety concerns understandably motivate a mother not to identify her baby's father.[157] If a child's father has a history of domestic violence, drug and alcohol abuse, or serious mental illness, to give a few examples, concealing his identity may

153. *Pregnancy*, OFF. ON WOMEN'S HEALTH, http://www.womenshealth.gov/pregnancy/you-are-pregnant/stages-of-pregnancy.html (last updated Sep. 27, 2010) [http://perma.cc/L8WX-HMT5].

154. *See In re Adoption of S.D.W.*, 367 N.C. at 398, 758 S.E.2d at 382 (Jackson, J., dissenting).

155. *See id.* at 387, 758 S.E.2d at 377 (majority opinion).

156. *See id.* at 395, 758 S.E.2d at 380.

157. *See infra* notes 178–81 and accompanying text.

very well be the best and safest course of action. But in *S.D.W.* there was no evidence of such factors. In essence, the court tacitly approved of Welker's deception and created an incentive for others who are similarly situated to do the same. Though Welker was in all likelihood attempting to provide a better life for her child by placing him for adoption, her desire should not have trumped Johns's constitutional interest absent a showing of unfitness or of an informed disinterest in fathering.[158]

C. Addressing the Best Interest Standard

Of course, it is understandable why the court reached the decision it did. One of the overarching, fundamental goals of family law is to protect the best interests of the child.[159] However, it is established law in North Carolina that the best interest of the child is subordinate to the paramount constitutional interest of a parent as against a nonparent, provided that the parent is fit and has not acted inconsistently with his or her protected right.[160] Generally, the "best interest of the child" test is used in custody determinations between two natural parents[161] who are similarly situated with regard to their constitutional right to the care, custody, and control of their children.[162] However, in custody determinations between a natural parent and nonparents, the best interest standard can only be applied if the natural parent is unfit or has acted inconsistently with his or her constitutionally protected status as a parent.[163] This is because there is a legal presumption that fit parents act in their child's best interest.[164]

158. *See* David N. v. Jason N., 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005).

159. *See* CHILD WELFARE INFO. GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD 1 (2012), https://www.childwelfare.gov/pubPDFs/best_interest.pdf [http://perma.cc/PC62-64WS].

160. *See* Petersen v. Rogers, 337 N.C. 397, 403–04, 445 S.E.2d 901, 905 (1994) (holding that "absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail" and explicitly rejecting plaintiffs' argument that "the welfare of the child is paramount to all common law preferential rights of the parents").

161. The term "natural parent" refers to both biological and adoptive parents. *See* Price v. Howard, 346 N.C. 68, 72, 484 S.E.2d 528, 530 (1997). Prospective adoptive parents would not likely be considered natural parents until the adoption is finalized, which divests the child's biological parents of all parental rights. *See In re* Adoption of Spinks, 32 N.C. App 422, 424, 232 S.E.2d 479, 481 (1977).

162. *See Price*, 346 N.C. at 79, 484 S.E.2d at 534.

163. *See* Adams v. Tessener, 354 N.C. 57, 62, 550 S.E.2d 499, 503 (2001) ("*Petersen* and *Price*, when read together, protect a natural parent's paramount constitutional right to custody and control of his or her children. The Due Process Clause ensures that the government cannot unconstitutionally infringe upon a parent's paramount right to custody solely to obtain a better result for the child. As a result, the government may take a child

Parents' constitutional interest in raising their children is so strong that they must only meet a minimum standard of care to be considered fit parents.[165] If a parent meets this minimum standard, the best interest standard may then only be applied upon a showing by clear and convincing evidence that the parent has acted inconsistently with his or her constitutionally protected status.[166] Acting consistently with the constitutionally protected status is accomplished mainly through establishing a significant "custodial, personal, or financial relationship with [the child]."[167] This support must be ongoing, so as the child ages, these responsibilities will necessarily become more substantial. However, when a child is very young, welcoming the child into a home and holding him out as a biological child is considered substantial.[168]

In this case, Johns never had an opportunity to welcome his son into his home or take custody. Instead, the boy went to live with the Joneses two days after his birth, and by the time the Supreme Court of North Carolina ruled on this case, he was nearly four years old. It is easy to see why the court would be hesitant to remove a four-year old child from the only family he has ever known. Still, the constitutional

away from his or her natural parent only upon a showing that the parent is unfit to have custody or where the parent's conduct is inconsistent with his or her constitutionally protected status." (citation omitted)); *Price*, 346 N.C. at 79, 484 S.E.2d at 534 ("A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child. Therefore, the parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child." (citation omitted)); *Petersen*, 337 N.C. at 403–04, 445 S.E.2d at 905 ("[A]bsent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of natural parents to custody, care, and control of their children must prevail.").

164. Troxel v. Granville, 530 U.S. 57, 68 (2000).

165. *See* Reno v. Flores, 507 U.S. 292, 304 (1993) ("Even if it were shown, for example, that a particular couple desirous of adopting a child would *best* provide for the child's welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child *adequately*. Similarly, 'the best interests of the child' is not the legal standard that governs parents' or guardians' exercise of their custody: So long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves." (citation omitted)).

166. *See* David N. v. Jason N., 359 N.C. 303, 307, 608 S.E.2d 751, 754 (2005).

167. Lehr v. Robertson, 463 U.S. 248, 267 (1983).

168. In fact, if before an adoption petition is filed, a man has received a child into his home and held him or her out to others as his biological child, his consent to adoption is thereafter required. *See* N.C. GEN. STAT. § 48-3-601(2)(b)(5) (2013).

rights of parents are paramount[169] and must be protected, even in cases where the outcome is potentially heartrending. To do otherwise risks setting a precedent that could erode the potency of those constitutional rights in their application to future cases. Furthermore, if the length of time spent with the prospective adoptive family influences the decisions of courts, that creates an incentive for those in favor of the adoption moving forward to stall litigation as long as possible. That is, of course, assuming that the putative father has the resources to litigate. Johns incurred considerable expenses pursuing this case,[170] but many putative fathers who find themselves in similar situations will likely not have the resources necessary to pursue their claims to the end and, as a result, may be unfairly cut out of their children's lives.

Courts should not routinely have to inquire as to the constitutionality of adoptions that have satisfied all the statutory requirements.[171] Since it is not the place of the United States Supreme Court to dictate how a state will handle the details of adoptions taking place within its borders,[172] the Court's standard in *Lehr* articulates only the outer limits of what is acceptable under the Constitution.[173] It's difficult for a father to show the existence of circumstances beyond his control.[174] Many things may be within a father's control, but he may not realize the need to exert such control. While it is this Recent Development's contention that the qualifications for notice were outside of Johns's control, the majority saw it differently. A better-designed statutory scheme could contemplate and provide for these sorts of scenarios in the future, streamlining the adoption process and ensuring increased stability for children while also protecting the rights of putative fathers.

169. *See* U.S. CONST. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

170. *See supra* note 13.

171. *See In re* Adoption of S.D.W., 367 N.C. 386, 391, 758 S.E.2d 374 378 (2014).

172. *See supra* note 56.

173. *See supra* notes 56–58 and accompanying text.

174. *See supra* notes 56–58 and accompanying text.

IV. SUGGESTIONS FOR A WORKABLE STATUTORY SCHEME

A. Policy Underpinnings of the Proposed Statutory Framework

The North Carolina General Statutes are not designed to handle adoptions where a father may not have known about his child or was actively thwarted from developing a relationship with his child.[175] The North Carolina General Assembly needs to implement a statutory scheme that would give meaningful protection to fathers' constitutional rights while still safeguarding women and promoting the best interests of children. Therefore, the general assembly should consider adopting the Uniform Adoption Act—specifically its provisions governing consent and termination of the parent-child relationship.[176] The Uniform Adoption Act was designed to protect the rights of birth parents while also expediting the adoption process and promoting family stability and the best interests of the child.[177] In other words, the Uniform Adoption Act was designed specifically to prevent cases like *S.D.W.* where, under dubious circumstances, an otherwise-fit biological father was deprived of his right to parent his child.

In order to properly address the issue of thwarted or unwitting fathers, one must consider what motivates a mother to hide her pregnancy or actively thwart the father from parenting his child. For example, in one survey, more than one-third of American women have reported experiencing stalking, physical violence, or rape at the hands of an intimate partner.[178] In the same survey, 8.6% of women surveyed, representing an estimated 10.3 million women, have reported having an intimate partner who either refused to wear a condom or attempted to impregnate them against their wishes.[179] These shocking statistics demonstrate that reproductive coercion is a reality—one that occurs all too frequently. Given that violence may "begin or escalate during . . . pregnancy,"[180] there is no doubt that

175. *See supra* Section I.B.

176. *See* UNIF. ADOPTION ACT §§ 3-502, 3-504 (UNIF. LAW COMM'N 1994).

177. *Adoption Act (1994) Summary*, UNIFORM L. COMMISSION, http://www.uniformlaws.org/ActSummary.aspx?title=Adoption%20Act%20(1994) [http://perma.cc/NH59-FCWP].

178. *See* NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CDC, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 2 (2010), http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf [http://perma.cc/527H-GAH4].

179. *See id.* at 48.

180. *See* Kathryn Robinson, *Pregnancy and Abuse: How To Stay Safe for Your 9 Months*, NAT'L DOMESTIC VIOLENCE HOTLINE (July 23, 2013), http://www.thehotline.org/2013/07/pregnancy-and-abuse-how-to-stay-safe-for-your-9-months/ [http://perma.cc/YHY2-D6G2].

many women have valid, legitimate reasons for keeping their child's biological father in the dark. For some women, hiding a pregnancy from a former or current partner could be the difference between life and death.[181] So how should North Carolina go about protecting men like Johns while safeguarding women who have valid reasons for excluding a child's father? The Uniform Adoption Act offers solutions to these problems and more.

B. The Proposed Statutes' Operation

For the most part, North Carolina's statute listing who must consent to an adoption tracks the Uniform Adoption Act's analogous provision, with only a few variances.[182] The first functional difference between the two is the timeframe during which a putative father can assert his rights. While North Carolina's statutes require that a man legitimate the child or take on an obligation of support *before* the filing of the petition in order to withhold consent to an adoption,[183] the Uniform Adoption Act allows a putative father to intervene at any point while the petition to adopt is pending.[184] The two diverge even further when it comes to the amount of focus each places on thwarted or unwitting fathers. Where North Carolina's statutes fail to address the issue at all,[185] the Uniform Adoption Act provides a step-by-step mechanism for determining whether a parent has forfeited his constitutional interest in his child and, therefore, whether he may withhold consent to an adoption.[186]

The Uniform Adoption Act requires only the consent of fathers who have "manifest[ed] parenting behavior[,]"[187] with an exception for fathers who can demonstrate by a preponderance of the evidence a compelling reason for not having demonstrated such behavior.[188]

181. *Cf.* N.C. DEP'T OF JUSTICE, REPORT ON DOMESTIC VIOLENCE RELATED HOMICIDES OCCURRING IN 2013, at 4 (2013), http://www.ncdoj.gov/getdoc/43e3cd15-65fb-409a-a71d-726f3dc92bf8/2013-Report-on-Domestic-Violence-Related-Homicides.aspx [http://perma.cc/4FRS-UF6Q] (noting that in 2013, sixty-two women were murdered by an intimate partner in North Carolina alone).

182. *Compare* N.C. GEN. STAT. § 48-3-601(2)(b) (2013) (stating that petitions for adoption may only be granted by consent of any man who may not be the biological father but was married or attempted to marry the mother when the child was born), *with* UNIF. ADOPTION ACT § 3-502 (1994) (stating that petitions for adoption may be filed by a parent whose spouse has filed a petition to adopt the child in question).

183. *See* N.C. GEN. STAT. § 48-3-601(2)(b)(3)–(5).

184. *See* UNIF. ADOPTION ACT § 3-502(a).

185. *See supra* Section I.B.

186. *See* UNIF. ADOPTION ACT § 2-401 cmt.

187. *See id.*

188. *See* § 3-504(d).

This exception is even further limited in order to weed out fathers who are otherwise unfit. For example, the statute explicitly excludes men who have been convicted of a violent crime or domestic violence offense that indicates that they would be unfit parents.[189] It also excludes men whose parental rights could be terminated under state law,[190] which in North Carolina amounts to men who have abused, abandoned, or neglected their children.[191] This serves to protect women who have justifiable reasons for excluding their child's father.

For those who do not meet any of the statutory criteria listed above, proving a compelling reason for not having manifested parenting behavior is considerably easier than proving that circumstances were beyond one's control. Many things may be within a person's control but outside his or her responsibilities. However, these same factors might still be considered compelling reasons for not manifesting parenting behavior. Once a man has proven a compelling reason by a preponderance of the evidence, the court inquires as to the best interest of the child.[192] If the court determines that it is not in the best interest of the child that the father's parental rights be terminated, the inquiry ends there.[193] His parental rights will not be terminated, and the adoption will not go forward. But where a man has demonstrated a compelling reason for not having stepped up as a father and termination of parental rights *is* in the child's best interest, the inquiry continues.

Where a man has demonstrated a compelling reason for not having taken responsibility as a parent, the adoption may still go forward without his consent if termination of his parental rights is in the child's best interest *and* an additional listed factor is met[194]—essentially creating a best interest of the child–plus standard. The additional factors justifying termination enumerated in the statute include an inability or unwillingness to promptly take over physical and legal custody of the child and pay for the child's support,[195] an inability or unwillingness to establish contact with the child and pay for his or her support in accordance with one's means,[196] and behaving

189. *See* § 3-504(c)(3).

190. *See* § 3-504(c)(5).

191. *See* N.C. GEN. STAT. § 7B-1111(a)(1)–(10) (2013). The statute also lists having fathered the child during the commission of a sexual offense as a ground for terminating parental rights. *See* § 7B-1111(a)(11).

192. *See* UNIF. ADOPTION ACT § 3-504(d).

193. *See id.*

194. *See id.*

195. § 3-504(d)(1).

196. § 3-504(d)(2).

or having behaved in a way that demonstrates unfitness to parent or risks substantial harm to the child's well-being.[197] The additional factor requirement can also be met by showing that failing to terminate the parental relationship would result in detriment to the child.[198] Determining what constitutes detriment to the child is guided by a catchall provision in the statute.[199] This catchall provision gives judges discretion to consider the efforts the thwarted father made to establish a relationship with his child, the role the birth mother played in thwarting the father, and a number of other factors that may influence the child's well-being.[200] The compelling reason, best interest, and best interest of the child–plus standards utilized in the Uniform Adoption Act manage to balance at times competing interests: a biological father's constitutionally protected interest in developing a relationship with his children and the best interest of the child.

Adopting the provisions of consent and termination from the Uniform Adoption Act would also make it clear to the public what the controlling legal standard is. A well-defined standard is easier for courts to enforce through their decisions than is an intentionally vague constitutional standard. With detailed statutes in place and a clear framework to follow, courts would be more likely to produce results that did not stray into potentially unconstitutional territory. Courts would be tasked only with interpreting the statute and spared the additional constitutional analysis and the heightened potential for appeals that come with it. Furthermore, the answers in difficult cases like *S.D.W.* would be more easily ascertainable, thereby reducing the possibility of protracted litigation and, consequently, increasing stability for the children involved.

Were North Carolina to adopt the Uniform Adoption Act's provisions, the end result would be clearer decisions and fewer reversals. Expectations would be clear, children would be spared the pain of forming attachments to an adoptive family only to be sent

197. § 3-504(d)(3).

198. § 3-504(d)(4).

199. § 3-504(e).

200. *See id.* ("In making a determination under subsection (d)(4), the court shall consider any relevant factor, including the respondent's efforts to obtain or maintain legal and physical custody of the minor, the role of other persons in thwarting the respondent's efforts to assert parental rights, the respondent's ability to care for the minor, the age of the minor, the quality of any previous relationship between the respondent and the minor and between the respondent and any other minor children, the duration and suitability of the minor's present custodial environment, and the effect of a change of physical custody on the minor.").

back to a birth family, and adoptive parents' pain would be mitigated as well. Furthermore, had the Uniform Adoption Act's standards been adopted in North Carolina, *S.D.W.* almost certainly would have been decided differently.

C. Application of the Uniform Adoption Act to S.D.W.

Applying the Uniform Adoption Act's provisions to the facts in *S.D.W.* provides a definitive answer to a close case. Had the Uniform Adoption Act's termination of parental rights provisions been in place, instead of being tasked with proving that qualifications for notice were beyond his control, Johns only would have had to demonstrate a compelling reason for why he had not participated in his child's life. Proving a compelling reason by a preponderance of the evidence is much easier than proving that the situation was beyond his control. Reasonable minds can—and did—disagree as to whether it was outside of Johns's control to obtain knowledge of his child. But the court would be harder pressed to justify a ruling that Johns did not have a compelling reason for not becoming involved in his child's life in light of Welker's deception and misrepresentations.

Once Johns had proven a compelling reason, the inquiry would then move to the child's best interest. The court would be tasked with determining whether it would be in the best interest of the child for Johns's parental rights to be terminated. Two days after the child was born, he was placed with the Joneses.[201] A court very likely would choose the Joneses, two parents who wanted and planned for a child and went through a considerable amount of trouble to adopt, over Johns, a single parent who never intended to become a father. But even if it were in the child's best interest to remain with the Joneses, Johns would still have had the right to withhold his consent to the adoption. Johns was prepared to promptly take over the child's physical and legal custody and pay for his support, and there was no evidence that he was unfit, so he does not meet any of the additional statutory factors required for the termination of parental rights under the Uniform Adoption Act. His consent still would have been required.[202]

In the end, had the Uniform Adoption Act been enacted in North Carolina, Johns likely would have won his case. He would have been entitled to stop the Joneses' adoption and take on an active

201. *See In re* Adoption of S.D.W., 367 N.C. 386, 388, 758 S.E.2d 374, 376 (2014).

202. *See* Part III's discussion of the lack of evidence indicating that Jones posed any danger to either Welker or her child, *supra*; *see also* UNIF. ADOPTION ACT § 3-504(d).

parenting role instead. Though it is understandable that a judge might hesitate to remove a young child from the only home and family she has ever known, the alternative is to deny Johns his constitutional rights. Denying Johns the opportunity to exercise his constitutional rights potentially weakens the well-established legal principle that a parent has a constitutional right to the care, custody, and control of his children.[203] Moreover, had the Uniform Adoption Act been in place, an appropriate legal judgment would have been more easily ascertainable. Litigation likely would not have lasted for more than three years as it did in *S.D.W.*, since, under the Uniform Adoption Act, the court's only task would have been to apply the clear and precise statute without having to wade into murky and vague constitutional territory. While it is a natural human instinct and an otherwise worthy goal to protect and promote children's best interests, it is still the responsibility of the courts to uphold the Constitution, even when it produces unpalatable results. A better and more thorough statutory provision governing consent to adoption and termination of rights, such as the Uniform Adoption Act, would have balanced the competing interests articulated in *Lehr* while simplifying the analysis for the court and easing its burden.

CONCLUSION

It is a well-established principle that parents have a constitutional interest in the care, custody, and control of their children.[204] However, "the mere existence of a biological link"[205] does not necessarily merit constitutional protection when a father has failed to step up and take on the responsibilities that come with parenting.[206] While it is clear that an absent or uninterested father should not be able to withhold his consent to an adoption, when the putative father was previously unaware of the child it is difficult to nail down the precise point where he has forfeited his constitutional right to develop a relationship with his child and when an adoption can proceed without his consent.

When a child is placed for adoption, the state is forced to balance several competing interests—those of the birth parents, those of the adoptive parents, and those of the child. In *S.D.W.*, the court allowed an adoption to become final without the consent of the child's

203. *See* Troxel v. Granville, 530 U.S. 57, 66 (2000).
204. *See* Stanley v. Illinois, 405 U.S. 645, 651 (1972).
205. Lehr v. Robertson, 463 U.S. 248, 261 (1983).
206. *See id.*

biological father because learning of his child's existence was deemed to be within his control.[207] This Recent Development analyzed why the majority was wrong and how the father's knowledge of his son and his entitlement to withhold consent were beyond his control.[208] Moreover, Johns's case has the potential for broad implications in future adoptions, with the majority opinion effectively requiring an unreasonably high level of skepticism between men and their romantic partners in order to safeguard his constitutional rights. Difficult cases like *S.D.W.* could be made easier for the courts if the North Carolina General Assembly were to enact further adoption legislation addressing the issue of fathers who are unaware of their children or have been otherwise thwarted from developing a relationship with them. As they stand now, North Carolina's adoption laws are woefully inadequate, failing to provide meaningful guidance.

By contrast, the Uniform Adoption Act contemplates thwarted and unwitting fathers and provides a mechanism for balancing their rights against the best interest of the child, while also taking into account the real and legitimate reasons a woman might have for hiding a pregnancy or preventing a father from developing a relationship with his child. North Carolina would do well to adopt these provisions. Had they been in place, the outcome in *S.D.W.* would have been different. As marriage becomes less prevalent and unconventional family arrangements more the norm, courts will be forced to confront more cases like *S.D.W.* The North Carolina General Assembly should take action and enact statutes, like the Uniform Adoption Act, that will protect the constitutional rights of fathers within the state while still promoting the child's interests. Until such time, it is the responsibility of the courts to uphold the Constitution, even when it produces unpopular results.

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207. *See In re* Adoption of S.D.W., 367 N.C. 386, 396, 758 S.E.2d 374, 381 (2014).

208. *See supra* Part III.

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