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Fathers Are Parents Too: Challenging Safe Haven Laws with Procedural Due Process

Dayna R. Cooper

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NOTE

FATHERS ARE PARENTS TOO: CHALLENGING SAFE HAVEN LAWS WITH PROCEDURAL DUE PROCESS

I. INTRODUCTION

In 1997, the country heard about the case of the teen couple who left their live newborn baby in a hotel dumpster.1 In 1998, Laura Rafferty, gave birth to a baby in the shower at her sorority house and cut its umbilical cord with scissors.2 Afterwards, she wrapped the baby in a towel and left it under her bed while she attended class.3 When she returned, the baby was dead and she disposed of it in a nearby dumpster.4 In another case, Kelly Angell, described as an honor student, managed to hide a full-term pregnancy from her family.5 She delivered her son within minutes in a heavily traveled airport restroom.6 She gave birth while other women came in and out of stalls within inches of her, tried to clean herself up, and then went to wait for her flight, leaving her baby in the toilet bowl.7

These incidents have sparked a series of laws aimed at preventing infanticide by allowing parents to leave their children at designated “safe havens”8 within a short period after their birth. In return for safely dropping off their infants, the safe haven laws guarantee anonymity and

2. See id.
3. See id.
4. See id.
6. See id.
7. See id.
8. “Safe havens” include hospitals and other similar facilities such as fire, ambulance, and police stations. See infra notes 21-33 and accompanying text.
immunity from prosecution for abandonment.\textsuperscript{9} The ultimate goal of these laws is to protect babies by persuading mothers to leave them in safe places so they can receive any medical care that is needed and, ultimately, be placed with an adoptive family. To date, forty-two states have enacted such legislation.\textsuperscript{10} No court, however, has directly addressed the implications of the non-relinquishing parents' parental rights in relationship to the safe haven laws.\textsuperscript{11} It is unclear how the safe haven laws constitutionally account for the fundamental rights of one parent, the father, when the baby's mother abandons their child. This Note will address this issue and focus on the constitutional rights of fathers in the context of safe haven laws.

Part II addresses information regarding the safe haven laws. First, the laws will be addressed generally, explaining what they are and why they were enacted. Then a closer look will be taken at the specific statutes and requirements in various states, and the similarities and differences between them will be identified. Part III discusses the fundamental rights of parents guaranteed by the Fourteenth Amendment and explains the rights afforded to nonconsenting parents, namely fathers, when the baby's mother attempts to relinquish her rights to the child. Supreme Court cases that deal with the rights of non-consenting unwed fathers in adoption cases will be discussed. Part IV addresses state cases where there is an interference with an unwed father's ability to establish a relationship with his child and the effect this has on the father's rights in adoption proceedings. Further, this part assesses how state courts treat cases that have arisen from the safe haven laws. Part V discusses the interaction between safe haven laws and procedural due process concerns. Part VI will conclude that some of these safe haven laws violate the fundamental rights of fathers.


\textsuperscript{11} For purposes of this Note, the term non-relinquishing parent and father will be used to mean the same thing. To date no father has challenged the constitutionality of the Safe Haven Laws. There have been a few cases which have discussed in dicta the constitutionality of the Safe Haven Laws. See infra Part IV.
II. SAFE HAVEN LAWS

Safe haven legislation is a national movement aimed at responding to baby abandonment by enacting laws that provide parents with an anonymous way to safely leave their babies in someone else’s care without the fear of being criminally prosecuted for abandonment. The first state to adopt this legislation was Texas which adopted its “Baby Moses” law in June 1999. The Texas legislation was triggered by the growing number of baby abandonments in the Houston area. In the first ten months of 1999, thirteen babies were abandoned in Houston, three of which were found dead. Given the high rate of baby abandonment, Texas leaders decided to take action. Led by Texas State Representative Geanie W. Morrison, the safe haven legislation was proposed to address two important issues. First, it was proposed to significantly reduce the risk of a newborn being abandoned in a dangerous environment that may result in death. Second, the legislation was proposed to protect mothers who feel as if they have no other option besides abandonment, but who might be willing to safely deliver their newborn to a safe haven. Accordingly, mothers who leave their babies in a designated safe haven receive either immunity from prosecution or an affirmative defense to child neglect and abandonment prosecution.

No two safe haven laws are exactly the same; however, all have similar characteristics. Each state provides information as to where the baby can be left, who may leave the child, and conditions under which

13. See Baum & Skaare, supra note 9, at 513; see also TEX. FAM. CODE ANN. §§ 262.302, 262.303 (Vernon 2002); TEX. PENAL CODE ANN. § 22.04(h) (Vernon Supp. 2003).
15. See id.
16. See id.
17. Geanie W. Morrison is a Texas state Representative who is the author of the first bill to address the increase in baby abandonment. See id.
18. See id.
19. See id.
20. See Child Welfare League, supra note 10. States which provide immunity from prosecution include: Arizona, California, Connecticut, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Minnesota, Montana, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Washington and Wisconsin. See id. States which provide the safe haven statute as an affirmative defense include: Alabama, Arkansas, Colorado, Delaware, Indiana, Louisiana, Maine, Michigan, Mississippi, New Jersey, New York, Oregon, Texas and West Virginia. See id. Missouri law provides for both an affirmative defense and immunity from prosecution depending on the age of the baby when he is left at the safe haven. See id.
children may be left. Additionally, each law includes procedures which must be followed when a designated safe haven accepts a child.

A. Places a Baby Can Be Left

Generally, states include hospitals and other similar facilities in their definition of a safe haven. For example, Indiana, Minnesota, South Carolina, Texas, and West Virginia are among the states which limit the definition of a safe haven. However, other states expand the definition of a safe haven to include other locations, such as fire, ambulance, and police stations. Some examples of states which have adopted a broader definition of safe havens include Colorado, Delaware, Kansas, Michigan, and Tennessee.

21. See id. The reason for using hospitals is that in an attempt to conceal the pregnancy: [I]t appeared that the majority of these mothers had received no prenatal care, making immediate medical attention critical. [I]t would appear that most mothers deliver their babies in secret because they desire to keep the fact of the pregnancy confidential. It is not unusual for babies delivered by mothers without assistance to develop various kinds of distress. For these reasons, the law is designed to encourage those who feel they are forced or left no alternative but to abandon a baby rather than seek emergency care from a health facility to go to those who are trained to stabilize and transport those in need of immediate medical attention.

Unruh, supra note 12.

22. See IND. CODE ANN. § 31-34-2-5-1(b) (West Supp. 2002) (calling for "emergency medical services providers" to accept children).


25. See TEX. FAM. CODE ANN. § 262.302(a) (Vernon 2002) (noting that "[a] designated emergency infant care provider shall, without a court order, take possession of a child").

26. See W. VA. CODE ANN. § 49-6E-1 (Michie 2001) (allowing for children to be left at a "hospital or health care facility").

27. This list does not include all the states which limit their definition of a safe haven, it only provides some examples of states which do.

28. See Raum & Skaare, supra note 9, at 519.


B. People Who Can Leave an Infant

A majority of states limit those eligible to leave a baby to the child’s parents. Examples of states in which this policy is followed include, but are not limited to, Colorado, Florida, Oklahoma, Tennessee, and Texas. However, there are several states that allow someone other than the parent to leave the child. Most of these states require that anyone leaving the child besides the parent be acting on behalf of the parent. Connecticut, Minnesota, South Carolina, and California are among these states. Delaware has the broadest requirement, providing merely that “a person” can leave the child without including any qualifying language. The anonymity which these laws guarantee present problems. The person who is leaving the child need not identify themselves or their relationship with the child. This leaves open the question of whether or not the person leaving the child was lawfully entitled to possession of the child.

C. What Children May Be Abandoned?

Newborns face two main limitations determining their eligibility for being left at safe havens. The primary limitation imposed by all states is an age limit. The other limitation, imposed by only a minority of states, is a requirement that the child be unharmed.
of states, prohibits safe havens from accepting abused children. The age limitations range from state to state but most states impose a thirty day limitation or a three day limitation (seventy-two hours) from birth. States which require a thirty day limitation include Connecticut, South Carolina, and Tennessee. Other states such as California, Florida and Minnesota impose a three day limitation. A person who leaves a child older than the prescribed age limit may face prosecution for abandonment. As a practical matter, the limits cannot be strictly enforced and merely amount to approximations since the reporting statutes anonymity clause provides that a parent/person need not state the child’s date of birth. Few of us could distinguish a thirty day old child from a thirty-one day old.

The other main prohibition amongst states dictates that the safe havens not accept abused children. States that proscribe such prohibitions such as Delaware, Florida and Minnesota, all take the same basic form. A safe haven will not accept a child if he or she shows signs of abuse. If the child manifests signs of abuse, parents are subject to prosecution.

D. Procedures for Accepting Children

A large component of safe haven legislation is the anonymity that it guarantees. Virtually every safe haven law either expressly guarantees or otherwise provides for the anonymity of the parents or person leaving the child. Generally, these anonymity provisions come in three forms. States that fall into the first group do not explicitly provide for

48. See id. at 523-24.
49. See id. at 524.
54. See FLA. STAT. ANN. § 383.50(1) (West 2002).
56. See Raum & Skaare, supra note 9, at 525.
57. See id. Several states attempt to clear up the ambiguity. For example Florida requires that a physician reasonably believe the child to be no more than three days old. See FLA. STAT. ANN. § 383.50(1).
58. See Raum & Skaare, supra note 9, at 526.
59. See DEL. CODE ANN. tit. 16, § 907A(b) (Supp. 2002).
60. See FLA. STAT. ANN. § 383.50(5).
62. See Raum & Skaare, supra note 9, at 526.
63. See id. at 527-28.
anonymity; however, they also do not provide for identification of parents. Since the statute does not mention parents after stating that they are allowed to leave the children, it implies that the parents do not need to be identified and can remain anonymous. Colorado, until recently, was an example of a state in which the law is silent as to identification. Additionally, Alabama, Texas and Louisiana legislation are also silent on the subject of anonymity. These states allow parents to leave children and do not mention the term “parents” again in the statute.

The second group of laws expressly provide for anonymity but place the burden of remaining anonymous on the parents. Safe havens, such as those in California, Connecticut and West Virginia, accepting a child may ask questions of the person abandoning the child but the person is not required to answer. In states such as New Jersey, Delaware and Oklahoma, anonymity is guaranteed by allowing parents to remain anonymous but there are no express limitations on what the safe haven may ask.

The final group affirmatively prevents safe havens accepting the child from doing certain things or asking certain questions. Florida, Wisconsin and Minnesota are states which fall within this category.

64. See id. at 528.
65. See COLO. REV. STAT. ANN. § 19-3-304.5(1) (2000) (providing only that a parent may leave child a without being prosecuted for abandonment, remaining silent as to identification).
68. See LA. CHILDREN'S CODE ANN. art. 1703-1706 (West Supp. 2002).
69. See CAL. HEALTH & SAFETY CODE § 1255.7 (West 2001).
70. See CONN. GEN. STAT. ANN. § 17a-58(b) (West Supp. 2002) (“The designated employee may request the parent or agent to provide the name of the parent or agent and information on the medical history of the infant and parents. The parent or agent is not required to provide such name or information.”).
71. See W. VA. CODE ANN. § 49-6E-1 (Michie 2001) (providing that a hospital “may not require the person to identify themselves, but shall otherwise respect the person’s desire to remain anonymous”).
74. See OKLA. STAT. ANN. tit. 10, § 7115.1 (West Supp. 2003) (providing anonymity for someone leaving a newborn, but requiring him or her to state that he or she is the newborn’s parent).
75. See FLA. STAT. ANN. § 383.50(5) (West 2002) (providing that anyone leaving a child “has the absolute right to remain anonymous and to leave at any time and may not be pursued or followed”).
76. See WIS. STAT. ANN. § 48.195(2) (West Supp. 2002) (prohibiting the coercion of anyone into revealing his or her name).
77. See MINN. STAT. ANN. § 145.902 (West Supp. 2002) (stating that “[t]he hospital must not inquire as to the identity of the mother or the person leaving the newborn”).
There are also several states which have provisions that provide parents with an opportunity to provide information. Under the provision in South Carolina, parents are provided with forms giving them an opportunity to provide information about the medical history of the child.\textsuperscript{78} California and Michigan have similar provisions requiring the person who accepts the child to attempt to discover certain information such as medical history and the parents' identities.\textsuperscript{79}

It is the anonymity requirement that creates a due process issue for fathers. Since the babies are anonymously abandoned, it becomes impossible to gather information regarding the identity of the father of the child in order to provide him with notice proceedings regarding the termination of his parental rights.

\textbf{E. Procedures for Post-Abandonment}

The details for the post-abandonment procedures vary from state to state. However, most of the safe haven legislation contains two similar requirements. First, the safe haven accepting custody of the child from a parent is directed to "[p]erform any act necessary, in accordance with generally accepted standards of professional practice, to protect, preserve, or aid the physical health or safety of the child during the temporary physical custody."\textsuperscript{80} California,\textsuperscript{81} Florida,\textsuperscript{82} Indiana,\textsuperscript{83} Louisiana,\textsuperscript{84} South Carolina,\textsuperscript{85} Texas\textsuperscript{86} and West Virginia\textsuperscript{87} are examples of states that provide for implicit consent by parents for necessary treatment of the child. Other states, such as Connecticut\textsuperscript{88} and Minnesota,\textsuperscript{89} do not contain any express provisions relating to the treatment of the child. The second requirement, present in all states, is that safe havens must contact the relevant state or county child welfare agency and notify them that they have received a child.\textsuperscript{90} Although the time frame for reporting is different among various states, reporting is

\begin{footnotesize}
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\item \textsuperscript{81} See Cal. Health & Safety Code § 1255.7(b) (West Supp. 2003).
\item \textsuperscript{82} See Fla. Stat. Ann. ch. 383.50(3) (West 2002).
\item \textsuperscript{83} See Ind. Code Ann. § 31-34-2.5-1(b) (West Supp. 2002).
\item \textsuperscript{84} See La. Children's Code Ann. art. 1704(A) (West Supp. 2003).
\item \textsuperscript{86} See Tex. Fam. Code Ann. § 262.302(c) (Vernon 2002).
\item \textsuperscript{87} See W. Va. Code Ann. § 49-6E-1 (Michie 2001).
\item \textsuperscript{89} See Minn. Stat. Ann. § 145.902(1) (West 2003).
\item \textsuperscript{90} See Raum & Skaare, supra note 9, at 533.
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mandatory.\textsuperscript{91} The relevant agency then takes physical custody of the child, takes over the care of the child, and continues with the rest of the prescribed process.\textsuperscript{92}

Once the statute provides that the baby is turned over to a child welfare agency, the safe haven laws are either silent about the procedures for the adoption of the abandoned baby or they simply cross reference the general provision of the particular state on the termination of parental rights and adoption.\textsuperscript{93} The general law, however, is not suited to deal with specific issues that arise from the abandoned baby cases. Most notably, there is no way to notify the father and obtain his consent to termination of his parental rights.\textsuperscript{94}

III. RIGHTS OF NON-CONSENTING FATHERS IN THE TERMINATION OF PARENTAL RIGHTS CASES

The validity of the safe haven laws turns on father's rights regarding notice of termination of parental rights proceedings. The Fourteenth Amendment declares that no state shall "deprive any person of life, liberty, or property without due process of law."\textsuperscript{95} The Fourteenth Amendment encompasses a parent's liberty interest in the custody, care, and control of their children.\textsuperscript{96} The Supreme Court has held that a parent's right to make decisions concerning the custody, care, and control of his or her children is protected by the Fourteenth Amendment's Due Process Clause.\textsuperscript{97}

Prior to 1972, an unwed father had no parental rights.\textsuperscript{98} To ensure an adoption of a child, all that was needed was the consent of the child's mother when the mother was not married.\textsuperscript{99} If the father objected and was not married to the mother, he had no legal standing to challenge the adoption.\textsuperscript{100} His consent was irrelevant. In 1972, this changed with the Supreme Court's decision in \textit{Stanley v. Illinois}.\textsuperscript{101} In \textit{Stanley}, an Illinois

\textsuperscript{91} For example, Minnesota requires twenty-four hours. See MInN. STAT. ANN. § 145.902(2).
\textsuperscript{92} See Raum & Skaare, \textit{supra} note 9, at 533.
\textsuperscript{93} See id.; see also Unruh, \textit{supra} note 12.
\textsuperscript{95} U.S. CONST. amend. XIV, § 1.
\textsuperscript{96} U.S. CONST. amend. XIV, § 1.
\textsuperscript{97} See Santosky, 455 U.S. at 753; Pierce, 268 U.S. at 533-35; Meyer, 262 U.S. at 399.
\textsuperscript{98} See Note, \textit{The Emerging Constitutional Protection of the Putative Father's Parental Rights}, 70 MICH. L. REV. 1581, 1583-84 (1972).
\textsuperscript{99} See id.
\textsuperscript{100} See id.
\textsuperscript{101} 405 U.S. 645 (1972).
statute that stated an unwed father was not fit to be a parent and that he did not have a right to custody of any child was challenged. Peter Stanley lived with Joan Stanley intermittently for eighteen years during which they had three children together but never married. When Joan Stanley died, the children were declared wards of the state and placed with court-appointed guardians. Stanley appealed, claiming that he was deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. The Court concluded that as a matter of due process, Stanley was entitled to a hearing on his fitness as a parent before his children were taken away from him. By denying Stanley a hearing, the state was denying him due process guaranteed by the Fourteenth Amendment. For the first time, the Court recognized that the right of unwed fathers to care for their biological children is entitled to heightened constitutional protection against state interference. Thus, after Stanley, fathers that have relationships with their children are entitled to notice and an opportunity to be heard before their parental rights can be terminated.

In Quilloin v. Walcott, the Supreme Court considered the constitutional claims of an unwed father who had never lived with, sought custody of, nor legitimated his child. Quilloin challenged a statute that required nothing more than the mother’s consent for the adoption of an illegitimate child. The statute denied the father of an illegitimate child any authority to block the adoption. Quilloin argued that this violated his due process and equal protection rights. The Court rejected Quilloin’s challenge to the statute, holding that although due process might require a state to obtain consent or establish unfitness before acting to separate a “natural family,” Quillon could make no claim to being part of such a family since he never sought custody of his child. The Court focused not on biology but on the nature of the

102. See id. at 646 (noting that under Illinois law, the children of unwed fathers become wards of the state upon the death of the mother).
103. See id.
104. See id.
105. See id.
106. See id. at 649.
107. See id.
110. See id. at 249-50.
111. See id. at 255-56.
112. See id. at 256.
relationship with the child. As a result, the rights of fathers’ who have never offered support or developed a relationship with their child are not entitled to constitutional protection.

Following the Quillion case, the Court returned to the question of an unwed father’s constitutional right in Caban v. Mohammed. In Caban, the Court held that a New York statute which mandated an unmarried mother’s consent, but not an unmarried father’s consent, was necessary for an adoption, violated the father’s right of equal protection. Unlike the father in Quillion, Abdiel Caban lived with the children’s mother for several years and helped raise the children. When the child’s mother left, Abdiel continued to visit the children and even took custody of them for several months. The Court concluded that where a father has developed a substantial relationship with his children, he could not have his rights terminated merely because he did not marry the mother. Therefore, a father who has developed a relationship with his child is entitled to notice that his parental rights may be terminated.

After the Supreme Court’s rulings in Quillion and Caban, it became clear that unwed fathers could not be unconditionally excluded from the adoption process, but neither were they positively entitled to insist that adoption be conditioned upon their consent. The constitutional rights of unwed fathers to challenge the adoption of their children does not arise from biological fatherhood alone, but rather from their having a substantial relationship with their child worthy of protection.

This rule was further validated by the Supreme Court in Lehr v. Robertson. The Court analyzed a New York statute that required notice to be given only to men who had been previously identified as, or adjudicated to be, the child’s father or had demonstrated an interest in the child by filing a claim of possible paternity with the state’s Putative Father Registry. Lehr, an unwed father, challenged the adoption of his two-year-old daughter because he had not been given prior notice. The Supreme Court held that Lehr did not fall within any of the categories of men who were entitled to notice because he had not developed a
substantial relationship with his child. The Court distinguished between fathers who have earned a right to be heard because they have established a substantial relationship with their child and those who have not earned rights because they have failed to establish a relationship.

These Supreme Court adoption cases seem to recognize two categories of fatherhood. One category involves the father who plays a role in the life of his child by offering support and assuming responsibility. This father is entitled to protection against interference with the relationship and is therefore entitled to parental rights comparable to that of the mother. Absent this father’s consent or a showing of unfitness, his rights to his child could not be terminated. In contrast, the Supreme Court has made it clear that a biological father who does not assume the duties of parenthood and who does not assert his interest in fatherhood is deemed to have given up his parental rights.

IV. STATE COURTS’ TREATMENT OF UNWED FATHERS’ RIGHTS REGARDING NEWBORN CHILDREN

Despite what appears to be decisive and all inclusive decisions, the Court does not resolve what rights should be afforded to a father who is unable to establish a relationship with his child for reasons outside of his control. For example, the Court does not answer the question of what rights a father has when his newborn child, with whom he is unable to establish a relationship due to the short time frame, is put up for adoption without his knowledge or consent.

In all of the cases decided by the Court, the unwed fathers knew of the child’s existence. In Stanley, the father had been living with the children until the time they were removed from his custody. In Quilloin, the very fact that Leon Quillion attempted to block his child’s

123. See id. at 263-67.  
124. See id. at 262. A substantial relationship includes establishing a custodial, personal or financial relationship with the child. The Court stated that, “[I]f one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a State from according the two parents different legal rights.” Id. at 267-68 (footnote omitted).  
125. See Meyer, supra note 108, at 762.  
128. See Stanley, 405 U.S. at 647.
adoption shows that he had knowledge of his child's existence. In Caban, the unwed father's contact and relationship with his children were substantial. Finally in Lehr, his visits to the child, his effort to seek a paternity declaration and his attempt to block the child's adoption are all evidence of the father's knowledge of his child's existence.

Furthermore, in the Supreme Court cases none of the children involved were newborns. In Stanley, the children's ages are not indicated, however, the Court's description of Stanley's interest being that "of a man in the children he has sired and raised," implies the children were beyond the age of newborns. In Quilloin, the child was approximately twelve years old when Walcott sought adoption. Caban's children were ages six and four when a petition for adoption was filed by Caban. The child in Lehr was more than two years old when the Robertson's sought to adopt her. Additionally, the Court in Caban stated that "because the question is not before us, we express no view whether such difficulties would justify a statute addressed particularly to newborn adoptions." Further, commentary on these cases has pointed out that the Court has left unanswered the question of the father's rights in the adoption of newborn children.

A. State Courts' Discussion of Questions Concerning Fathers' Rights Which Are Left Unanswered by the Supreme Court

Although the Supreme Court has failed to address these issues, state courts have attempted to answer these concerns. Cases have arisen in state courts involving newborns and mothers who hide their pregnancy

129. See Quilloin, 434 U.S. at 247.
130. See Caban, 441 U.S. at 382-84; see also supra note 119 and accompanying text.
131. See Lehr, 463 U.S. at 250-53.
132. Stanley, 405 U.S. at 651.
133. See Quilloin, 434 U.S. at 247.
134. See Caban, 441 U.S. at 382-83.
135. See Lehr, 463 U.S. at 250, 252.
136. Caban 441 U.S. at 392 n.11; see also HARRY D. KRAUSE, FAMILY LAW IN A NUTSHELL 174 (2d ed. 1986) ("The question that is most important to the effective functioning of the typical adoption process, has not been answered: [none] of the earlier cases articulates the interested and responsible unmarried father's rights immediately after the child's birth.").

The Lehr case also leaves unanswered the question of the father's rights respecting adoption placements of newborn children. In such cases he usually will have had no opportunity to develop a relationship with the child if the mother relinquishes the child straight from the hospital to an adoption agency, the procedure favored for non-relative adoptions by many agencies.

Id.
from the father. In these situations, the fact that the father has not established a relationship with his child is due to the mother’s actions, not any inaction on his part. Many state courts have found that the father would be entitled to notice of the adoption of the child because it was the mother’s bad deeds, not the father’s inaction, that deprived the father of the opportunity to develop a parent-child relationship. 138 The safe haven laws present issues similar to the ones which the state courts have been presented with.

In many cases, the courts have held that interference with an unwed father’s efforts to show a commitment to parenting his child provides just cause for not stripping away his rights to contest an adoption of his child. 139 In 1978, a Kansas court in In re Adoption of Lathrop 140 ruled that an unwed father who has been prevented from providing parental care for his child from the time of birth by outside agencies, such as adoptive parents, cannot be faulted nor can his parental rights be lessened by his failure to perform his parental responsibilities. 141 In this case, the unwed father was not originally notified of the filing of the petition for adoption nor was his consent to the adoption obtained. 142 The court acknowledged that only the baby’s mother needs to give her consent to the adoption of a child. 143 If the father, after learning of the adoption, appears and asserts his rights and desire to assume parental responsibility for the child, then his rights must be given preference over the adoptive parents. 144 However, it should be mentioned that the court restricted this ruling to fathers who had failed to assume responsibility of their child for less than two years and fathers who are found to be fit. 145

The court in Ex rel. Baby Girl W. 146 held that an unwed father’s parental rights could not be subject to termination prior to the time he was contacted with a request that he relinquish his parental rights. 147 This

138. See, e.g., In re Doe, 638 N.E.2d 181, 182; B.G.C., 496 N.W.2d 239, 241 (Iowa 1992); Nale v. Robertson, 871 S.W.2d 674, 680 (Tenn. 1994); see also In re Kirchner, 649 N.E.2d 324, 333 (Ill. 1995) (awarding writ of habeas corpus and noting that unwed fathers who “through deceit, are kept from assuming responsibility for and developing a relationship with their children, are entitled to the same due process rights as fathers who actually are given an opportunity and do develop this relationship”).

139. See Ardis L. Campbell, Annotation, Rights of Unwed Father to Obstruct Adoption of His Child by Withholding Consent, 61 A.L.R. 151, 179 (5th ed. 2001).


141. See Campbell, supra note 139, at 248.

142. See id.

143. See Lathrop, 575 P.2d at 898.

144. See id. at 898-99.

145. See id. at 899.

146. 728 S.W.2d 545 (Mo. Ct. App. 1987).

147. See id. at 548.
applies if a father has no knowledge of the mother’s location during the prenatal period, if he was not informed the child was born, if the mother acted to conceal the child’s birth and the father’s identity, and if there is no evidence to suggest that the father had any means of learning those facts.  

In *In re Adoption of Ashley*, the child’s mother moved several times and at no time advised the unwed father where the child was located. The court determined that there was no showing of purposeful ridding of parental obligations or withholding of interest, presence, affection, care and support, and held that the unwed father’s consent to the adoption of his child was therefore required.

Courts have also considered whether an unwed mother should be permitted to be the sole authority on cases where she refuses to reveal the identity of the father. In *Augusta County Department of Social Services v. Unnamed Mother*, the court held that an agreement surrendering a child for adoption is invalid without notice, at least by publication, to the father when the mother knows the identity of the natural father. The court reasoned that the statute recognized that an unmarried natural father has parental rights that are protected by procedural due process. When a mother knows but refuses to reveal the identity of the father, his rights attach to the child and cannot be terminated without due process notice.

In the cases of Baby Richard and Baby Jessica, the state supreme courts of Illinois and Iowa, respectively, regarded fathers as blameless victims and held that the Constitution would not permit these men to suffer the loss of fatherhood when they had done nothing to warrant such a penalty. In the Baby Richard case, the Illinois Supreme Court decided that the biological mother had schemed with the couple who adopted Baby Richard in order to deprive the biological father of

148. See id.
150. See id. at 338.
151. See id. at 339.
152. See Campbell, *supra* note 139, at 301.
154. See Campbell, *supra* note 139, at 301 (quoting the Virginia statute section 63.1-204(D): “what is reasonable under the circumstances . . . taking into account the relative interests of the child, the mother, and the father”).
155. See id.
156. *In re Kirchner*, 649 N.E.2d 324, 326 (Ill. 1995).
any chance to obtain custody.\textsuperscript{158} The court ruled that the adoption of Baby Richard be vacated.\textsuperscript{159} When the court heard the case on petition, they justified the result by pointing to the United States Constitution. Although Kirchner did not have a substantial relationship with his son, he had not dodged the responsibilities either.\textsuperscript{160} Concluding that the case fell in between these circumstances, the court reasoned that the rationale underlying Supreme Court decisions dealing with the rights of unwed fathers "suggests that fathers . . . whose parental rights are not properly terminated and who, through deceit, are kept from assuming responsibility for and developing a relationship with their children, are entitled to the same due process as fathers who actually are given an opportunity and do develop this relationship."\textsuperscript{161}

The courts of Iowa and Michigan arrived at the same conclusion in the Baby Jessica case. In this case the courts ordered Baby Jessica to be taken from her adoptive parents' home in Michigan and returned to her biological father.\textsuperscript{162} The Iowa court invoked authority from the Constitution in coming to the conclusion that the adoption could not continue without the father's consent or showing that he is unfit.\textsuperscript{163} The court asserted that an unwed father has a constitutionally protected interest in establishing a relationship with a child when they were prevented from having a relationship in the past.\textsuperscript{164}

Thus, based on these state court cases, a father has a due process right to notice of any proceedings to terminate his parental rights. A father has these rights, even if they have not offered support to the mother or established a relationship with the child, when his inaction was not his fault.

\textsuperscript{158} See Kirchner, 649 N.E.2d at 327. When Kirchner returned from a visit to Czechoslovakia he was informed from the biological mother's relatives that the baby had died after childbirth. See id. The mother then hid herself and the child from Kirchner's persistent inquiries. See id. When the child was fifty-seven days old, the mother confessed that she had surrendered the child for adoption. See id.

\textsuperscript{159} See In re Doe, 638 N.E.2d 181, 183 (Ill. 1994).

\textsuperscript{160} See Kirchner, 649 N.E.2d at 336.

\textsuperscript{161} Id. at 333; see also Doe, 638 N.E.2d at 186 (McMorrow, J., concurring) (concluding that Kirchner's behavior would not provide sufficient grounds for involuntarily terminating his parental rights and therefore the adoption could not proceed without his consent).

\textsuperscript{162} See B.G.C., 496 N.W.2d at 241. The mother named another man the father on Baby Jessica's birth certificate and with that man surrendered the child for adoption. See id.

\textsuperscript{163} In re Baby Girl Clausen, 502 N.W.2d 649, 664 (Mich. 1993).

\textsuperscript{164} See id.
B. State Courts' Treatment of Cases that Have Arisen from the Safe Haven Laws

The Family Court of New York and circuit courts of Michigan and Florida have all heard cases in which social service agencies have requested a termination of parental rights of a baby who was surrendered under the Safe Haven Laws. In the New York case, a baby was abandoned and left at a hospital. The Department of Social Services was seeking an order to terminate parental rights and place the baby in their guardianship and custody. Regarding notice to the parents, the court stated that since “the identity and whereabouts of the mother were unknown, and with absolutely no specific information about the putative father of the child, notice of the proceeding was given via publication to ‘Jane Doe’.” However, this notice was primarily aimed at the mother, Jane Doe, and therefore the father’s parental rights were not addressed. Ultimately, the court terminated the parental rights and granted custody and guardianship to the Department of Social Services based on the facts that the parents had abandoned their baby and failed to contact the child during the six months after the termination proceedings were instituted. However, when addressing the factual basis for this determination, the court only discussed the mother and made no mention of the father at all.

The Michigan court discussed the rights of biological parents and Judge Brennan stated that “when the state takes action, or provides a method by which, to terminate parental rights, the Constitution requires fundamentally fair procedures.” In that case, the court decided not to terminate the parental rights of the father since the emergency service provider failed to comply with provisions intended to protect non-surrendering parents’ rights. In another Michigan case, the court found

166. See id.
167. See id. at 514.
168. See id.
169. See id.
170. See id. at 515. The court stated that the: [M]other placed her newborn child at a designated safe haven site and has failed to contact the child or agency during the six-month period after termination proceedings were instituted. The mother has never paid child support, visited the child or in any way contributed to the welfare of the child during this six-month period. Id.
172. See id. at 6, 7. The court stated that
the emergency service provider failed to make any ‘reasonable effort’ to provide the
that the mother had concealed her pregnancy and the birth of the child from the father.\textsuperscript{173} Therefore, the court was not persuaded that the father had sufficient notice of a potential obligation to provide proper care and custody to the child in order to terminate his parental rights.\textsuperscript{174}

Finally, in a Florida case, a woman anonymously abandoned her baby at a Florida medical center.\textsuperscript{175} The Department of Child and Family Services requested a hearing to terminate the parental rights of the baby.\textsuperscript{176} Judge Doyel contended that the Department of Children and Families has a constitutional due process requirement not only to find the infant’s mother, but also the father who may not have realized that the baby’s mother was pregnant.\textsuperscript{177} Judge Doyel appointed a lawyer to act on the father’s behalf and ordered a more diligent search for the biological parents.\textsuperscript{178} Problems and delay with this case arose because the Safe Baby Act does not explicitly dictate what to do in these cases. A specific statute which was buried in the adoption law addresses a father’s right. This statute required published notice of the abandonment which should include all identifying information.\textsuperscript{179}

V. HOW SAFE HAVEN LAWS ADDRESS PROCEDURAL DUE PROCESS CONCERNS

Rights of parents regarding their children have been implied through the Supreme Court’s interpretation of the Fourteenth Amendment.\textsuperscript{180} However, the Supreme Court has failed to address the rights of fathers with regard to their newborn babies who have been put

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mother with any of the written and/or oral notifications that the surrender of the newborn, absent certain action on her part, would result in the termination of the mother’s parental rights upon the expiration of the twenty eight (28) days.

\textit{Id.}


177. \textit{See id.}

178. \textit{See id.}

179. \textit{See id.}

up for adoption without their knowledge or consent.\textsuperscript{181} The safe haven laws impact the rights of fathers who fall into this category. State courts have attempted to answer these questions and many have embraced the view that the Constitution protects not only existing parent-child relationships, but also a parent's "opportunity interest" in establishing such a relationship.\textsuperscript{182} Thus, in order for safe haven laws to comply with the minimum procedural due process standards, notice and an opportunity to be heard must be provided to fathers.\textsuperscript{183} This standard obliges the state to make diligent efforts to locate the father of an abandoned infant before moving to terminate his parental rights.\textsuperscript{184} Safe haven laws raise concerns that the mother's anonymity endangers or eliminates the rights of fathers who may not know that they have children.\textsuperscript{185}

A. Safe Haven Law Notice to Father Provisions

Of the forty-two states that have safe haven legislation, only twelve comply with the due process requirements and include procedures to safeguard fathers' rights.\textsuperscript{186} The other thirty states do not provide for any search and/or notice to be given to the father.\textsuperscript{187} The forty-two states with safe haven legislation can be split into three categories. The first category consists of states that meet the due process requirements of notice and opportunity to be heard. These are the states that provide for notice by publication or through the media. The second category of states includes those which require a search of the putative father

\begin{itemize}
\item \textsuperscript{181} For a discussion on this topic, see supra Part II.E.
\item \textsuperscript{182} See Meyer, supra note 108, at 768-69; see also Appeal of H.R., 581 A.2d 1141, 1162-63 (D.C. App. 1990); Smith v. Malouf, 722 So.2d 490, 497 (Miss. 1998); In re Raquel Marie X., 559 N.E.2d 418, 424 (N.Y. 1990); In re Baby Boy K., 546 N.W.2d 86, 91 (S.D. 1996); Nale v. Robertson, 871 S.W.2d 674, 680 (Tenn. 1994); Kessel v. Leavitt, 511 S.E.2d 720, 747-50 (W. Va. 1998).
\item \textsuperscript{183} See id.; see also Nina Williams-Mbengue, Safe Havens for Abandoned Infants, 26 NCSL STATE LEGISLATIVE REPORT 1, 5 (2001).
\item \textsuperscript{184} See Dailard, Cynthia, The Drive to Enact 'Infant Abandonment' Laws—A Rush to Judgment?, 3 GUTTMACHER REPORT ON PUBLIC POLICY 1, 3 (2000).
\item \textsuperscript{185} See The Nature of Baby Abandonment, at http://www.cwla.org/programs/baby/babymonograph.pdf [hereinafter Baby Abandonment].
\item \textsuperscript{186} Delaware, Florida, Idaho, Illinois, Iowa, Michigan, Missouri, Montana, Nevada, South Carolina, Tennessee and Utah. See EVAN B. DONALDSON ADOPTION INSTITUTE, UNINTENDED CONSEQUENCES: ‘SAFE HAVEN’ LAWS ARE CAUSING PROBLEMS, NOT SOLVING THEM 6, 12 n.49 (2003), at http://www.adoptioninstitute.org/whowe/Last%20report.pdf [hereinafter UNINTENDED CONSEQUENCES].
\item \textsuperscript{187} See id.
\end{itemize}
registry and provide that notice should be sent to any potential father who has registered. This second category most likely meets the minimum due process requirements; however, there are problems regarding substantive procedures of these statutes. Finally, a third category of safe haven laws are silent about providing notice to fathers. These statutes are unconstitutional and violate the procedural due process requirement of the Fourteenth Amendment.

The first category of states meet the due process requirements by providing constructive notice. Constructive notice is given via publication in widely circulated newspapers. The publication contains information that a baby has been abandoned, any identifying information about the baby, and information about how to assert a claim of parental rights. Delaware, for example, requires publishing notice in a statewide newspaper at least 3 times over a 3-week period immediately following the surrender of the baby unless the Division has relinquished custody. The notice, at a minimum, shall contain the place, date and time where the baby was surrendered, the baby’s sex, race, approximate age, identifying marks, [and] any other information the Division deems necessary for the baby’s identification.

Other state statutes which require notice by publication resemble that of Delaware. In addition to requiring publication by notice, some states,

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188. The putative father registry requires a man who believes he may have fathered a child out of wedlock to file notice with the appropriate state agency. Notice of any adoption proceeding is then provided to any registrant. See Mary Beck, Toward a National Putative Father Registry Database, 25 HARV. J.L. & PUB. POL’Y 1031, 1039 (2002).

189. See FLA. STAT. ANN. § 63.0423(4) (West 2003); NEV. REV. STAT. ANN. § 432B.520(4)(c) (Michie 2002); S.C. CODE ANN. § 20-7-85 (Law. Co-op. 2002).


191. See Baby Abandonment, supra note 185, at 15.

192. DEL. CODE ANN. tit. 16, § 907A(h) (Supp. 2002).

193. These states include Florida, Michigan, Nevada and South Carolina.

Within 7 days after accepting physical custody of the newborn infant, the licensed child-placing agency shall initiate a diligent search to notify and to obtain consent from a parent whose identity or location is unknown, other than the parent who has left a newborn infant at a hospital, emergency medical services station, or fire station in accordance with s. 383.50. . . . Constructive notice must also be provided pursuant to chapter 49 in the county where the newborn infant was left and in the county where the petition to terminate parental rights will be filed. The constructive notice must include at a minimum, available identifying information, and information on whom a parent must contact in order to assert a claim of parental rights of the newborn infant and how to assert that claim.

FLA. STAT. ANN. § 63.0423(4).

Within 28 days, make reasonable efforts to identify and locate a parent who did not surrender the newborn. If the identity and address of that parent are unknown, the child
such as Florida, require that a diligent search be conducted for the child’s father.\textsuperscript{194} Florida does this by providing inquiries of all known relatives, offices, or programs that may have information and all other state and federal agencies that would be likely to have any information.\textsuperscript{195}

It is possible that constructive notice will not reach the unknown father; however, an actual notice requirement would be impossible to meet.\textsuperscript{196} If the court were to require actual notice, the process of adoption for the abandoned newborn would be seriously impaired.\textsuperscript{197} Actual notice may never be achieved and this would mean the child would never be eligible for adoption because the requirements to terminate parental rights would not be met.

The middle category of statutes appear to meet the minimum due process requirements. This category includes eight states that require

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194. \textit{See} FLA. STAT. ANN. § 63.0423(4):

The diligent search must include, at a minimum, inquiries of all known relatives of the parent, inquiries of all offices or program areas of the department likely to have information about the parent, inquiries of other state and federal agencies likely to have information about the parent, inquiries of appropriate utility and postal providers, and inquiries of appropriate law enforcement agencies.

195. \textit{See} id.

196. \textit{See} Partida, \textit{supra} note 180, at 78-79.

197. \textit{See} id.
only a search of the state’s putative father registry. If any men on the registry could be the infant’s father, the state must notify them of proceedings that terminate their parental rights. 

Putative father registries have generated a great deal of criticism. Critics argue that few men are aware of the registries or the need to register to protect their rights, women may conceal their pregnancy or misrepresent the situation, and filing with the registry in one state does not guarantee notice of an adoption in other state. An examination of the substantive procedures which the putative father registry entails shows that the putative father registry is not the best means of providing a potential father with notice.

The putative father registry requires that a father provide the following information in regards to himself: his name, address, social security number and date of birth. The father is also asked to provide the following other information relating to the mother: her name, last address, social security number, and date of birth. Additionally, he is asked the name, gender, place of birth and date of birth or anticipated date of birth of the child. This information may be helpful if one knows the identity of the mother or the child. However, due to the anonymity requirement of safe haven laws, authorities required to search the putative registry will not have any information regarding the mother, father, and possibly even the baby. The authorities will not know the name of the baby, or with any degree of certainty the baby’s date of birth. Due to these factors, it is unlikely that the identity of the father will ever be ascertained.

Furthermore, a search of the putative father registry is limited to those who have registered with it. It is possible that a father could have lived with the mother and supported her during her pregnancy or possibly even lived with the child and established an emotional bond


199. See Baby Abandonment, supra note 185, at 14.

200. See Beck, supra note 188, at 1049.


202. See, e.g., 750 Ill. Comp. Stat. 50/12.1; Iowa Code § 144.12A; Tenn. Code Ann., § 36-2-318; see also Beck, supra note 188, at 1039.


with the baby and still be denied all rights regarding the infant if he has not filed with the registry. Therefore, “unless you have information concerning the identity of the other parent gathered at the time an infant is abandoned, the prospects for a successful adoption of the child may be fatally compromised.”

The majority of states with safe haven legislation fall within the third category of statutes: those which do not explicitly address providing fathers with notice. Some states “follow existing child welfare statutes providing that abandonment constitutes a waiver of parental rights.” These child welfare statutes do not provide for any notice to be given to a father. Others do not specifically address termination of parental rights, even by referencing existing law, in their safe haven statutes. Therefore these provisions violate due process.

First, it is not clear whether a parent can abandon a child prior to the birth of the child in a manner sufficient to excuse the court from

205. See id. at 235.
207. See UNINTENDED CONSEQUENCES, supra note 186, at 6. Examples of these states are: California, Connecticut, Louisiana, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota and West Virginia. See id.
208. Id.
209. See id. at 6. See, e.g., CAL. HEALTH & SAFETY CODE § 1255.7(d) (West 2003); CONN. GEN. STAT ANN. § 17A-59 (West 2003); IND. CODE ANN. § 31-34-2.5-3 (Michie 2003); LA. CHILDREN’S CODE ANN. art. 1704(C) (West Supp. 2002) (describing that the department of social services shall file and pursue a petition to terminate parental rights and relinquishment may be grounds for such termination); N.J. STAT. ANN. § 30:4C-15.6 to 30:4C-15.9 (West Supp. 2002) (stating a petition to terminate parental rights can be initiated on the ground that the parent has abandoned the child and that authorities are not required to search for relatives as a placement option); N.C. GEN. STAT. § 7B-111(a)(7) (2003); OHIO REV. CODE ANN. § 2151.3519 (Anderson 2002) (stating that notice is only required to be given if the court has knowledge of the names of the parents); OR. REV. STAT. § 418.017(5)(b) (2001) (determining that a child is deemed to be abandoned for all legal purposes); R.I. GEN. LAWS § 23-13.1-5 (2002) (requiring a commencement of proceedings to terminate parental rights in accordance with existing law provided no person has asserted a claim to be the parent within 90 days, however, there is no mention of notice to potential parents. Further, leaving a child at the safe havens prima facie evidence of permanent abandonment); S.D. CODIFIED LAWS § 25-5A-29 (Michie 2002); W. VA. CODE ANN. § 49-6E-5 (Michie 2002) (stating that the child shall be deemed an abandoned child and be eligible for adoption as an abandoned child); WIS. STAT. § 48.195 (2002) (requiring that the court can grant involuntary termination of parental rights on the grounds that custody has been relinquished with no need to provide notice).
requiring that parent’s consent to the adoption proceeding. For example, someone may not have a stable relationship with the mother of the child or may provide little support during the pregnancy. However, it is possible that the father could develop a relationship with the child after the child’s birth. Therefore, it would not be fair to treat the father as though he has abandoned his child before the birth.

Second, not only do these statutes take away the rights of the father who has no idea that he has even fathered a child, but they also deprive rights to fathers who may have taken affirmative steps towards parenting. For example, one can imagine a scenario where a father wants to play an active role in his child’s life. He may have provided support to the mother during pregnancy, but the mother did not want to marry the father or want his help. The mother then leaves the child at a safe haven without telling anyone. Under legislation following only child welfare statutes, this father would not receive notice that his baby had been abandoned or that his parental rights were going to be terminated. Another scenario envisions a father who has registered with the putative father registry who does not receive notice of the termination of his parental rights because the safe haven statutes do not require a search of the registry. This category of statutes, which inadequately protects the rights of the father, can hinder the goals of adoption proceedings by allowing a father to interfere with the process once it has already begun (or even after an adoption has been completed) in order to fight for his custody rights.

B. Solutions on How to Make Safe Haven Laws Constitutional

In order to protect due process rights, many of the safe haven statutes should be amended to provide for notification to fathers. The statutes should include provisions such as those contained within South Carolina’s legislation requiring publication of the abandoned baby. This statute requires that a news release be sent to television and radio broadcast and print media in the area with all known information about the infant and the circumstances surrounding the abandonment. Immediate publicity of the abandonment coupled with a search of the

211. See Raum & Skaare, supra note 9, at 546.
212. The Court in Lehr v. Robertson noted that by simply registering with the putative father registry, Lehr would have been entitled to notice of the adoption proceedings. See 463 U.S. 248, 264 (1983).
213. See Partida, supra note 180, at 79.
putative father registry should be performed wherein notice is provided to all possible fathers.

A second feature that all states should mandate is a provision to help determine paternity of the child. New Hampshire is considering establishing a registry to help fathers who think that their children may have been abandoned. 214 These fathers can submit DNA samples to the Department of Health and after a newborn is abandoned the database would be checked to see if there is a match. 215 Although, this suggestion would only benefit a father who was aware of the pregnancy, it is a stronger way to ensure that due process is preserved.

Furthermore, all safe haven laws should include provisions asking the mother to give some information so that the father can be identified. While it may be argued that to require the mother to provide this information would undermine the purpose of the statute, it does not undermine it to simply ask for it. A mother may be so emotional or distraught about abandoning her child that she is not thinking about providing the safe haven with any information even though she does not mind giving some details. Even if the mother does not provide details about the father, any facts that the mother provides can be helpful and can be used in the notice and publication of the abandonment.

The impact of these statutes upon the father is enormous. If he learns of a child’s existence after the abandonment or even worse, after the adoption, he is left knowing that there is a child somewhere, whom he is the father of but may never see. The impact on the father is immeasurable. Additionally, the impact on children of knowing that somewhere they have a biological father who abandoned them when in fact their biological father would have loved to raise them should be avoided.

VI. CONCLUSION

The rights of unwed fathers have come a long way over the years. However, safe haven statutes prevent fathers from achieving a status that they are constitutionally entitled to. This Note has examined Supreme Court cases which give unwed fathers rights in relation to their children; however, the father’s rights in the context of newborns has been left unanswered by the Supreme Court. Additionally, this Note has discussed

215. See id. This would be at the expense of the father. See id.
the attempt by many state courts to resolve the issues of father's rights in this context. It appears that it would be consistent with these decisions to conclude that fathers have a right to be notified about the existence of their newborn child and that a father's consent is necessary in order to terminate his parental rights. Based on these findings, a fair conclusion is that many of the safe haven statutes violate this constitutional right which fathers are entitled to. Therefore, despite all the benefits of the statutes, they must be changed in order to provide for the constitutional rights of fathers in relation to the custody, care, and control of their children.

Dayna R. Cooper*

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