

FRUSTRATING JUDICIAL PROCEDURE: THE UNCONSTITUTIONALITY OF SAFE HAVEN ANONYMITY LAWS

By

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[2012]

The United States once had a significant child discard problem.¹ In the latter part of the nineteenth century, New York City and Philadelphia averaged 90 or more foundlings per year.² States passed laws to deter the behavior.³ New Jersey, for example, criminalized concealing pregnancies, deliveries, and out-of-wedlock stillbirths.⁴ Discards decreased due to improved child welfare, adoption,⁵ changed attitudes about illegitimacy,⁶ increased mobility for women,⁷ and the safety of abortion.⁸ By 1990, the United States averaged fewer than 100 known discards per year.⁹ Child welfare progressed and, regarding infanticide, succeeded.

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¹ “Discarded” infants are newborns abandoned in public places, other than hospitals, without care or supervision. National Resource Center. Boarder babies, Abandoned Infants, Dec. 2005, at 1, http://aia.berkely.edu/media/pdf/abandoned_infant_fact_sheet_2005.pdf (last visited Mar. 20, 2011).

² Lawrence M. Friedman, *Crimes of Mobility*. 43 Stan L. Rev. 637, 654 (Feb. 1991) citing Edward Crapsey, *The Nether Side of New York: Or the Vice, Crime, and Poverty of the Great Metropolis* 123 (reprint 1969) (1872); citing Roger Lane, *Roots of Violence in Black Philadelphia, 1860-1900* 128-30 (1986).

³ *Id.*, citing, e.g., Lucius Q. C. Elmer, *A Digest of the Laws of New Jersey*. 163 (J. Nixon 2d ed. 1855).

⁴ *Id.*

⁵ Cynthia R. Mabry & Lisa Kelly, *Adoption Law: Theory, Policy and Practice* 9 (1st ed. 2006).

But a moral panic¹⁰ was imminent due to the accessibility of adoption records. In 1996, the adoptee rights organization Bastard Nation (“BN”) sought to give adult adoptees the right to access their original, unaltered birth certificates.¹¹ Three years later, several states had done so.¹² Other states opened their birth records to certain adoptees.¹³ Open records laws withstood constitutional challenges.¹⁴ Opponents could no

6 *Id.* at 9; see also Kathleen Caswell, Comment: *Opening the Door to the Past: Reorganizing the Privacy Rights of Adult Adoptees and Birthparents in California’s Sealed Adoption Records While Facilitating the Quest for Personal Origin and Belonging*, 32 Golden Gate L. Rev. 239, 280 (Spr. 2002).

7 Friedman, above, n. 2, at 654-55.

8 Mabry & Kelly, above, n. 6, at 9-10.

9 Bastard Nation: The Adoptee Rights Organization: Baby Moses/Safe Haven Laws. Working Papers, Second Ed., Ariadne Group 2004 at 1, (Hereafter “BN Working Papers”) citing a Lexis-Nexis newspaper search commissioned by the Department of Health and Human Services.

10 “Moral panic” is a “condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests.” Cohen, S., *Folk Devils and Moral Panics* 9 (1973). Moral panic is characterized by the action taken being disproportionate to the threat posed by the accused group. Jones, M, and E. Jones, *Mass Media* London: Macmillan Press (1999).

11 Donna Martz, *Bastard Nation Adopts New Bylaws*, available at <http://www.bastards.org/bq/bq18/newbylaws.html>, (last visited February 21, 2011).

12 Ballot Measure 58 in 1998. Challenged by birthparents in *Does 1-7 v. State*, 993 P.2d 822 (Or. App. 1998); Alaska Stat. § 18.50.500(a) (West 2007); Ala. Code § 22-9A-12(c) (2006) and §§ 26-25-1 through 5.; Kan. Stat. Ann. § 65-2423(a) (2002); Or. Rev. Stat. § 432.240(1) (2009).

13 Del. Code Ann. Tit. 13, § 929 (West 2006) (mutual consent was needed for access by adoptee); Ohio Rev. Code Ann. § 3705.12(c)(1) (LexisNexis 2005) (access restricted according to adoptee’s birth date); Tenn. Code Ann. § 36-1-127(b)(3)(A) (West Supp. 2011) (access subject to certain parental veto provisions).

14 *Doe v. Sundquist*, 106 F.3d 702 (6th Cir. 1997) (A Tennessee bill made adoption records available to anyone at least 21 years old); *Doe v. Sundquist*, 2 S.W.3d 919, 926 (Tenn. 1999) (The confidentiality of records was a political matter left to the legislature); *Does 1-7*.

longer rely on privacy, breach of contract, and social stigma arguments¹⁵ to hide suspected misdeeds¹⁶ such as coercion, record falsification, and child abductions.¹⁷

So when 13 infants were discarded around Houston,¹⁸ Texas enacted a “safe haven” law that let parents anonymously surrender their infants to the state.¹⁹ The state claimed some parents would kill or discard their children to avoid the legal or social consequences of surrendering their infants for traditional adoption.²⁰

15 E.g., *Does 1-7*, 993 P.2d at 835-36 (holding that law letting birthparents identify themselves to the adoptee did not violate birthparents’ privacy and confidentiality rights and did not impair the contract clause of the state or federal Constitution.) Compare with *Alma Society, Inc. v. Mellon*, 601 F.2d 1225, 1233 (2d Cir. 1979)(New York laws that restricted all adoption record access except for good cause did not violate substantive due process because of the state’s proper recognition of the natural and adoptive parents’ privacy interests.)

16 Fear of exposure of misdeeds is the main factor believed by BN behind the closed records agenda. BN: Frequently Asked Questions, <http://www.bastards.org/FAQ.html>, (last visited May 10, 2011). “We are angry at those self-interested sections of the adoption industry which continue to lobby for sealed records, hiding their own past misdeeds under a cloak of birth parent privacy.”

17 Author’s interview with Marley Greiner, Executive Chair, Bastard Nation, May 14, 2011.

18 Otilia Oancu, *Agenda Setting and Safe Haven Laws: The Convergence of Multiple Stream*, Georgia Political Science Assoc. Conference Proceedings 2009, *available at* <http://a-s.clayton.edu/trachtenberg/2009%20Proceedings%20Iancu%20Submission%20PDF.pdf>, (last visited May 11, 2011).

19 See, e.g., *Id.* at 1.

20 Mot. to Dismiss at 4 in *Smith v. Hayes*, 2005 Ohio App. LEXIS 2754, (10th Dist. June 14, 2005), *discretionary appeal not allowed by* *Smith v. Hayes*, 835 N.E.2d 728.

BN called the safe haven laws a “tool to codify secret adoption relinquishment.”²¹

The Evan B. Donaldson Institute, an advocacy group, criticized the laws for omitting preventative measures, counseling for distressed mothers, and due process for fathers.²²

The National Council for Adoption, which supported sealed adoption records,²³ admitted that safe haven laws countered “disappearing privacy rights in adoption[.]”²⁴

Nevertheless, by 2009, all states had anonymous surrender statutes.²⁵

21 BN: Working Papers, above, n. 10, at 2; See also Marley E. Greiner, Response to Unintended Consequences: “Safe Haven” Laws are Causing Problems, Not Solving Them, Mar. 14, 2003, http://www.bastards.org/activism/EBD_report.html at 1 (“We furthermore believe that the very existence of these laws is an attack on adoptee rights and open record activism...and are nothing but a tactic to perpetuate the sealed records/secret adoption system.” (Last visited Mar. 5, 2011)).

22 Adoption Nation Education Initiative. Unintended Consequences: ‘Safe Haven’ laws are Causing Problems, Not Solving Them. Study by the Evan B. Donaldson Institute, *available at* the Adoption GuideSite at About.com (last visited Fall 2003). Other advocacy groups opposing safe haven laws included Ethica and Concerned United Birthparents (CUB).

23 See e.g. “Safe Haven Laws” <http://www.adopting.org/uni/frame.php?url=http://www.adoptioncouncil.org> (last visited Mar. 19, 2011); See also Affidavit of William L. Pierce (Sep. 6, 1996) in *Doe v. Sundquist*, Case No. 3:96-0599 (M.D. Tenn. 1996), *available at* http://www.americanadoptioncongress.org/TN_legislation_files/pierce.htm, (last visited Mar. 19, 2011).

24 William J. Pierce, “European Court of Human Rights may overturn French law that promised women confidentiality in adoption,” *Extra!* October 9, 2002, no longer available online; formerly available at <http://www.iavaan.org/Archives/2002/October%202002/EUROPEAN%20COURT%20OF%20HUMAN%20RIGHTS%20MAY%20OVERTURN%20FRENCH%20LAW%20THAT%20PROMISED%20WOMEN%20CONFIDENTIALITY%20IN%20ADOPTION.htm>. Copy *available from* author. (Full quote: “Disappearing privacy rights in adoption in the US has led most States to pass ‘safe haven laws’ so that women and their babies have a life-saving option of anonymously taking a baby to a hospital or other safe place.”)

25 See, Oancu, above, n. 19, at 1. See also, e.g., Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 Colum. L. Rev. 753, 773-80 (2006) (noting that from 1999 to 2005 only three states declined to pass safe haven laws and that claims of safe haven successes were usually “accepted uncritically”).

By 2011, two dozen law review articles analyzed the pros and cons of safe haven laws. Two critical articles proposed sociological or cultural theories behind the popularity.²⁶ A few articles discussed the due process rights of non-surrendering fathers.²⁷ This note shows how state court rules and federal laws preempt anonymous surrender statutes. But because anonymity makes constitutional claims non-justiciable, a cure must come through Congress's spending power. Congress must enforce the

26 Sanger, above, n. 26, describing safe haven laws as being generated from the anti-abortion campaign; Jeffrey A. Parness, *Lost Paternity in the Culture of Motherhood: A Different View of Safe Haven Laws*, 42 Val. U.L. Rev. 81 (2007) (Discusses Sanger and adds that "Safe Haven laws are also tied to a second culture, the culture of motherhood...that an unwed genetic mother knows what is best for her child, prompting an unconditional respect under the law for her right to act alone on matters involving her young child." The genetic father is considered a stranger to his child or a folk devil.)

27 See, e.g., Jeffrey A. Parness, *Systematically Screwing Dads: Out of Control Paternity Schemes*, 54 Wayne L. Rev. 641 (2008) (Discusses how anonymous surrender laws thwart fathers' rights.) Mark Strasser, *The Often Illusory Protections of "Biology Plus:" On the Supreme Court's Parental Rights Jurisprudence*, 13 Tex. J. on C.L. & C.R. 31 (2007) (mentions how safe haven schemes interfere with fathers' constitutional rights to notice); Laura Oren, *Thwarted Fathers or Pop-Up Pops?: How to Determine When Putative Fathers Can Block the Adoption of Their Newborn Children*, 40 Fam. L.Q. 153 (2006) ("[I]nfant abandonment laws are of questionable constitutional validity" as they "create thwarted fathers by...design who do not enjoy even a modicum of procedural due process.") Robbin Pott Gonzalez, *The Rights of Putative Fathers to Their Infant Children in Contested Adoptions: Strengthening State Laws that Currently Deny Adequate Protection*, 13 Mich. J. Gender & L. 39 (2006) ("[S]afe haven laws make it too easy for a state to discard a father's interest in the adoption of his infant child," thus denying due process.) Jeffrey A. Parness, *Deserting Mothers, Abandoned Babies, Lost Fathers: Dangers in Safe Havens*, 24 Quinnipiac L. Rev. 335 (2006) ("Safe Haven laws infringe upon the paternity opportunity and the childrearing interests of many genetic fathers.") Laurence C. Nolan, *Preventing Fatherlessness Through Adoption While Protecting the Parental Rights of Unwed Fathers: How Effective are Paternity Registries?* 4 Whittier J. Child & Fam. Advoc. 289 (2005) (discusses how safe haven schemes will satisfy due process for fathers.) Dayna R. Cooper, Note, *Fathers are Parents Too: Challenging Safe Haven Laws with Procedural Due Process*, 31 Hofstra L. Rev. 877, 895-96 (2003) (Some safe haven laws violate the fundamental rights of fathers by having no provision for finding them.) Karin Dwelle, Note, *Adoption Without Consent: How Idaho is Treading on the Constitutional Rights of Unwed Fathers*, 39 Idaho L. Rev. 207 (2002) (arguing that Idaho's safe haven law violates the due process rights of fathers).

Adoption and Safe Families Act by withholding adoption assistance funds from states that have anonymous-surrender laws.

SAFE HAVEN LAWS

Safe haven laws let parents anonymously surrender their unharmed infants to designated authorities²⁸ for any reason.²⁹ The laws “deter mothers from leaving newborns in dumpsters” or other unsafe places.³⁰ Anonymity is the lure.³¹

Most schemes immunize parents from criminal prosecution or make the procedure a defense to abandonment or neglect.³² All schemes require that the infant be delivered to an intermediary who transfers the child.³³ Otherwise, the laws differ in detail, such as the infant’s maximum age, who the intermediary can be, the consequences of the

28 Susan Ayres, *Kairos and Safe Havens: The Timing and Calamity of Unwanted Birth*, 15 Wm. & Mary J. of Women & L. 227, abstract (Wtr. 2009); See e.g. Ohio Rev. Code Ann. §§ 2151.3515-3530 (LexisNexis 2007 & Supp. 2011).

29 Brief of Appellee at p. 1 in *Smith v. Hayes* (wherein the Ohio Attorney General admitted that “[The safe haven] law permits a parent, for any reason, to hand over their unharmed three-day old or younger child with any list of persons...”)

30 Barbara Stark, *Baby Girls from China in New York: A Thrice-Told Tale*, 2003 Utah L. Rev. 1231, 1278-79.

31 Sanger, above, n. 26, at 771 (“The secrecy assured by statute substitutes for the cover of night that shielded mothers in earlier times in their efforts to abandon unwanted infants without detection.”) See also Nina Williams-Mbengue, Analysis of State Actions on Important Issues: Safe Havens for Abandoned Infants, National Conference of State Legislatures, Vol. 26, No. 8 (Sep. 2001), available at <http://www.ncsl.org/programs/cyf/slr268.htm> (last visited Mar. 5, 2011) (“The goal of the anonymity provisions is to encourage women to safely surrender their infants without fear of identifying themselves.”)

32 The following states do not give parents absolute immunity or a defense to criminal charges: (Arkansas) Ark. Code Ann. §§ 9-34-201 *et seq.* (West 2009); (Delaware) Del. Code Ann. tit. 16 §§ 902 (West Supp. 2011 & 907a (West 2006); (Florida) Fla. Stat. Ann. § 383.50(10) (West Supp. 2011) (no criminal investigation shall occur without suspicion of abuse); (Georgia) Ga. Code Ann. § 19-10A-4 (West 2010) (parent immune from criminal liability if parent shows proof of identity, if available, and gives her address); (Texas) Tex. Fam. Code Ann. § 262.301-309 (West 2008).

surrender, and how to invoke anonymity. Parents can surrender infants to professional staff at hospitals, police departments, and fire stations.³⁴ Three states include staffed churches or “centers of worship.”³⁵ Several states limit surrender locations to hospitals, health clinics, and emergency medical service providers.³⁶ One state lets parents deliver newborns to adoption agencies.³⁷ Thirty-nine states let parents remain anonymous. Eleven states stay silent about anonymity.³⁸ Some states require or encourage the intermediary to request identifying information.³⁹ Two states forbid asking for identifying information.⁴⁰ No state requires the parent to give it. If a parent does not

33 See Alaska Stat. Ann. § 47.10.013(c)(1)(A) (West 2007), Iowa Code Ann. § 233.2 (West 2006); Md. Code Ann. Cts. & Jud. Proc. § 5-641 (West 2011); R. I. Gen. Laws § 23-13.1-3 (West 2006); Utah Code Ann. § 62A-4a-802(1)(a) (West Supp. 2010).

34 See, e.g., Alaska Stat. Ann. § 47.10.013(c) (West 2007); Ariz. Rev. Stat. Ann. § 13-3623.01(B) (West 2010) (fire station and health care institution only); Ohio Rev. Code Ann. § 2151.3515(A) (LexisNexis 2007).

35 S.C. Code Ann. § 63-7-40(J)(2) (West 2010); Vt. Stat. Ann. tit. 13, § 1303(b)(1)(B) (West 2007); N.H. Rev. Stat. Ann. § 132-A:1(III) (West 2005).

36 Ala. Code § 26-25-1 (West 2009); Conn. Gen. Stat. Ann. § 17a-57 (West 2006); Ga. Code Ann. §§ 19-10A-2 and 10A-6 (West 2010); Miss. Code Ann. § 43-15-201 (West 2008); N.D. Cent. Code § 50-25.1-15; Neb. Rev. Stat. § 29-121 (2008); N.M. Stat. Ann. § 24-22-3 (West 2003); 23 Pa. Cons. Stat. § 4306, 6504 (West 2010); W. Va. Code § 49-6E-1 (West 2002); Va. Code Ann. § 40.1-103(B) (West Supp. 2010); Utah Code Ann. § 62A-4a-802(1)(a) (West Supp. 2010).

37 Tex. Fam. Code. § 262.301(1)(C)(ii) (West 2008).

38 The states staying silent are Alabama: Ala. Code §§ 26-25-1 through 26-25-5 (West 2009); Arizona: Ariz. Rev. Stat. Ann. § 13-3623.01 (West 2010); Arkansas: Ark. Code Ann. §§ 9-34-201 through 204 (West 2009); Colorado: Colo. Rev. Stat. Ann. § 18-6-401(9) (West 2004); Maryland: MD. Code Ann., Cts. & Jud. Proc. § 5-701 (West 2011); Michigan: Mich. Comp. Laws Ann. §§ 712.1 through 712.20 (West 2002); Missouri: Mo. Ann. Stat. § 210.950 (West 2010); Mississippi: Miss. Code Ann. §§ 43-15-201 through 43-15-209 (West 2008); Montana: Mont. Code Ann. §§ 40-6-401 through 40-6-417 (2009); Nebraska: Neb. Rev. Stat. § 29-121 (2008); Virginia: Va. Code Ann. §§ 18.2-371, 371.1 (West 2001); 40.1-103, 8.01-226.5:2, & 63.2-910.1 (West Supp. 2010).

contact the agency within a specified time, the agency moves to terminate parental rights (TPR). The Ohio scheme provides a model.

OHIO SAFE HAVEN LAW

Ohio's "Desertion of Child Act"⁴¹ is a custody procedure invoked when a parent "voluntarily delivers the child to an emergency hospital employee, emergency medical service worker, or peace officer without expressing an intent to return for the child."⁴² The law was passed because "some distraught parents [gave] birth in secret and left the newborns to die in trash cans or dumpsters."⁴³ Those parents needed "a way to anonymously leave their newborns with individuals capable of providing adequate care."⁴⁴ The child must be unharmed, 30 days old or younger, and transferred to the intermediary by a biological parent.⁴⁵ The parent has an "absolute right to remain anonymous."⁴⁶ The intermediary cannot "try to force the parent into revealing the

39 *E.g.* Cal. Health and Safety Code § 1255.7(b)(3) (West 2008) (the medical information questionnaire shall not require identifying information and may be declined); Me. Rev. Stat. Ann., tit. 22 § 4018(2) (West 2004) (The intermediary can ask the parent to provide information helpful to the child but cannot detain the parent to get it); Mich. Comp. Laws Ann. § 712.3(2)(d) (West Supp. 2011) (the intermediary must make a reasonable attempt to ask the parent to identify themselves.)

40 Idaho Code § 39-8203(3) (West 2006); Minn. Stat. Ann. § 145.902(b) (West 2005).

41 Ohio Rev. Code Ann. § 2151.3515 – 3530 (LexisNexis 2007 & Supp. 2011).

42 Ohio Rev. Code Ann. § 2151.3516 (LexisNexis Supp. 2011).

43 Ohio Attorney General's Mot. to Dismiss at 1 in State ex rel. Smith v. Lumpkin, Ohio Sup. Ct. Case No. 2009-0538, (Apr. 8, 2009), *dismissed without published opinion* at 907 N.E.2d 319 (Ohio 2009).

44 *Id.*

45 Ohio Rev. Code Ann. § 2151.3516 (LexisNexis Supp. 2011)

46 Ohio Rev. Code Ann. § 2151.3524(A) (LexisNexis 2007)

identity of the child’s parents.”⁴⁷ The intermediary contacts the County Children Services Department, which takes emergency custody and moves for temporary custody in juvenile court.⁴⁸ If the court lacks the parents’ names, it need not notify them of the emergency custody hearing.⁴⁹ At that hearing, the agency asks the court to declare the child “deserted.”⁵⁰ No reunification attempt is needed.⁵¹ The agency must pursue TPR unless it has “compelling reasons not to.”⁵²

CONSTITUTIONALITY

Anonymous surrender statutes violate the separation of powers doctrine by infringing on the judiciary’s power to govern its proceedings. The Ohio Constitution authorizes the Ohio Supreme Court to enact procedural court rules.⁵³ Statutes that conflict with those rules lack force and effect.⁵⁴ Issuing summonses and notices is procedural and thus governed by the court rules.⁵⁵

⁴⁷ Ohio Rev. Code Ann. § 2151.3527(A)(1) (LexisNexis 2007).

⁴⁸ Ohio Rev. Code Ann. § 2151.3520 (LexisNexis 2007).

⁴⁹ Ohio Rev. Code Ann. § 2151.3519 (LexisNexis 2007).

⁵⁰ Doe Ohio, 880 N.E.2d 989, ¶ 2 citing Ohio Rev. Code Ann. § 2151.3515.

⁵¹ Ohio Admin. Code § 5101:2-39-08.1(H) (2009).

⁵² Ohio Admin. Code § 5101:2-42-95(A)(2) (Supp. 2009-2010). The rule gives no example of a compelling reason.

⁵³ Ohio Const., art. IV, § 5(B).

⁵⁴ *Id.*

⁵⁵ *Id.*; Krause v. State, 285 N.E.2d 736, 744 (Ohio 1972); *In re Doe*, 565 N.E.2d 891, 892-93 (Ohio Com. Pl. Cuyahoga Co. 1990) (“The issuance of notice for court proceedings is procedural as it pertains to the method of enforcing rights or obtaining redress rather than creating, defining, or regulating the rights of the parties.”) The court rules regarding summons were enacted long before the safe haven statutes.

Ohio Juvenile Rule of Procedure 2(Y) makes parents parties to juvenile court proceedings. Juv. R. 15(A) requires the clerk to summon the parties to hearings, including emergency hearings. Juv. R. 16(A) requires the agency to use due diligence to determine the missing parent's name and address for actual notice. Due diligence means "taking steps which an individual of ordinary prudence would reasonably expect to be successful in locating a defendant's address."⁵⁶ That includes asking the parent and family members for the missing parent's identity and address.⁵⁷

Those rules applied in *In re Baby Boy Doe (Ohio)*,⁵⁸ where the mother surrendered her baby anonymously under Ohio's safe haven law.⁵⁹ The juvenile court granted the child's request to dismiss the county's permanent custody motion on grounds of a separation-of-powers violation.⁶⁰ The Court reasoned that the county's duty to use due diligence to locate a missing parent⁶¹ included asking the parent and family members about the mother's identity and residence.⁶² Thus, the parent's right to remain anonymous and the prohibition against forcing a party to reveal the parents' identities under the safe haven law violated the Ohio Supreme Court's rulemaking authority, thereby invalidating the statutes.⁶³

⁵⁶ *In re Thompkins*, 875 N.E.2d 582 (Ohio 2007), ¶ 25 quoting *Sizemore v. Smith*, 453 N.E.2d 632, 635 (Ohio 1983).

⁵⁷ *In re Sitgraves*, 1997 Ohio App. LEXIS 5318 at **7-8 (8th Dist. Nov. 26, 2007).

⁵⁸ *In re Baby Doe (Ohio)*, 880 N.E.2d 989, ¶ 6.

⁵⁹ *Id.*

⁶⁰ *Id.* at ¶¶ 1-2.

⁶¹ *Id.* at n.3.

⁶² *Id.* citing *Sitgraves*.

⁶³ *Doe Ohio*, 880 N.E.2d 989, ¶¶ 6-7 and n.3.

The Ohio Attorney General has argued that notice by publication in anonymous surrenders did not conflict with the court rules because the intermediaries (police officers, hospital staff, and firefighters) were private actors, meaning the state did not cause the lack of parental information.⁶⁴ But actors are private only if they can make private decisions.⁶⁵ Ohio's anonymity statute prevented the intermediary from requiring the deserter to prove her identity, even if the intermediary wanted to ask her. Thus, the statute commands the intermediary's actions, making her a state actor.

The Attorney General also argued that the safe haven law referred to an emergency hearing, which can proceed without notice if the parents' identities are unknown, leaving the notice requirements for the temporary and permanent custody hearings intact.⁶⁶ But Juv.R. 15(A) requires summoning parents to emergency hearings when they can be identified with due diligence.⁶⁷ Anonymity eliminates the ability to do so, leaving the rules regarding temporary and permanent custody rules thwarted, not intact.

⁶⁴ Reply to Mot. to Dismiss at n. 1 in *State ex rel. Smith v. Lumpkin*.

⁶⁵ *Peterson v. Greenville*, 373 U.S. 244, 248 (1963) (A restaurant manager was a state actor even though he would have kicked black people out of his restaurant without the segregation law.)

⁶⁶ Mot. to Dismiss at 6 in *Smith v. Hayes*.

⁶⁷ Ohio Juv. R. P. 15(A).

In most states, procedural rules control when statutes conflict with them.⁶⁸ The doctrine applies without constitutional dictate.⁶⁹ “A court’s inherent power extends to all matters reasonably necessary for the administration of justice within the scope of its jurisdiction, subject to or not in conflict with existing laws and constitutional

68 AK: *Winegardner v Greater Anchorage Area Borough*, 534 P.2d 541, 545-46 (Alaska 1975) citing Alaska Const. art. IV, §§ 1 and 15; AL: *Schoenvogel v. Venator Group Retail, Inc.*, 895 So.2d 225, 234 (Ala. 2004) citing Alabama Const. art. VI, § 140; AR: *Miller v. State*, 555 S.W.2d 563, 564 (Ark. 1977); AZ: *State v. Blazak*, 462 P.2d 84, 85 (Ariz. 1969) citing Ariz. Const. art. VI, § 5, cl. 5; CO: *People v. McKenna*, 585 P.2d 275, 276-77 (Colo. 1978) citing Colo. Const. art. VI, § 21; CT: *State v. Clemente*, 353 A.2d 723, 727 (Conn. 1974); DE: *In re Stroik*, 1998 Del. LEXIS 369, ¶ 6 citing Del. Code Ann. tit. 10, § 161; FL: *State v. Raymond*, 906 So.2d 1045, 1048 (Fla. 2005) citing Fla. Const. art. V, § 2(a) and art. II, § 3; GA: *Atlanta Journal & Atlanta Constitution v. Long*, 376 S.E.2d 865, 867 (Ga. 1989); ID: *State v. Knee*, 616 P.2d 263, 265 (Ida. 1980); IL: *O’Connell v. St. Francis Hosp.*, 492 N.E.2d 1322, 1326 (Ill. 1986); IN: *Campbell v. Criterion Group*, 605 N.E.2d 150, 157 Ind. 1992); KY: *Kentucky Farm Bureau Mut. Ins. Co. v. Wright*, 136 S.W.3d 455, 458-459 (Ky. 2004); Com. v. Reneer, 734 S.W.2d 794, 796 (Ky. 1987) citing Ky. Const. § 28; MA: *First Justice of the Bristol Div. of the Juvenile Court Dep’t v. Clerk-Magistrate of the Bristol Div. of the Juvenile Court Dep’t*, [780 N.E.2d 908, 916 \(Mass. 2003\)](#) citing [Mass. Const. Decl. Rights art. 30](#); MI: *McDougal v. Schanz*, 597 N.W.2d 148, 162 (Mich. 1991); MO: *State ex rel. Union Elec. Co. v. Barnes*, 893 S.W.2d 804, 805 (Mo. en banc 1995) citing Mo. Const. art. V, § 5; MT: *Coate v. Omholt*, 662 P.2d 591, 599 (Mont. 1983) citing Mont. Const. art. VII, § 2(3); NH: *Opinion of the Justices*, 688 A.2d 1006, 1011 (N.H. 1997) citing N.H. Const. Part II, art. 73-a; *see also* *In re Stapleton*, 159 N.H. 694, 992 A.2d 593 (2010); NJ: *Winberry v. Salisbury*, 74 A.2d 406, 409 (N.J. 1950); NM: *Albuquerque Rape Crisis Ctr. v. Blackmer*, 120 P.3d 820, 822 (N.M. 2005) citing N.M. Const. art. VI, § 3; NV: *Borger v. Eighth Judicial Dist. Court ex rel. County of Clark*, 102 P.3d 600, 606 (Nev. 2004); OH: *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1087 (Ohio 1999) citing Ohio Const. art. IV, § 5(B); PA: *Laudenberger v. Port Authority of Allegheny Cty.*, 436 A.2d 147, 151 (Penn. 1981) citing Penn. Const. art. V, § 10(c); TN: *State v. Brackett*, 869 S.W.2d 936, 939 (Tenn. Ct. Crim. App. 1993); TX: *In the Interest of M.N.*, 262 S.W.3d 799, 802 citing Tex. Const. art. V, § 31(c); UT: *State v. Banner*, 717 P.2d 1325, 1333 (Utah 1986); VT: *State v. Corliss*, 484 A.2d 924, 925 (Vt. 1984) citing VT Const., Ch. II, § 37; WA: *State v. Templeton*, 59 P.3d 632, 641-42 (Wash. 2002) following *In re Welfare of Messmer*, 326 P.2d 1004, 1005 (Wash. 1958); WI: *Rao v. WMA Sec., Inc.*, 752 N.W.2d 220 Wis. 2008), ¶ 35; *State v. Jennings*, 647 N.W.2d 142 (Wis. 2002) at ¶ 13; WV: *Mayhorn v. Logan Medical Found.*, 454 S.E.2d 87, 94 (W.Va. 1994) citing W. Va. Const. art. VIII, § 3; WY: *Terex Corp. v. Hough*, 50 P.3d 317 (Wyo. 2002) at ¶ 11; *Kittles v. Rocky Mt. Recovery, Inc.*, 1 P.3d 1220, 1223 (Wyo. 2000) citing Wyo. Const. art. 5, § 2.

provisions.”⁷⁰ That “implied authority [lets] the court...dictate its own rules, even if they contradict rules established by the legislature.”⁷¹ Thus, anonymous surrender laws in states whose court rules require due diligence before proceeding are invalid.

⁶⁹ For a detailed summary, see Christopher Reinhart & George Coppolo, Court Rules in Other States—Legislative Approval. OLR Research Report, Dec. 30, 2008, *available at* <http://www.cga.ct.gov/2008/rpt/2008-R-0430.htm>, (last visited May 8, 2011).

⁷⁰ 20 Am. Jur.2d § 39 citing *Veilleux v. State*, 635 So. 2d 977 (Fla. 1994).

⁷¹ *Id.* citing *Sackett v. Santilli*, 47 P.3d 948, 951 (Wash. 2002); *See also* *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398 (Tex. 1979) (“The inherent judicial power of a court is not derived from legislative grant or specific constitutional provisions, but from the very fact that the court has been created and charged by the constitution with certain duties and responsibilities”); but see Cal. Const. art. VI § 6(d): “The rules adopted [by the judicial Council] shall not be inconsistent with statute.”

FEDERAL PREEMPTION

Federal law preempts anonymous surrender statutes. The United States Constitution makes federal laws the “supreme Law of the Land.”⁷² When Congress has not expressly preempted state law, courts determine whether the state law frustrates the federal law’s “full effectiveness.”⁷³ If so, the state law is invalid.⁷⁴

Indian Child Welfare Act

Anonymous surrender statutes frustrate the Indian Child Welfare Act (ICWA).⁷⁵ ICWA guards against removing Indian children for placement in non-Indian homes.⁷⁶ In a court proceeding for the foster care placement of or TPR to an Indian child, the child’s tribe has a right to receive notice and intervene.⁷⁷ If a parent’s identity or location is unknown, the court must give the United States Secretary of the Interior the information needed to learn that information.⁷⁸ If a parent requests anonymity, the court notifies the Secretary, who keeps the parent’s information confidential.⁷⁹ The court must still prefer placement with the Indian child’s extended family or a tribal foster home, while giving weight to the parent’s anonymity wish.⁸⁰

⁷² U.S. Const., art. VI, cl. 2.

⁷³ *Perez v. Campbell*, 402 U.S. 637, 652 (1971), *superseded by statute in* *Md. Port Admin. v. Premier Auto Servs.*, 343 B.R. 501 (Bankr. D. Md. 2006) *Perez*, 402 U.S. at 652.

⁷⁴ *Id.*

⁷⁵ 25 U.S.C. § 1901 et seq. (2006).

⁷⁶ *Id.*

⁷⁷ 25 U.S.C. § 1911(c) (2006).

⁷⁸ 25 U.S.C. § 1912(a) and § 1951(a)(2) (2006).

⁷⁹ 25 U.S.C. § 1951(a)(4) (2006).

⁸⁰ 25 U.S.C. § 1915(b) and (c) (2006).

*In re Baby Girl Doe (Montana)*⁸¹ exemplifies anonymity statutes' subversive effect on ICWA. There, an unwed mother was eligible for Tribal membership.⁸² The state took the child from the hospital, alleging dependency.⁸³ The mother relinquished parental rights, requested anonymity, and asked the court to withhold notice to her family and tribe.⁸⁴ The trial court found that the mother's desire for anonymity outweighed the tribe's interest in a placement preference.⁸⁵

The Montana Supreme Court reversed, reasoning that courts had to interpret the conflicting provisions to achieve ICWA's principles optimally.⁸⁶ Applying *Mississippi Band of Choctaw Indians v. Holyfield*,⁸⁷ a United States Supreme Court case, the Montana Supreme Court held that prioritizing anonymity defeated the tribe's right to intervene and threatened the extended-family preference.⁸⁸ To advocate for the latter, the tribe needed the mother's identity while respecting her privacy as far as possible.⁸⁹

Doe (Montana) shows that the right to anonymity in safe haven laws goes too far. The trial court and the Supreme Court in *Doe (Montana)* tried to balance the interests

⁸¹ 865 P.2d 1090 (Mont. 1993).

⁸² *Id.* at 1090.

⁸³ *Id.* at 1091.

⁸⁴ *Id.*

⁸⁵ *Id.* at 1091-92.

⁸⁶ *Id.* at 1093.

⁸⁷ 490 U.S. at 49 (1989) (The tribe's interest is distinct from that of its individual members about the child's placement.)

⁸⁸ *Doe* (Mont.), 865 P.2d at 1095.

⁸⁹ *Id.*

between anonymity and placement preference. Even had the Montana Supreme Court affirmed, the trial court would have had information to use in balancing the preferences.

Anonymous surrender statutes remove the court's ability to balance anything. Had the mother in *Doe (Montana)* surrendered the child anonymously at a hospital, the trial court could not have identified the tribe or learned the child's Indian status. The Tribe would have lost an eligible member based on a mother's wish, contravening *Holyfield*. Even if the mother identified the tribe while remaining anonymous, the tribe and the court could not have enforced the placement preferences to the extent Congress intended since the baby's immediate relatives were unknown.

The need to notify the Secretary of the Interior when a parent's information is unknown does not eliminate the conflict.⁹⁰ The notification provision aims to *respect* privacy, not *create* a foundling. To achieve the full effectiveness of ICWA's placement preferences, surrendering parents must identify themselves so the state can identify Indian children and their tribes. Anonymous surrender statutes sidestep ICWA and thus are preempted.

Adoption and Safe Families Act

Anonymous surrender laws also thwart the Adoption and Safe Families Act (ASFA).⁹¹ ASFA concerns substitute care.⁹² The act balances the interest in preserving families with children's need for permanence.⁹³ The state must give parents, relatives,

⁹⁰ The Ohio Attorney General made that argument in its Reply to Second Mot. to Dismiss at 4-5 in *Smith v. Hayes*.

⁹¹ 42 U.S.C. §§ 620 *et seq.* (2006).

⁹² *Id.*

⁹³ See 42 U.S.C. § 671(a) (2006)

and children who have been removed a fair chance to reunify.⁹⁴ Once reunification becomes unlikely, adoption becomes the goal.⁹⁵

ASFA conditions adoption subsidies upon states having plans that achieve the ASFA's goals.⁹⁶ The state must require reasonable efforts to notify relatives of the removal and reunify the children with their families.⁹⁷ Aggravated circumstances, such as abandonment, excuse those efforts. ASFA considers safe haven laws a "family preservation service" and authorizes their promotion.⁹⁸ That part of ASFA reads:

"Within 30 days of the removal of a child from the custody of the parent...the State shall exercise *due diligence* to identify and provide notice to all adult grandparents and other adult relatives of the child (*including* any other adult relatives suggested by the parents), subject to exceptions due to family or domestic violence[.]"⁹⁹

State anonymous surrender statutes conflict with that subsection by making due diligence unenforceable when the parent withholds identifying information.¹⁰⁰ The ASFA language in state safe haven laws shows that conflict. For example, one of the first safe

⁹⁴ See 42 U.S.C. § 671(a)(15) and (29) (2006).

⁹⁵ Ex parte T.V., 971 So.2d 1, 11 (Ala. 2007); Nekima Levy-Pounds, *Children of Incarcerated Mothers and the Struggle for Stability*, 2 Am. U. Modern Am. 14, 16 (2006).

⁹⁶ 42 U.S.C. § 670 (2006)

⁹⁷ 42 U.S.C. § 671(a)(29) (2006).

⁹⁸ Promoting Safe and Stable Family Amendments of 2001 (PSSFA). Pub. L. No. 107-133, 42 U.S.C. § 629a (2006).

⁹⁹ 42 USC § 671(a)(29). (Emphasis added.)

¹⁰⁰ Stacie Schmerling Perez, *Combating the "Baby Dumping" Epidemic: A Look at Florida's Safe Haven Law*, 33 Nova L. Rev. 245, 266 (2008) ("...[T]he amendments [to the Florida safe haven law] will help newborns legally surrendered under the law achieve permanency faster since the time-consuming requirement of conducting a diligent search for known parents has been eliminated."); see also Cooper, above, n. 28, at 878 ("The ultimate goal of these laws is to protect babies by persuading mothers to leave them in safe places...and, ultimately, be placed with an adoptive family.")

haven laws¹⁰¹ relieved the state from having to “search for relatives of the child as a placement option” if the parents remained anonymous.¹⁰² Thus, the part of ASFA requiring the state to use due diligence to identify relatives “within 30 days after the removal of a child” means the state must *act* on the information it obtains within thirty days, not wait thirty days to *obtain* it. Due diligence begins with getting the parent’s identity and address, if available. The information is available at the transfer.

ASFA’s encouragement of states to promote safe haven services¹⁰³ does not avoid conflict. The ASFA amendments state that safe haven programs should let parents “safely relinquish a newborn infant at a safe haven designated pursuant to a state law.”¹⁰⁴ The amendments do not require anonymity. The phrase “at a safe haven designated pursuant to state law” refers to safe haven locations. One can abandon a child safely and non-anonymously. Even if states consider safe haven surrenders to be “abandonment,” thereby creating an aggravated circumstance that excuses reunification, states cannot make *anonymity* the aggravating circumstance to avoid due diligence. Letting parents abandon children anonymously destroys the balance between reunification and TPR, which ASFA strives for. Thus, the anonymity provisions frustrate ASFA’s purpose and are invalid.

Anonymity Gone Wild

Proponents insist that child safety is a compelling interest justifying anonymity. The argument is results-oriented, thus invalid. Anonymity makes danger unprovable,

101 Enacted in 2000 at N. J. Stat. Ann. §§ 30:4C-15.7 to 15.11.

102 *Id.* at § 30:4C-15.8 (200__).

103 42 U.S.C. § 629a (2006).

104 42 U.S.C. § 629a(1)(F) (2006).

leaving the anonymity right available to parents for reasons unrelated to danger (e.g., wanting to avoid future contact with the child, a contested TPR, or the red tape of traditional adoption). But proponents reason that, because a child could be in danger, we must assume they are, and thus the law works so long as the child is adopted.

For example, an unharmed newborn left on fire station steps, wrapped in bags and towels, was in the spirit of delivering a baby to a firefighter under the safe haven law.¹⁰⁵ The baby stayed on the steps unattended for an hour in the morning before a resident called the Fire Rescue Engineer.¹⁰⁶ The Engineer found the child lying by a bag with a note: “Please find her a good home. I’m sorry. Thank you. Birth mom.”¹⁰⁷ The Safe Haven Chapter Coordinator stated, “It’s tragic, but because this child was brought to a location where it could be helped and assisted, it’s a blessing. It’s a good thing, we know [the safe haven law is] working.”

The results-oriented agenda is clear. Had a third person or animal harmed the baby while on the steps, the mother’s action would have been a tragedy, not a “blessing.” The Safe Haven Chapter Coordinator would have blamed the mother for failing to follow the law. Endangering newborns by abandoning them on porches cannot be rewarded. A responsible safe haven coordinator would have asked the prosecutor to send a message that this is *not* how the safe haven law works and that the right to anonymity left no excuse for refusing to transfer the infant to a firefighter. The coordinator’s comment

105 Fla. Stat. Ann. § 383.50 (West Supp. 2011); Vince Norman—wptv.com, Baby left outside south Florida fire station wrapped in bags, towels. A Safe Haven for Newborns, August 6, 2010, *available at* <http://www.asafehavenfornewborns.com> (Under “News and Media” tab), (last visited May 4, 2011).

106 *Id.*

107 *Id.*

about how the surrender showed that the safe haven is working makes sense only if the criterion for success is having another unharmed infant available for uncontested adoption, with their identity erased. That spirit was met.

A safe haven promoter also urged the spirit of the law when someone abandoned a newborn on a bench outside a hospital emergency room.¹⁰⁸ In another case, Police officers accepted an infant five months over the safe haven age limit without obtaining the mother's identity.¹⁰⁹ Those actions were presumed okay because the child was presumed to be in danger before being discarded. The "danger" assumption becomes so circular and broad that the policy behind anonymous surrender shifts from protecting a class of infants to letting any mother frustrate court procedures to achieve adoption.

*In re Doe (New Jersey)*¹¹⁰ exemplified the phenomenon. Hospital staff treated a boarder baby (born in a hospital and left there) as a safe haven infant despite the statute's clear intent to disallow that.¹¹¹ The statute¹¹² let a parent deliver their unharmed

¹⁰⁸ Holly Hickman, Law lets babies be abandoned, but not hope, Aug. 24, 2003, Associated Press. Miami, *available at* <http://www.floridaschildrenfirst.org>, (last visited May 4, 2011).

¹⁰⁹ Heywood Hoffman, Baby abandoned on New Year's Day. Chicago Breaking News Center, Jan. 2, 2010, <http://archive.chicagobreakingnews.com/2010/01/baby-abandoned-on-new-years-day.html>, (last visited May 4, 2011.)

¹¹⁰ *See In re Doe* ("Doe New Jersey"), 2010 N.J. Super. LEXIS 160 (Cumberland Co. May 5, 2010) (Baby was born safely in hospital).

¹¹¹ *Id.* at *1.

¹¹² "New Jersey Safe Haven Infant Protection Act" N.J. Stat. Ann. § 30:4C-15.7(a)-(b) (West 2008).

infant anonymously to a police station or “*emergency department* of a licensed hospital.”¹¹³ If the parent showed no intent to return, the agency sought TPR.¹¹⁴

The Spanish-speaking mother was admitted to the maternity ward, where she gave the staff her name and address.¹¹⁵ After the birth, the mother said she wished to surrender the child for adoption anonymously.¹¹⁶ She received information about the safe haven law in Spanish, and a Spanish-speaking social worker interviewed her.¹¹⁷ The mother requested complete anonymity.¹¹⁸ She explained that she had another child and that the father of this one had disappeared.¹¹⁹ She claimed she couldn’t raise another child, “especially with no help.”¹²⁰ The mother asked the doctor to write a letter stating that the mother miscarried to explain the baby’s absence to her family.¹²¹ The doctor wrote a vague medical leave letter instead.¹²²

After the mother was discharged, the hospital’s lawyers concluded that the mother had to take the infant to a police station or hospital emergency room under the

¹¹³ Doe (New Jersey) at ***6-7 discussing N. J. Stat. Ann. § 30:4C-15.7 to 15.11 (West 2008), (emphasis added.)

¹¹⁴ *Id.* at ***7-8 citing and quoting N. J. Stat. Ann. § 30:4C-15(e).

¹¹⁵ *Id.* at ***1-2.

¹¹⁶ *Id.* at ***2.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at ***2-3.

¹¹⁹ *Id.* at ***3

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

safe haven law.¹²³ The social worker called the mother, explained the situation, and sent a prepaid taxi to her house.¹²⁴ The mother did not meet the taxi.¹²⁵ So the hospital redacted the mother's identifying information and relinquished the child to the agency, stating that the child was born in the hospital and left there under the safe haven law.¹²⁶ The agency petitioned for guardianship with an adoption plan without notice to the biological parents.¹²⁷ The agency requested that the court declare the child a safe haven baby, letting the mother remain anonymous.¹²⁸

The court did that, reasoning that the mother did not intend to return for the child because she refused to meet the taxi.¹²⁹ According to the court, the legislature "anticipated the need for a more expansive set of safe haven sites than hospital emergency rooms."¹³⁰ Legislative findings showed that the safe haven law gave "mothers of unwanted infants, who may otherwise end up in dangerous or deadly circumstances, a way to safely and anonymously surrender their child without risk to the child's life or health."¹³¹ A government website indicated that the safe haven law applied to babies delivered in hospitals.¹³² That could make mothers believe that a hospital delivery would

¹²³ *Id.* ***3-4.

¹²⁴ *Id.* ***4.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* ***4-5.

¹²⁸ *Id.* ***8.

¹²⁹ *Id.* at ***10.

¹³⁰ *Id.*

¹³¹ *Id.* at ***10-11.

¹³² *Id.* at ***12-13.

not deprive them of the anonymity and legal protections “Jane Doe so very much wanted.”¹³³ A pregnant woman who read the website might believe that the safe haven law allowed that alternative.¹³⁴ Because giving birth in the hospital was better than encouraging mothers to do so outside the hospital, Jane Doe was deemed to have gone to the emergency room.¹³⁵ That made the infant a safe haven baby, eliminating the need to notify the mother.¹³⁶ And sending notices to the mother could have serious family consequences.¹³⁷ But the law required the court to wait four months to see if the father became known and, if so, to serve him with notice of the TPR proceedings.¹³⁸

The court merely expanded the target group from “at-risk” parents to all parents of newborns. In fact, traditional adoption would have served the mother better. Unlike the ASFA, the adoption laws did not require notice to relatives.¹³⁹ Did anyone tell the mother that? Would it have made a difference?

The court also erred from every legal angle. The statute required the parent to deliver the child to a specific place. A parent motivated enough to invoke the safe haven law should have no problem doing that, especially when someone sends a prepaid taxi to their house. The mother’s refusal to take the taxi was her refusal to invoke the safe

¹³³ *Id.* at ***13.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at ***15-16.

¹³⁷ *Id.* at ***16.

¹³⁸ *Id.* at ***18.

¹³⁹ N. J. Stat. Ann. § 9:3-45 (West 2002).

haven law. And using the website in applying the anonymity statutes to babies born in hospitals was improper. Agency websites are neither law nor legislative history.

History also spoke against the belief that the New Jersey safe haven law applied to boarder babies. In 2004, when New Jersey State officials planned to promote the safe haven law,¹⁴⁰ they also planned to stop New Jersey's "disturbing" boarder baby problem.¹⁴¹ The Human Services Commissioner allocated \$300,000 to deter it,¹⁴² saying: "We must do whatever it takes to stop this disturbing problem...This...funding... will... help more boarder babies go home with relatives."¹⁴³ In contrast, the safe haven law let parents "*drop off* unwanted newborns at hospitals."¹⁴⁴

Thus, the New Jersey legislature meant to limit its safe haven law to distraught parents who gave birth *outside* hospitals. Accordingly, the court in *In re Doe (New Jersey)* should have declared the infant a boarder baby and required the parties to comply with the law. Instead, it twisted the statute to achieve the parties' desired result: secret adoption. The court called that a "favorable policy" while ignoring the unfavorable policy it created: Any parent can achieve a secret adoption of their newborn on request

¹⁴⁰ Tom Bell, Associated Press. Newsday.com: State plans campaign to discourage dumping of newborns, Jan. 20, 2004, *available at* <http://www.laborlawtalk.com/archive/index.php/t-9325.html>, (last visited Mar. 20, 2011).

¹⁴¹ The Associated Press. Newsday.com: State adds funding to stop 'boarder baby' problem, Feb. 3, 2004, *available at* <http://www.familykb.com/uwe/forum/.aspx/adoption/949/state-adds-funding-to-stop-boarder-baby-problem>, (last visited Mar. 20, 2011).

¹⁴² *Id.* at *1.

¹⁴³ *Id.*; see also Philly.com: N.J. to study problem of abandoned babies, Feb. 04, 2004, no longer available online. Previously available at <http://www.Philly.com>. (Emphasis added.)

¹⁴⁴ *Id.*

in New Jersey because they are all presumed to be homicidal. The circular reasoning is apparent: The state must let any parent of an infant frustrate notice procedure because only a parent whose child is in danger would do that. Safe haven proponents then twist that absurdity into a compelling interest by calling it a “saved life.”

But even if it’s true that all safe haven deserters “see no other option,”¹⁴⁵ why not help them see other options? Why not determine why the parent feels desperate? Was the mother in *Doe (New Jersey)* an illegal resident fearing deportation? Did she fear domestic violence? Could she have been counseled about that?

Misleading advertisements exacerbate the problem. An Ohio ad states that the parent will face “no legal consequences” for choosing a safe haven surrender.¹⁴⁶ And:

“The professional staff person who accepts the baby will contact the county children services agency; and the baby will be placed in an adoptive home. There are many families who want to adopt a baby.”¹⁴⁷

But the county will sue the parent for desertion.¹⁴⁸ That’s a legal consequence: TPR after being adjudicated a deserter.

Considering the surrender as “consent” to TPR¹⁴⁹ further underscores the absurdity. Consent is impossible if the parent is under duress.¹⁵⁰ A parent consenting to

¹⁴⁵ See *e.g.*, Cooper, above, n. 28, at 879 (describing intent behind anonymity).

¹⁴⁶ See, *e.g.*, Ohio Dep’t of Job and Family Services (ODJFS) Ohio’s Safe Haven for Newborns, <http://jfs.ohio.gov/safehavens/>, (last visited: February 21, 2011.)

¹⁴⁷ *Id.*

¹⁴⁸ See *Doe (Ohio)*, 880 N.E.2d 989, ¶ 2.

¹⁴⁹ Fla. Stat. § 383.50(2) (West Supp. 2011)(“There is a presumption that the parent who leaves the newborn infant in accordance with this section intended to leave the newborn infant and consented to termination of parental rights.”)

¹⁵⁰ *E.g.* N.J. Stat. § 30:4C-15.6(b) (West 2008) (“The parents of these newborn infants may be under severe emotional stress and may need a safe haven available to them and their child.”)

adoption out of fear for the child's safety or grave family disgrace is under duress, the situation safe haven anonymity targets.¹⁵¹ Thus, safe haven proponents waffle between their claim that anonymous surrender statutes target parents under duress and that deserting parents can consent to TPR because they are not under duress.

Anonymous surrender laws are also irrational because a party's appearance at the hearing destroys anonymity. If anonymity convinces at-risk parents to avoid harming their children, that promise must retain credibility with future at-risk parents. A father or relative can identify the surrendering mother. Thus, the lure of anonymity *compels fathers and relatives* to default. Accordingly, the anonymity promise constitutes the legislature letting any parent of an unharmed newborn demand a secret adoption by frustrating court procedure, which is unconstitutional and bad policy.

IV. CONGRESS MUST PROVIDE RELIEF

Anonymous surrender laws threaten child welfare by letting parents use substitute care for the wrong reasons, e.g., avoiding notice to interested parties, hiding incest, avoiding rules about interstate placement, and erasing children's identities. Anonymity shields those reasons from detection. A constitutional challenge by the child won't help because the trial court cannot summon unknown parents, leaving the child in substitute care. Thus, the state will not need to appeal the constitutional ruling, leaving the judgment non-binding.

¹⁵¹ *E.g.*, *In re Hua*, 405 N. E.2d 255, 232 (Ohio 1980)(Vietnamese mother's relinquishment was executed under duress where she became reasonably convinced that the Viet Cong would kill her mixed-race child if she kept it); *In re Baby Girl E.*, 2005 Ohio App. LEXIS 3288, *PP 32-33 (10th Dist. July 14, 2005) (Vietnamese mother's adoption consent was invalid for undue duress because it was based on her concern for the life of her Vietnamese-American child and fear of family and societal rejection).

The solution must be political. The leverage comes through the federal funding enabled by ASFA. Congress must withhold funds from states that let parents surrender children anonymously. States must require parents to provide proof of identity and address. The service can proceed confidentially, keeping the surrendering parent's name and address for administrative purposes. The surrendering parent can waive notice after understanding the consequences and her rights, as in traditional adoption.

Anonymous surrender is unnecessary, just as it was when infanticide and discards were a significant problem. Confidentiality suffices. Preventative measures must be used for troubled parents. Parents who see their shame or embarrassment as more important than their child's life should be treated like the criminals they are. As unfortunate as "grave family consequences" are, states need to reduce the threat with rational, protective measures, not by hiding children inside the government, erasing those children's identities, and passing laws that make non-surrendering parents and adoptees scapegoats for others' dysfunction.