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In Re: Adoption of a Minor Child Circuit Court of the 15th Judicial Circuit Palm Beach County, Florida

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IN RE: ADOPTION OF A MINOR CHILD

CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT, PALM BEACH COUNTY, FLORIDA

INTRODUCTION

If you are a man who has had anonymous sex and are interested in parenting a child that may have been conceived from this random union—do not despair, the Florida legislature recently passed a new adoption law that protects your rights. In March of 2001, the Florida State Legislature passed sweeping amendments to Florida's adoption laws.[1] The most controversial of these laws has been named the "Scarlet Letter" law by many of its opponents.[2] In a nutshell, if a mother who is placing her child for adoption does not know who her baby's father is, and she has exhausted avenues of finding him, she must place a notice in the local newspaper in the county where the baby was conceived.[3] This notice must include her name, a

1. *See* H.R. 141, 103rd Reg. Sess. (Fla. 2001) (showing that both houses voted in March 2001), *available at* http://www.flsenate.gov/session/index.cfm; *see also* Shelby Oppel, *Senate Okays Adoption Changes,* ST. PETERSBURG TIMES, Mar. 23, 2001, at 1A (listing the new changes, which include giving birth mothers three days to revoke consent to adoption of a child who is not an infant; requiring a "diligent search" for birth fathers; and giving birth fathers who claim fraud two years to challenge an adoption). Other amendments within the bill include the creation of a forty-eight hour waiting period before a birth mother can release a child for adoption and preventing courts from finding that a birth father abandoned his child simply because he did not give the birth mother "emotional support" during her pregnancy. *Id.*

2. *See, e.g.*, Al Neuharth, *'Scarlet' or Adoption for Unwed Mothers?,* USATODAY.com, Aug. 15, 2002 (arguing that the new Florida law stigmatizes unwed women or teenage girls who wish to put their child up for adoption as did the fabled scarlet "A" from Nathaniel Hawthorne's classic novel), *available at* http://www.usatoday.com/news/opinion/columnist/2002-08-15-neuharth_x.htm; Daniel de Vise, *Suit Attacks Adoption Law Requiring Sex Details in Ads*, THE MIAMI HERALD, Aug. 9, 2002, at 1A (highlighting feminist leaders' characterization of the new law as "a humiliation to women everywhere, a modern-day *Scarlet Letter*"). *See generally* NATHANIEL HAWTHORNE, THE SCARLET LETTER 47-55 (Penguin Books 2003) (1850) (detailing the public ridicule of Hester Prynne, required by law to wear a red "A" upon her bosom for the sin of adultery and unwed pregnancy).

3. *See* FLA. STAT. ch. 63.088(5) (2001) (requiring constructive notice where the location and identity of the father are unknown); *see also* Jon Burstein, *Moms Challenge New Adoption Laws; Women Fear Ads Naming Sex Partners,* S. FLA. SUN-SENTINEL (Palm Beach County, Fla.), Aug. 7, 2002, at 1A (noting that when background searches are unsuccessful, the birth mother must place notice in the

description of herself, a name and/or description of the possible father, the date and the city or county of conception.[4]

The law, which took effect in October 2001,[5] has been highly controversial.[6] One critic stated "it invades privacy and brands women with a 'scarlet letter' by making them divulge embarrassing intimate sexual details."[7] This same opponent even hypothesized what an "ad" in the newspaper would look like: "Jane Smith, 31, brown hair, brown eyes, seeking 30-something man, blond hair, blue eyes, mole on right cheek, who spent last Nov. 20 in Rural Route 44 motel after drinks at sports bar next door. May have fathered child."[8] Regardless, proponents of the new law say it provides finality to adoption proceedings.[9] Another supporter believes that this law finally acknowledges "the problem birth fathers nationwide face in preventing adoptions that they don't want or, in many cases, don't even know are happening."[10]

Governor Jeb Bush, in an unsigned letter to the legislature, also entered into the debate, supporting the bill because it would increase the finality of adoptions.[11] He stated that he recognizes the law may

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newspaper).

4. FLA. STAT. ch. 63.088(5).

5. *See* FLA. STAT. ch. 63.087, 63.088.

6. *See, e.g.*, Burstein, *supra* note 3 (noting that legislators were aware at the time of passage that the bill would probably attract attention, particularly from adoption attorneys).

7. Geraldine Sealey, *Florida's 'Scarlet Letter': Controversial Adoption Law Pits Women's Privacy, Fathers' Rights*, ABCNEWS.com, Aug. 20, 2002 (comparing critics who find the law "an anachronistic injustice," with supporters who welcome the "attempt to secure paternal privileges."), *at* http://abcnews.go.com/sections/us/DailyNews/fathersrights 020820.html.

8. *Id.*

9. *See* Juleyka Lantigua, *Progressive Media Project, Florida Adoption Law Humiliates Women*, Aug. 28, 2002 (quoting Senator Walter Campbell, who stated that without the law, "we have potential biological fathers coming back and taking children out of adoptive parents' hands"), *available at* http://www.progressive.org/Media%20Project%202/mpla2802.html. *See generally* de Vise, *supra* note 2 (quoting Senator Campbell as stating that the intent behind the bill was "to prevent disruptive legal attacks from biological fathers after an adoption is final, not to subject mothers to public humiliation").

10. Jeffrey Leving, *New Adoption Law Correctly Requires Mothers to Publish Sexual Pasts, Says Fatherhood Educational Institute,* U.S. NEWSWIRE, Aug. 13, 2002 (commending the Florida legislature and Governor Jeb Bush for acknowledging birth fathers' rights), *available at* http://www.usnewswire.com/topnews/search5/0813-139.html. Leving argues that adoption laws should not ignore biological fathers' rights "simply because it's more convenient." *Id.*

11. *See* Unsigned Letter from Governor Jeb Bush, State of Florida, to Secretary Katherine Harris 1 (Apr. 17, 2001) (on file with author) [hereinafter Unsigned Letter] ("House Bill 141 begins with the premise that we should bring more certainty to Florida's adoption procedures and laws. This certainty is designed to provide greater finality once the adoption is approved, and to avoid circumstances where

not be perfect;[12] however, Governor Bush rationalized the adoption bill by discussing the need to balance the rights of three interested parties: "the birth mother, the birth father, and the adoptive parents."[13] He also noted the state's responsibility to ensure "the child's safety, well-being, and permanency."[14] Finally, Governor Bush conceded that the statute "provides some comfort as well as discomfort for all groups involved in the process."[15]

The primary proponent of the bill, Senator Walter Campbell, brought the legislation forward in order to discourage disruptions in the adoption process.[16] Although there was sparse opposition to the bill, opponents were adamant that there were inherent problems with the new procedures.[17] The bill ultimately passed both houses of the Florida legislature with ease,[18] and the unsigned letter from Governor Bush was attached to the bill when it was adopted.[19]

The most important debate on the law has taken place in a Palm Beach County Court. On May 20, 2002, attorneys Charlotte Danciu and Lynn G. Waxman filed a Motion for Declaratory Judgment, challenging the constitutionality of Florida Statute sections 63.087 and 63.088.[20] The Motion challenged the Florida laws as a violation

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future challenges to the adoption disrupt the life of the child.").

12. *See id.* at 3-4 (quoting Ben Franklin at the constitutional convention stating: "I cannot help expressing a wish that every member of the convention who may still have objections to it would with me on this occasion doubt a little of his own infallibility. . . .").

13. *Id.* at 1. *But see* Y.H. v. F.L.H., 784 So. 2d 565, 576 (Fla. Dist. Ct. App. 2001) (Polston, J., dissenting) (identifying the three parties who can claim "competing constitutional interests" in an adoption battle between adoptive parents and a maternal grandmother as the adoptive parents, birth mother and child).

14. Unsigned Letter, *supra* note 11, at 1. *See generally* Ramey v. Thomas, 382 So. 2d 78, 80-81 (Fla. Dist. Ct. App. 1980) (stating that in all proceedings regarding child custody, the "best-interest and welfare of the child" must be the primary focus).

15. Unsigned Letter, *supra* note 11, at 1.

16. *See* de Vise, *supra* note 2.

17. *See, e.g.*, Oppel, *supra* note 1 (quoting Senator Bill Posey, who stated: "I just truly and in my heart think we're going in the wrong direction. . . .").

18. *See* H.R. 141, 103rd Reg. Sess. (Fla. 2001) (showing the vote: the House of Representatives voted 104 to eight in favor of the bill and the Senate voted thirty to eight in favor of the bill).

19. *See id*; *see also* Oppel, *supra* note 1 (explaining that Governor Bush had seven days after the passage of the bill to veto, sign, or allow it to become law without his signature—he chose the last option.)

20. Pl's. Mot. for Declaratory J. at 1, In re: Adoption of a Minor (citation omitted) (Fla. Cir. Ct. 2002) (docket no. omitted) (redacted version on file with author) [hereinafter Motion] (contending that the required publication violates both the Fourteenth Amendment of the United States Constitution and Art. I, section 23 of the Florida Constitution). Information about the law offices of Charlotte H. Danciu, located in Boca Raton, Florida, is available at http://www.adoption-surrogacy.com/aboutus.htm.

of the Fourteenth Amendment of the United States Constitution and the Florida Constitution.[21] Interestingly, the Florida Attorney General opted not to defend the statute in question.[22] On July 24, 2002, Circuit Court Judge Peter D. Blanc issued an Order that partially granted, but mainly denied plaintiffs' Motion.[23] The following is an analysis of the Florida Adoption law and the Fifteenth Circuit's holding.

I. FLORIDA ADOPTION LAW

The Florida Adoption Act requires a petition and hearing to terminate the parental rights by both the biological mother and father before the adoption.[24] Under the amended law, if the father is unknown or cannot be located at the time of the petition, the mother must publish a petition and notice of hearing in the newspaper in "each city in which the mother resided or traveled, in which conception may have occurred, during the 12 months before the minor's birth."[25]

Section 63.088 sets forth requirements for notice, service, and the diligent search of a biological father, in order to terminate his parental rights.[26] If these inquiries fail to illuminate a birth father's identity, a notice must be published in the newspaper.[27] According to the new amendments,[28] this notice must contain:

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21. *See id.* at 5-6 (illustrating the similarities in the right to privacy articulated in the federal and Florida constitutions); *see also infra* Part III.

22. *See* Order Granting in Part and Denying in Part the Mot. to Declare Florida Statute Sections 63.087 and 63.088 Unconstitutional at 1, In re: Adoption of a Minor Child (citation omitted) (Fla. Cir. Ct. 2002) (docket no. omitted) (redacted version on file with author) [hereinafter Order] (noting that the state did not respond to the plaintiffs' Motion for Declaratory Judgment); *see also* Jane Sutton, *Sex History Law Looks Set to Be Dumped,* REUTERS, Feb. 20, 2003 (explaining that, on appeal, Attorney General Charles Crist would not defend the adoption statute, as passage of the bill and the Circuit Court's decision took place before he came into office), *at* http://www.reuters.com/newsArticle.jhtml?type=oddlyEnoughNew&storyID=226048; *see also id.* (quoting plaintiffs' attorney Danciu stating: "It speaks loudly . . . that the attorney general's office doesn't believe this statute is worth defending.").

23. Order, *supra* note 22, at 19-20.

24. *See* FLA. STAT. ch. 63.087 (2001) (setting forth the administrative procedures and outlining the contents of a petition to terminate parental rights); *see also* Order, *supra* note 22, at 4 (describing the required procedure of termination of parental rights prior to the filing of an adoption petition).

25. FLA. STAT. ch. 63.087(b)(f). *See, e.g.,* Example Petition and Notice for Filing in Local Newspaper (on file with author).

26. *See* FLA. STAT. ch. 63.088(2), (4) (2002) (including procedures that apply when the father's location and identity are known and unknown).

27. *See* FLA. STAT. ch. 63.088(5).

28. *See generally* de Vise, *supra* note 2 (noting that the previous adoption law required a much simpler notice to unknown fathers, including only the baby's date

> [A] physical description including, but not limited to, age, race, hair and eye color, and approximate height and weight of the minor's mother and of any person the mother reasonably believes may be the father, the minor's date of birth; and any date and city, including the county and state in which the city is located, in which conception may have occurred.[29]

Before a court will proceed with the termination of parental rights and the adoption, an affidavit of constructive service must be filed with the court.[30] To achieve constructive service as required by the statute,[31] the above information must be published in the county where the court is located once a week for four consecutive weeks.[32]

II. PLAINTIFFS

The constitutional challenge was brought on behalf of six plaintiffs. In the Order, the court explains each plaintiff's factual scenario:

> [A] is a [minor] child[33] who was raped by an adult male of approximately twenty seven years of age. The male's name is known, but his whereabouts are unknown to the birthmother, as well as the police. The mother gave birth to a child and wishes to place him for adoption. Sections 63.087 and 63.088 requires publication of the child/victim's name in the newspaper for the adoption to be completed;

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and place of birth).

29. FLA. STAT. ch. 63.088(5) (requiring that unknown or unascertainable facts be indicated within the notice petition). *See generally* Motion, *supra* note 20, at 6-7 (noting that FL. STAT. ANN. § 63.162 sets forth strict confidentiality requirements in adoption proceedings). However, under the 2001 amendments, these requirements were waived for information required in Section 63.088. *Id.* at 7.

30. *See* FLA. STAT. ch. 63.088(2) (2001) ("Before the court may determine that a minor is available for adoption . . . each person whose consent is required . . . must be personally served."); FLA. STAT. ch. 63.088(5) (stating that "the unlocated or unidentified person must be served notice under subsection (2) by constructive service"); FLA. STAT. ANN. § 63.089(2)(d) (West 2003) ("The court may hold the hearing [to terminate the father's rights] only when . . . all affidavits of inquiry, diligent search, and service required under section 63.088 have been obtained and filed with the court."). *See, e.g.,* Aff. of Don Morgan, Legal Advertising Representative at 1 (Jul. 22, 2002) (on file with author) (attaching an actual advertisement that ran in the *Tallahassee Democrat*).

31. FLA. STAT. ANN. § 49.011(10) (West 2003).

32. FLA. STAT. ch. 49.011(10), 49.10(1).

33. Depending upon the Florida statute involved, a minor may be under the age of sixteen or eighteen. *Compare* FLA. STAT. ANN. § 794.05 (West 2001) (defining a minor as a person who is sixteen or seventeen years old), *with* FLA. STAT. ANN. § 800.04 (West 2003) (criminalizing lewd conduct with persons under sixteen years old).

> [B] is a [minor] child[34] who now resides . . . in Florida . . . and had sexual relations with numerous classmates. Subsequently, she gave birth to an infant . . . and placed her for adoption with family friends. Sections 63.087 and 63.088 require publication of the minor's name, description, location of conception and circumstances of conception in [B's] hometown newspaper to effectuate notice to a possible birth father;
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> [C] is a single woman in her late twenties. She has had an on again, off again drug problem. During a period of 'using' she had sexual relations with other drug users. She has no idea of the identity or whereabouts of the possible father. She subsequently entered rehab and gave birth to a drug free baby. She is working. She wishes for her child to be adopted. Sections 63.087 and 63.088 require [C's] name, description and the whereabouts and circumstances of conception to be published in the newspaper;
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> [D] is a single woman in her twenties and a former foster child. . . . She has had numerous[35] sex partners and has an alcohol abuse problem. She is currently working.
>
> [E] is a single woman in her thirties. . . . She alleges she was slipped a 'date rape' drug at a bar and was assaulted by three unknown men. Sections 63.087 and 63.088 require publication of her name, description, location of conception and circumstances of conception in the newspaper;
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> [F] is a single mother . . . in her thirties who has a substance abuse problem. While 'using' she had sexual relations with a number of drug 'dealers.' She conceived a child but does not know the identity or whereabouts of the birth father. Sections 63.087 and 63.088 require publication of her name description, location of conception and circumstances of conception in newspaper. . . .[36]

34. Although the Order on file is a redacted version, later news publications indicate that the minor in scenario "[B]" was thirteen years of age. *See Court to Hear Challenge to Florida's 'Scarlet Letter Law,'* L.A. TIMES, Feb. 20, 2003, at A25 [hereinafter *Court to Hear Challenge*] (explaining that the appellate court will hear the case brought by various plaintiffs, one of which is "a girl who had sex with several classmates and conceived at age 13. . . .").

35. As in the case of scenario "B", although the Order on file was a redacted version, later news publications indicate that this plaintiff has slept with seven men and has no idea who the father might be. *See* Sutton, *supra* note 22 (quoting plaintiffs' attorney Charlotte Danciu).

36. Order, *supra* note 22, at 2-3.

III. CONSTITUTIONAL CHALLENGE

Plaintiffs challenged the statute as a violation of their federal right to privacy and their right to be free from government intrusion in personal matters.[37] This right has been interpreted to encompass and protect "fundamental interests in marriage, procreation, contraception, family relationships and rearing of children."[38] Further, the State of Florida has explicitly provided additional privacy protection within its constitution.[39] According to the Florida Constitution, "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life as otherwise provided herein."[40] Florida courts interpret this language to include the right to make personal decisions such as whether to have an abortion and how to raise children.[41]

In order to bring a challenge to a Florida statute as a violation of the state constitution, the plaintiff must first have a reasonable expectation of privacy in the matters under dispute.[42] The state then has the burden of demonstrating that the statute "serves a compelling

37. U.S. CONST. amend. XIV ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ."). *See, e.g.,* Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (recognizing for the first time that the right to privacy extends to matters surrounding an individual's intimate relationships); Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("For also fundamental is the right to be free . . . from unwanted governmental intrusions into one's privacy."); Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (highlighting the right to privacy in matters of intimate sexual behavior); Lawrence v. Texas, No. 02-102, slip op. at 18 (U.S. June 26, 2003) (overruling *Bowers* and declaring that no legitimate state interest can "justify its intrusion into the personal and private life of the individual.").

38. Motion, *supra* note 20, at 5. *See e.g.,* Carey v. Population Servs., Int'l, 431 U.S. 678, 684-85 (1977) (noting that decisions regarding such personal decisions are protected and the government must not interfere without a justified reason).

39. *See* Von Eiff v. Azicri, 720 So. 2d 510, 514 (Fla. 1998) (noting that the Florida "constitutional right to privacy is much broader in scope, embraces more privacy interests, and extends more protection . . . than its federal counterpart").

40. FLA. CONST. art. I, § 23 (added 1980, amended 1998).

41. *See Von Eiff*, 720 So. 2d at 516-17 (upholding the parental right to decide whether to allow grandparent visitations); *see also In re* T.W., 551 So. 2d 1186, 1195 (Fla. 1989) (upholding a minor's right to decide whether to have an abortion without first having to obtain her parents' consent).

42. *See, e.g.,* Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d 544, 547 (Fla. 1985) (determining whether there was a reasonable expectation of privacy by analyzing whether the law reasonably recognizes an "individual's legitimate expectation of privacy in financial institution records").

state interest."[43] Finally, the state must prove that it "accomplishes its goal through the use of the least intrusive means."[44]

IV. HOLDING AND ANALYSIS

As an introduction to its holding, the court outlined the State of Florida's role as the "final guarantor[] of personal privacy."[45] The court noted that Florida's constitution "embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution."[46]

A. Reasonable Expectation of Privacy

In their Motion for Declaratory Judgment, plaintiffs identified two distinct areas in which women have a reasonable and justified expectation of privacy. First, plaintiffs argued that in cases of sexual battery, information about the victim should be strictly confidential.[47] Second, plaintiffs argued that all information regarding adoptions is also strictly confidential.[48] The court agreed, extending the fundamental and personal right of child rearing as defined in *Y.H. v. F.L.H.*,[49] to the right to make decisions regarding adoption of a child.[50] This was not a difficult decision; the right to privacy in personal matters is well established.

43. *See id.* (citing *Roe v. Wade*, 410 U.S. 113 (1973), and *In re Estate of Greenberg*, 390 So. 2d 40 (Fla. 1980)).

44. *Id.*

45. Order, *supra* note 22, at 7 (quoting *Katz v. United States*, 389 U.S. 347, 350-51 (1967)).

46. *Id.* at 8 (citing *Winfield*, 477 So. 2d at 544); *see also id.* (boasting that Florida is one of only four states, including Alaska, California, and Montana, to specifically guarantee the right to privacy within its state constitution).

47. Motion, *supra* note 20, at 7 (indicating that there are criminal penalties for a newspaper if it publishes an assault victim's name); *see also* FLA. STAT. ANN. § 794.03 (West 2003) (criminalizing the publication of any information that identifies the victim of a sexual offense).

48. Motion, *supra* note 20, at 7-8.

49. 784 So. 2d 565 (Fla. Dist. Ct. App. 2001).

50. Order, *supra* note 22, at 11 ("Clearly, there is a reasonable expectation of privacy regarding these [adoption] matters."); *see also* Rasmussen v. S. Fla. Blood Serv., Inc., 500 So. 2d 533, 535 (Fla. 1987) (recognizing that Supreme Court precedent encompasses autonomy and the right to make certain decisions).

B. Compelling State Interest

The second determination by the court was whether a compelling state interest was served by the statutes in question.[51] The court found that the goal of the statutes was to "provide notice to biological fathers so that they may both exercise their rights and accept their responsibilities with respect to their biological children. . . ."[52] It is unclear how the court developed this interpretation of the statute. Yet from this goal, the court then identified two "compelling state interests":

> First, there would certainly be a compelling state interest in strengthening and maintaining the bond between parent and child. Second, in those instances where the biological mother would need financial assistance from the state due to lack of support from the biological father, the notice provisions of the aforementioned statutes would reduce the financial burden on the state in each instance where a biological father comes forward and accepts his responsibility for financial support of the minor child.[53]

Unfortunately, the Court provided no further explanation of why it identified only these two particular interests. Further, the Court did not discuss the plaintiffs' Motion arguing that the compelling state interest in this matter should be the "necessity to provide an unidentified and unlocated father with notice . . . [and] to protect the father's state and federal constitutional right in determining the care and upbringing of his children free from governmental interference."[54]

The compelling interests stated in the Judge's Order are inapplicable to the situation at issue. For example, the unknown father, whose rights this law protects, may have had anonymous sex with a woman while under the influence of drugs or alcohol.[55] Do we want to encourage this type of non-deliberate conception of children by protecting the biological father's rights? Further, would a man who has decided to have anonymous sex with a woman be interested in parenting a child from that interaction?

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51. Order, *supra* note 22, at 11.

52. *Id.*

53. *Id.*

54. *See* Motion, *supra* note 20, at 8 (citing the Florida House of Representatives' Committee on Judicial Oversight Analysis).

55. *See* Order, *supra* note 22, at 2-3 (noting that in at least three of the six plaintiffs' scenarios, drugs or alcohol was involved before sex).

Then, in the second interest, there is no need for the biological father to decrease the financial burden of the biological mother, who is giving the child up for adoption.[56] If the biological father wishes to oppose the adoption, there is a strong possibility he would receive custody.[57] If the goal of the statutes is to give biological fathers the opportunity to exercise their parental rights,[58] then surely a more reasonable compelling interest would be as plaintiffs stated, to give unknowing fathers the opportunity to parent their children.[59] However, the court did not discuss this in its opinion.

Next, the court determined that the compelling state interests were not met in cases involving forced sexual battery.[60] The court held that there is no compelling state interest justifying the publication requirements when conception was the result of non-consensual criminal conduct such as sexual battery or rape, with the exception of "sexual battery of a consensual nature where the crime is based only on the age of the victim."[61] To make this determination, the court cites various cases and other state statutes that preclude paternal rights and adoption challenges in instances of rape.[62] Although the court extensively reviewed the statutory and forced rape laws both in

56. *See id.* at 11 (stating that there was a compelling interest to require biological fathers to become involved, in order that they would take responsibility for their offspring).

57. This statement is based on the assumption that the mother who already wishes to give her child up for adoption would not change her mind if the biological father suddenly came forward.

58. *Compare* Order, *supra* note 22, at 11 (stating that the goal of the Florida Adoption law is to give biological fathers the opportunity to exercise their rights or become responsible for their offspring), *with* Unsigned Letter, *supra* note 11, at 1 (stating that the goal of Florida Adoption Act is to encourage finality in the adoption process).

59. If giving biological fathers the opportunity to parent were a reasonable "compelling state interest," it would certainly fail to be the least intrusive means available. In the case in which the father is completely unknown—in other words, he participated in a completely anonymous sexual encounter—it is unreasonable to think that he is looking to be a father, much less that he should receive constitutional protection.

60. *See* Order, *supra* note 22, at 14-15 (finding no compelling interest justifying the statutes' publication requirements where the child was conceived out of "forced" or "non-consensual battery").

61. *See id.* at 17 (distinguishing between two categories of cases: those that involve forced sexual battery; and those that either do not involve sexual battery, or that only involve sexual battery "of a consensual nature" based only on the age of the victim). The court found the state's interest was not compelling in the first category, but was sufficiently compelling in the latter. *Id.*

62. *See id.* at 15-16 (noting that only a few states automatically terminate rights or eliminate notice requirements if the child was conceived as a result of sexual assault, but many states preclude parental rights in instances of violent rape).

Florida and other jurisdictions, it never rationalized why only the forced sexual battery scenarios did meet the compelling state interest test.

C. Least Intrusive Means

The third section of the Order discussed whether the statute was the least intrusive means available. The court first states that "[t]he right to privacy in adoption in all aspects of an adoption proceedings [sic] is, thus, well established in this State."[63] The court ultimately holds that it "cannot find that the existing publication requirements contained within sections 63.087 and 63.088 do not accomplish their goal through the use of the least intrusive means."[64] Aside from the negative affirmative, the court's holding is ambiguous because it bases its decision merely on the fact that there is no data or statistics on the success or failure rate of the notice requirements.[65] The court did note that there was no evidence that the statutes were accomplishing the goals set forth above, but it refused to hold the statutes unconstitutional, without further evidence that less intrusive means would accomplish these goals.[66]

Unfortunately, the court suffers from a lack of creativity. One potentially less intrusive method of achieving the same goal would be a putative father registry.[67] In fact, Senator Walter Campbell, the law's primary sponsor, recently proposed such a registry for the State of Florida.[68] Furthermore, it is possible that the needs of putative

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63. *Id.* at 18. *See also In re* T.W., 551 So. 2d 1186, 1191-92 (Fla. 1989); Rasmussen v. S. Fla. Blood Serv., Inc., 500 So. 2d 533, 535-36 (Fla. 1987); Winfield v. Div. Of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985).

64. Order, *supra* note 22, at 19 (holding that it "cannot find that the existing publication requirements contained within sections 63.087 and 63.088 do not accomplish their goal through the use of the least intrusive means"). *But see* de Vise, *supra* at note 2 (quoting plaintiffs' attorney Charlotte Danciu who stated "[t]here's so much potential harm that can come from this, and there are so many less intrusive ways of getting the message out. . . .").

65. Order, *supra* note 22, at 19 (mentioning that there are other less intrusive means, such as only publishing initials of birth mothers, but disregarding these possibilities because "there is no data to establish that these alternative methods would be more or less effective than the existing notice requirements").

66. *Id.*

67. "Putative father" has been defined as "a man who may be a child's father, but who was not married to the child's mother before the child was born and has not established the fact that he is the father in a court proceeding." 750 ILL. COMP. STAT. ANN. 50/12.1 (West 2003) (authorizing the Department of Children and Family Services to establish a putative father registry); *see also* 750 ILL. COMP. STAT. ANN. 50/12a (West 2003) (delineating the type of notice that must be given to putative fathers). In fact, this has been recently proposed as a revision to the Florida statute. *See* S. 2456, 105th Reg. Sess. (Fla. 2003).

68. *See* S. 2456, 105th Reg. Sess. (Fla. 2003). The bill creates a new section

fathers were not being met under the previous system, which merely required publishing the child's date and place of birth.[69] Although the "old" system may not have worked particularly well in cases in which the father is an ex-boyfriend, it is most likely at least as ineffective in the anonymous sexual partner situation.

V. IMPLICATIONS

As Judge Blanc stated in his Order, there really is no concrete statistical data available on the effectiveness of these statutes.[70] However, anecdotal predictions abound. "Adoption attorneys blame the law for a 17 percent decrease in adoptions statewide for the first half of 2002."[71] According to Charlotte Danciu, attorney for plaintiffs, many of her clients would and have had abortions, rather than go through the humiliating process of publishing their sexual history as required by this law.[72] One client even told Danciu she "would have killed herself," before publishing one of the notice petitions.[73]

VI. THE APPEAL

After the Order was issued, plaintiffs appealed to the Fourth District Court of Appeals.[74] Oral arguments were held on February 20, 2003.[75] The Attorney General of Florida "intentionally failed to file a contesting brief"[76] and the state's lawyers refused to appear to defend the law.[77] The Fourth District Court filed a ruling on April 23, 2003,

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defining the rights of an "unmarried biological father" and specifically defines the related compelling state interest as follows:

> [A]n unmarried biological father has an inchoate interest that acquires constitutional protection only when he demonstrates a timely and full commitment to the responsibilities of parenthood . . . [and] the state has a compelling interest in requiring an unmarried biological father to demonstrate that commitment by providing appropriate medical care and financial support and by establishing legal paternity rights in accordance with the requirements of this chapter.

Id.

69. No empirical data was available on this requirement either.

70. Order, *supra* note 22, at 19.

71. Peter Franceschina, *'Scarlet Letter' Law Discussed; State Doesn't Contest Adoption Statute Challenge*, S. FLA. SUN-SENTINEL, Feb. 21, 2003, at 5B.

72. *See* Sutton, *supra* note 22 (stating that Danciu has estimated that about thirty of her clients have had abortions rather than publish their sexual histories).

73. *Id.*

74. *See Court to Hear Challenge*, *supra* note 34.

75. *Id.*

76. G.P. v. State, 842 So. 2d 1059, 1061 (Fla. Dist. Ct. App. 2003).

77. *See Florida Court Strikes Down Adoption Posting Law*, L.A. TIMES, Apr. 24,

finding the statutes under the Florida Adoption Act unconstitutional.[78] The Court struck down the challenged sections 63.087 and 63.088, deciding that the "offending provisions substantially interfere" with a woman's right to choose adoption and her right not to disclose the intimate details of her personal life that was required in the notice.[79] Moreover, the Court declared that the state failed to demonstrate a compelling interest that outweighed the privacy rights of the mother and child to not be described in such a "personal, intimate, and intrusive manner."[80] Although the Court reversed the trial court ruling, it did not address any alternative proposals[81] that were raised by the appellants.

However, in accord with the judgment, lawmakers unanimously passed a bill to establish the "Florida Putative Father Registry."[82] The bill's stated purpose is to "preserve the right to notice and consent to an adoption."[83] The confidential paternity registry requires men to register with the state if they believe they may be a father.[84] The potential fathers would have to provide the name, address, and physical description of the mother as well as the date and place where conception could have taken place.[85] Additionally, the men are notified if a woman they have specifically named in the registry has a baby up for adoption and a claim of paternity may be filed any time

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2003, at A28 [hereinafter *Florida Court Strikes Down Law*] (reporting that the state's lawyers did not agree with the heavily criticized adoption law).

78. *See G.P.*, 842 So. 2d at 1061 (stating that the challenged sections violated the right to privacy guaranteed under the Fourteenth Amendment of the United States Constitution and Art. I, section 23 of the Florida Constitution).

79. *See id.* at 1062 (noting that invasion of both of these rights and interests are "so patent in this instance" that they did not require a case analysis to interpret the constitutional provision).

80. *Id.* at 1063

81. *See* S. 2456, 105th Reg. Sess. (Fla. 2003) (introducing, on March 19, 2003 before the judgment was rendered, proposed revisions to the adoption statute that included the creation of a putative father registry); *see also* Jerry Berrios, *Birth Mothers Regain Privacy in Adoptions*, THE MIAMI HERALD, Apr. 24, 2003, at 1B (reporting that Senator Campbell, the primary sponsor of the challenged statutes, introduced and supported the revisions because he realized that the statutes had "unintended consequences").

82. FLA. STAT. ANN. § 63.054 (West 2003) (detailing actions required by an unmarried biological father in order to establish parental rights). *See, e.g.,* Lloyd Dunkelberger, *Legislators look to cut 'Scarlet Letter' law*, SARASOTA HERALD-TRIBUNE, Apr. 13, 2003, at BS1 (providing a thorough explanation about the paternity registry and statistics of whether the new law will be effective).

83. *See* § 63.054(1).

84. *See* FLA. STAT. ANN. § 63.0541 (West 2003) (explaining that the information given by the potential father will be kept by the Office of Vital Statistics in the Department of Health and is "confidential and exempt from public disclosure").

85. *See* § 63.054(3).

prior to the child's birth.[86] However, potential fathers cannot file with the registry if the mother has already begun the process to terminate the father's parental rights.[87]

On May 30, 2003, Governor Jeb Bush signed the bill supporting the paternity registry noting that the bill imposes a certain level of responsibility on the father.[88] After Governor Bush officially repealed the "Scarlet Letter" law by signing the new bill, Lieutenant Governor Toni Jennings announced the official demise of the law to the Florida Adoption Council members, who in response gave a standing ovation.[89]

Although the Court's decision and the lawmakers' actions came as little surprise, Florida women expressed a general feeling of vindication and relief.[90] Adoption attorneys and civil rights groups labeled the appellate decision a "huge victory for women."[91] Moreover, Charlotte Danciu, attorney for the appellants, was ecstatic with the Court's decision saying that it was a "great day for adoptions" and it dissipated the humiliation birth moms were subjected to under the "Scarlet Letter law."[92]

86. *See* § 63.054(1), (7) (establishing that when a mother begins an adoption proceeding she must contact and provide the same information requested from the men to the Office of Vital Statistics allowing the Office to conduct a diligent search of the registry to find a possible match for a father).

87. *See* § 63.054(1).

88. *See* Randolph Pendleton, *Bush Signs Bill Repealing 'Scarlet Letter Law,'* ORLANDO SENTINEL, May 31, 2003, at B5 (discussing lawmakers' positive opinions regarding the paternity registry). Representative Mark Mahon from Jacksonville also supported the bill saying it puts the responsibility where it should be, the father, who should volunteer rather than requiring the mother to try to locate someone who may not want to be found. *Id.*

89. *See* Sherri Ackerman, *Florida Adoption Officials Applaud Bush Veto of "Scarlet Letter Law,"* TAMPA TRIBUNE, May 31, 2003, at 7 (describing the success and happiness among adoption officials for the repeal of the "Scarlet Letter law").

90. *See Florida Court Strikes Down Law*, *supra* note 77 (quoting ACLU attorney, Mariann Wang, expressing, "A lot of women's lives and children's lives have been on hold for all this time, so it's a wonderful thing that women's rights have finally been vindicated and protected.").

91. *See* Susan Spencer-Wendel, *Court: Moms Needn't List Partners to Pick Adoption*, THE PALM BEACH POST, Apr. 24, 2003, at 1A (indicating that the "Scarlet Letter law" had a "chilling effect" and only served to humiliate women).

92. *See* Berrios, *supra* note 81 (noting the elated reactions from various lawmakers and adoption officials about the repeal of the law); *see also supra* notes 72-73 and accompanying text (explaining the embarrassment women faced with the choice that they must publish their intimate personal information).

CONCLUSION

The primary purpose of adoption laws is not to find babies for parents who want them but rather to locate stable homes for children while still protecting the rights of every party involved. The paternity registry gives lawmakers a second chance to protect the mother's privacy, preserve a father's parental claims, and maintain the adoptive parents' rights to care for a child. Further, the bill allows Florida to effectuate useful adoption laws and closes an embarrassing chapter in the state's legislative history. However, regardless of the final outcome, it is frustrating that lawmakers are willing to deprive women of the right to privacy in matters as personal as sexual experiences. Finally, it is disturbing that in the year 2003, lawmakers are willing to cast the same sort of wrath and humiliation on unwed mothers that the Puritans cast on Hester Prynne in *The Scarlet Letter,* written in 1850.[93]

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93. *See* HAWTHORNE, *supra* note 2, at 220-21 (describing the scarlet letter that Hester Prynne was forced to wear: "[w]herever her walk hath been,—wherever, so miserably burdened, she may have hoped to find repose,—it hath cast a lurid gleam of awe and horrible repugnance roundabout her.").