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THE PARADOX OF UNMARRIED FATHERS AND
THE CONSTITUTION: BIOLOGY 'PLUS' DEFINES
RELATIONSHIPS; BIOLOGY ALONE
SAFEGUARDS THE PUBLIC FISC

LAURA OREN*

I. INTRODUCTION

Beginning in the 1970s, the Supreme Court decided a number of constitutional questions concerning unmarried fathers and their children. Whether in the context of procedural or substantive due process or of equal protection, of 'illegitimacy' or 'gender,' these cases reflected the Court's views of the 'natural' family from two angles. On one hand, the Court created a jurisprudence of the unmarried father's interest in a personal relationship with his child.¹ These decisions explored the nature and extent of the nonmarital father's right to the care and custody of his child,² and the procedural and substantive protections available to him when another man sought to adopt his child or otherwise preclude him from having a paternal relationship.³ On the other hand, the Court also decided a number of issues about benefits which derived through the connection between an unmarried father and his child.⁴ These cases considered a variety of questions, such as the procedural requisites for establishing paternity involuntarily,⁵ formulas for 'deeming'

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1. See *infra* Part I.

2. *Stanley v. Illinois*, 405 U.S. 645 (1972) (addressing the presumption of unfitness of an unmarried father).

3. *Quilloin v. Walcott*, 434 U.S. 246 (1978) (addressing the issue of stepfather adoption); *Caban v. Mohammed*, 441 U.S. 380 (1979) (addressing the issue of stepfather adoption); *Lehr v. Robertson*, 463 U.S. 248 (1983) (addressing the issue of stepfather adoption); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (denying an adulterous biological father standing to establish paternity of his child born into the marriage of the child's mother to another man).

4. See *infra* Part II.

5. *Gomez v. Perez*, 409 U.S. 535 (1973) (holding that a law denying the right of paternal support to nonmarital children is unconstitutional); *Mills v. Habluetzel*, 456 U.S. 91 (1982) (stating that a one-year limit on a nonmarital child's right to bring a paternity suit is unconstitutional); *Pickett v. Brown*, 462 U.S. 1 (1983) (invalidating a two-year statute of limitations); *Clark v. Jeter*, 486 U.S. 456 (1988) (declaring a six-year statute of limitations invalid); *Little v. Streater*, 452 U.S. 1 (1981) (explaining that, under Connecticut statute,

family income for purposes of public assistance,⁶ or rules for obtaining derivative citizenship through an unmarried father.⁷ Directly or indirectly, however, the opinions in this category all concerned claims on the public fisc.

While the Court held that a biological connection alone established the requisite link in benefits cases, the Court found that something more was necessary in personal association cases, i.e., 'biology plus.' Thus, factual biology was enough for involuntary establishment of paternity and the consequent duty of child support; conversely, however, a non-marital father who did not wish to be legally displaced by another man seeking to adopt his child had to prove the biological link *plus* some kind of an existing relationship. This dichotomy in analysis creates an apparent paradox of paternity. It also complicates the constitutional line-drawing commanded by the personal relationship line of cases. The resulting uncertainties make it difficult to predict the answer to an issue about which the Court has given little guidance: the procedural and substantive rights of a putative father of a newborn who has been thwarted in his efforts to grasp his 'opportunity interest' and to develop a relationship with his child.

In Part II, this article will discuss the Constitution and the nonmarital father's personal relationship with his children. In a series of cases ranging in subject from an issue about care and custody of children to stepfather adoption disputes, the Court developed a distinction between reluctant nonmarital fathers and fathers who had stepped forward to grasp the unique opportunity offered by biology. Even if a man enjoyed a minimal right to notice and some kind of individualized hearing, he did not necessarily acquire full parental rights. Instead, in order to become a father whom the state must presume to be fit for the custody of his children or to wield veto power if another man sought to adopt them, an unmarried father had to satisfy a 'biology plus' standard. In one case, however, even a man who met this threshold nonetheless lost when he came up against what the Court called "the unitary family."⁸

Part III of this article considers the benefits or 'public fisc' cases. Suits to establish paternity and claim child support belong in this category. These ostensibly private lawsuits in fact were designed

the state must pay for blood tests for an indigent man alleged to be a father); *Rivera v. Minnich*, 483 U.S. 574 (1987) (declaring preponderance of the evidence sufficient as the standard for establishing paternity).

6. *Bowen v. Gilliard*, 483 U.S. 587 (1987).

7. *Nguyen v. INS*, 533 U.S. 53 (2001).

8. See *Michael H.*, 491 U.S. at 123.

to recoup, from unmarried fathers, as much of the costs of Aid to Families with Dependent Children (AFDC) payments as possible. At the end of the day, the children often received little or no benefit.

In a changing political and statutory climate, the Court heard cases in this public fisc category involving time limits on paternity suits, blood test evidence, burdens of proof, and devices for calculating household qualifications for public assistance. A citizenship case was the most recent in a line of decisions where children sought to derive benefits, public or private, through their parents, or parents through their children, and it conceptually fell into the public fisc category as well.⁹ Interestingly, the majority of the Court seemed to agree that mere biology, the factual reality alone, was enough where the issues centered on financial obligations and a welfare collection rationale.

Part IV considers how recent trends in the biology versus 'biology plus' approaches have underscored the apparent paradox of paternity, sometimes even in the same case. While pure biology increasingly reigns in federal welfare 'reform' policy, state courts and legislatures have to struggle with the 'biology plus' legacy for personal relationship issues. Biology plus has been particularly difficult to define in the context of the unmarried father who claims to have been denied his 'opportunity interest' in developing a relationship with his child through no fault of his own. By its inaction on two notorious cases of failed adoptions in this context, the Supreme Court provided no additional guidance for this prong of the paradox of paternity. State courts and legislatures, therefore, have proceeded to 'resolve' the problem of the thwarted father through statutory devices such as putative father registries and through judicial opinions which define the requisite 'plus' factor with subjectivity and a focus on the degree of misbehavior involved.

In its conclusion, this article ponders the question of what makes a man a father in a constitutional sense. The Court's answer is, 'it depends' — sometimes it is mere biology, but for other purposes 'biology plus' is required. The Court generally seems satisfied to follow the lead of legislative policy which views establishment of biological paternity as the key to safeguarding the public fisc. When it comes to an unwed father who is competing with another man for a chance to protect or establish a relationship with his child, however, biology alone does not suffice, and a 'plus' factor is required. Jurisprudential problems exist on both sides of this paradox of paternity. Together, they raise some very troubling questions.

9. See *Nguyen*, 533 U.S. 53.

Both lines of cases have failed to define the constitutional status of the thwarted putative father. What should happen to the biological father who has not been swept up in the new wave of in-hospital paternity establishment nor been precluded by the application of a valid putative father? When biology alone cannot prevail, and 'biology plus' is hard to establish because the man has had no opportunity to develop a relationship with the child, the principles that guide paternity determination remain illusive.

This article suggests that although 'justice' (and injustice) is clearly relevant, especially with truly gross misconduct, there is no social crisis of thwarted fathers that justifies severe results that treat children like 'sacks of potatoes' to be handed from parent to parent precipitously and without regard to the passage of time in the child's life. A mother's choices or mis-choices in identifying her child's biological father ordinarily should not provide a basis for the later total uprooting of the child. A 'thwarted' father who is not willing to take custody and raise his child, but wants only to interfere with the mother's adoption placement decision, should not acquire constitutionally protected rights to invalidate the adoption. On the other hand, there may be more nuanced and individualized solutions to adoptions that have been flawed by a thwarted father's loss of an 'opportunity interest' in developing a relationship with his child.

II: NONMARITAL FATHERS AND THE CONSTITUTION: PERSONAL RELATIONSHIPS

The line-drawing with respect to a nonmarital father's right to the enjoyment of the care and custody of his children was not clear at first. In 1972, the Court decided *Stanley v. Illinois*.¹⁰ Upon the death of the mother of his three children, the State of Illinois declared Mr. Stanley's children dependent and "dismember[ed]" his family,¹¹ without any showing that he was an unfit parent. Illinois law provided that the children of unwed fathers automatically became wards of the State upon the death of their mothers.¹² By contrast, married fathers, "whether divorced, widowed or separated" and mothers, including those who never married, enjoyed a presumption that they were fit to raise their children.¹³ As to all

10. 405 U.S. 645 (1972).

11. *Id.* at 658. The children were placed with court-appointed guardians, the same people with whom the father had already informally placed them. *Id.* at 663 n.2.

12. *Id.* at 646.

13. *Id.* at 647.

these parents, the presumption of fitness could be overcome only via an individualized hearing. Nonmarital fathers, like Peter Stanley, however, had no right to any hearing. Stanley attacked this statutory scheme on the basis that it violated his constitutional rights.¹⁴ The Court concluded that "as a matter of due process of law," he was entitled to a hearing on the question of his parental fitness before the State removed his children.¹⁵ The Court held that by extending the right to such a hearing to other kinds of parents, but denying it to Mr. Stanley, Illinois violated his equal protection rights.¹⁶

No one disputed the fact that Joan Stanley had lived with Peter Stanley "intermittently" over the course of eighteen years and the birth of their three children or that they had never married.¹⁷ The Court's¹⁸ portrayal of unmarried fathers in general, and of Peter Stanley in particular, was in marked contrast to the briefs of the State of Illinois and to the views expressed in Justice Burger's dissent. The Court viewed Mr. Stanley as a man who had "sired and raised" his children.¹⁹ As a result, he had a private interest which "undeniably warrants deference and, *absent a powerful countervailing interest*, protection,"²⁰ derived from the line of constitutional cases beginning with *Meyer v. Nebraska*.²¹ If the state could not deprive a married father of his children without a showing of unfitness, neither could the state remove children from the unmarried father who had "sired and raised" them as Mr. Stanley had without the same due process.²² The Court rejected the statutory presumption that unwed fathers who met the *Stanley* standard were *per se* unfit and instead required an individualized hearing on that very issue.²³ To the State's arguments that the unwed father could have either adopted his children or petitioned for custody and control, the Court replied that neither option satisfactorily protected his

14. *Id.*; see also *id.* at 663 n.2 (discussing Stanley's resistance to the naming of others as legal guardians).

15. *Id.* at 649; see also *id.* at 658 (mandating a hearing when considering removal of a father's family).

16. *Id.* at 649.

17. *Id.* at 646.

18. Only seven Justices participated in considering the case, not including Justices Powell and Rehnquist. *Id.* at 659. Justice Douglas did not join Part III of the majority opinion. *Id.*

19. *Id.* at 650.

20. *Id.* (emphasis added).

21. *Id.* (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923) (deeming the rights to conceive and raise one's children 'essential')).

22. *Id.* at 650.

23. *Id.* at 649.

rights.²⁴ As a legal stranger rather than a parent, Stanley would enjoy no priority in an adoption proceeding. Furthermore, he would appear at a disadvantage due to his unmarried and "impecunious" state.²⁵ The legal custody route was also inadequate because it would not constitute recognition of his parenthood. He would always remain a mere guardian, subject to the loss of his children without the necessity for a neglect hearing to show him unfit.²⁶

The State of Illinois argued that based on "history and culture" unmarried fathers were "factually different" than married fathers, because they were absent from the home, lacked interest in their children, and failed to undertake responsibility for them.²⁷ The Court replied that even if this was true for many men, it was not so for *all* unwed fathers, and, therefore, the statute could not preempt an individualized hearing to determine the fitness of unwed fathers like Stanley.²⁸

By contrast, the dissent not only accepted the State of Illinois' general characterization of unwed fathers, but was skeptical about Mr. Stanley himself. Justice Burger opined that the State was justified in protecting "illegitimate" children by recognizing a difference between unwed mothers and unwed fathers.²⁹ Unwed fathers "as a class" were not as easy to locate and identify as unwed mothers.³⁰ Moreover, "centuries of human experience" supported the view that mothers care while unwed fathers generally do not.³¹ Fathers who

24. *Id.* at 648.

25. *Id.*

26. *Id.* at 649-50.

27. *Id.* at 653 n.5

28. *Id.* at 654. *See also id.* at 653 n.6 (quoting the Illinois' statement concerning disinterested putative fathers).

29. *Id.* at 665 (Burger, J., dissenting).

30. *Id.* The proof problems in Stanley's day were substantially superceded by later developments in genetic testing and the consequent willingness of courts to accept new kinds of evidence. D. H. Kaye, *The Probability of an Ultimate Issue: The Strange Cases of Paternity Testing*, 75 IOWA L. REV. 75, 77 n.9 (1989). Kaye explains that the "traditional" evidentiary treatment in most jurisdictions "was that blood tests could be used to disprove, but not to prove paternity, and the admissibility of newer tests — primarily Human Leucocyte Antigen (HLA) typing — often was in doubt." *Id.* at 77 n.9 (citing Ellman & Kaye, *Probabilities and Proof: Can HLA and Blood Group Testing Prove Paternity?*, 54 N.Y.U. L. REV. 1131, 1136 (1979)). In the 1980s, however "the old exclusionary rule for incriminating genetic findings . . . crumbled in the face of improvements in immunogenetic testing." *Id.* at 78. For an influential article promoting the reliability of HLA testing, see Paul I. Terasaki, *Resolution by HLA Testing 1000 Paternity Cases not Excluded by ABO Testing*, 16 J. FAM. L. 543, 552 (1977-78). By the 1990s, it was clear that the new biological testing (HLA and beyond) was widely accepted as determining evidence of paternity. *See, e.g.*, Leslie Joan Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461, 463 (1996).

31. *Stanley*, 405 U.S. at 666 (Burger, J., dissenting).

do care could demonstrate that they are willing to accept legally enforceable rights and duties by marrying the mother and acknowledging the children as their own. An unmarried father could also be established as a parent through a paternity suit initiated by the mother which would make him liable for support to the child.³² In the absence of such legally established responsibilities, however, the unwed father may be denied the same privileges that the married father enjoys.³³

Justice Burger noted that Peter Stanley depicted himself as an “unusual” unwed father, one who “loved, cared for, and supported these children from the time of their birth until the death of their mother.”³⁴ Not only did the dissent think that Illinois was not obligated to tailor its definition of “parent” to account for such rare cases, it doubted that Mr. Stanley was all he claimed to be.³⁵ Apparently, after the death of the children’s mother, Stanley had confided the actual care and custody of the children to a Mr. and Mrs. Ness.³⁶ He made no effort to adopt or to obtain legal guardianship of the children, but when the state instituted a dependency proceeding, he intervened to stop it.³⁷ Justice Burger pointedly noted that “he seemed, in particular, to be concerned with the loss of the welfare payments he would suffer as a result of the designation of others as guardians of the children.”³⁸

The dissent’s skepticism about Mr. Stanley’s motives was the only overt cross-reference to the public fisc issue, and the majority of the Justices apparently were unimpressed by this argument, nor would one expect them to be responsive to it. Whether the status quo remained or the children were removed from his care and custody, Mr. Stanley’s children would still be dependent on state largess, unless a family could be found to adopt them.

Clearly, in *Stanley*, the majority rejected a stigma on a whole class of men, unmarried fathers, whom Illinois had conclusively presumed to be uninterested and uninvolved in the lives of their children. While the dissent implied that without marriage, adoption, or some other legal undertaking, men were *per se* reluctant fathers, the majority cast its net more broadly. This man who had “sired and raised”³⁹ his children, even without the benefit of marriage,

32. *Id.* at 664.

33. *Id.*

34. *Id.* at 666.

35. *Id.* at 666-67.

36. *Id.* at 667.

37. *Id.*

38. *Id.*

39. *Id.* at 650.

had to be dealt with as any other parent would be.⁴⁰ As to those nonmarital fathers who really were indifferent to their children, the Court suggested that their interests could be disposed of easily via notice served personally, by certified mail, or by publication.⁴¹ Any putative fathers who, after receiving notice, did not "promptly respond [could] not complain if their children [were] declared wards of the State."⁴² If the putative father did respond, however, then the state could not avoid holding an individualized hearing.⁴³ Presumably, at this hearing he could establish whether he was more than merely the biological father, that is whether he was a father like Mr. Stanley who had "raised" as well as "sired" his children. If so, the unmarried father was entitled to be treated the same as any other parent whose unfitness had to be demonstrated by the State.⁴⁴

40. This ruling is not the same as a holding that all unmarried fathers must be considered "parents" under state law. However, following the decisions of the 1960s and *Stanley* itself, the Commissioners for the 1973 Uniform Parentage Act concluded that the states required new legislation "because the bulk of current law on the subject of children born out of wedlock is either unconstitutional or subject to grave constitutional doubt." See Uniform Parentage Act, Prefatory Note (1973), available at http://www.law.upenn.edu/bll/ulc/ulc_frame.htm. The Uniform Commissioners, however, believed that "many state courts" were interpreting *Stanley* "overly broadly," in a manner which made "the adoption process . . . cumbersome and insecure." *Id.* Following 1973, many states adopted the significant changes in the definition of "parent" promulgated in the Uniform Parentage Act of that year, which eliminated many of the distinctions between marital and nonmarital children, set up rules to create a presumption of paternity, and abandoned the term "illegitimate" in favor of "child with no presumed father." *Id.* According to the Uniform Commissioners, the inspiration for their proposal may be traced to Harry D. Krause's article *A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829 (1966) and his "pathfinding book," *ILLEGITIMACY: LAW AND SOCIAL POLICY* (1971). *Id.*

41. *Stanley*, 405 U.S. at 657.

42. *Id.*

43. *Id.*

44. Within two weeks of the *Stanley* decision, the Court vacated an Illinois case and remanded it for reconsideration in light of that opinion. See *Vanderlaan v. Vanderlaan*, 405 U.S. 1051 (1972). On remand, the Illinois court had little trouble resolving the issues in a fairly straightforward application of the *Stanley* distinction. See, *Vanderlaan v. Vanderlaan*, 292 N.E.2d 145 (Ill. App. Ct. 1972) [hereinafter *Vanderlaan II*]. Mr. Vanderlaan fit the *Stanley* paradigm more closely than even Mr. Stanley. He was once married to the mother of all three of his children. *Id.* at 147. But for Illinois' dedication to the abolition of common law marriage, he no doubt would have been married to her again. Indeed, with each birth of his two youngest children, his divorce decree was actually modified to reflect his paternity and to modify his obligations. *Id.* After the last separation, and after the mother asked him to do so, he had them all living in his home. *Id.* He had both legal and actual responsibility for his children. *Id.* He was as close as one could be to a 'married father,' while technically bearing the label of 'nonmarital.' He had both "sired and raised" his children, and had clearly stepped forward to assume his obligations. The result on remand was unsurprising. No lines needed to be drawn, and Mr. Vanderlaan clearly could not be absolutely precluded from retaining custody of his children. Reading *Stanley* to invalidate such statutory presumptions as a matter of due process and equal protection,

The Court further explored and explicated its 'biology plus' standard for unmarried fathers and their personal associations with their children in a series of stepfather adoption cases.⁴⁵ In each of these cases, the mother of the child stayed in place and indeed, the child's home was not in question. In 1978 and 1979, the Court decided *Quilloin v. Walcott*⁴⁶ and *Caban v. Mohammed*.⁴⁷ Reaching due process and equal protection claims, the Court filled in the outlines of the distinction it had made between the reluctant biological father who failed to step forward and the nonmarital father who did grasp the unique opportunity presented by biology. The Court subsequently approved a "solution" for the uncertainties consequent on such an indeterminate line in *Lehr v. Robertson*,⁴⁸ in which it upheld New York State's putative father registry.

Leon Quilloin had neither married the mother of his child nor established a home with them.⁴⁹ When his son was less than three years old, his mother married another man.⁵⁰ The stepfather eventually sought to adopt the boy, who was then eleven years old.⁵¹ Mr. Quilloin moved to block the adoption, even though a Georgia statute denied nonmarital fathers that veto right unless they legitimated their children.⁵² Finding that it was not "in the best interest of the child," the Georgia courts refused to allow Quilloin to legitimate his child, and thus to acquire the veto right he sought.⁵³ Justice Marshall, writing for a unanimous Court, held that the Georgia statute, as applied in this case, violated neither equal protection nor due process⁵⁴ because the putative father had never "had, or sought, actual or legal custody of his child,"⁵⁵ had notice of the proposed adoption, and had a legitimization hearing,⁵⁶ and because the proposed adoption would not "place the child with a new set of parents with whom the child had never before lived."⁵⁷

the state appeals court found that the unwed father was eligible to vie for custody. *Id.*

45. *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 463 U.S. 248 (1983).

46. 434 U.S. 246.

47. 441 U.S. 380.

48. 463 U.S. 248.

49. *Quilloin*, 434 U.S. at 247.

50. *Id.*

51. *Id.* at 249.

52. *Id.* at 248-49; see also *id.* at 248-49 n.2-3 (citing GA. CODE ANN. §§ 74-403(1), (2), (3) (1975)).

53. *Id.* at 254.

54. *Id.* at 256.

55. *Id.* at 255.

56. *Id.* at 253-54.

57. *Id.* at 255.

To arrive at this conclusion, the Court briefly grappled with *Stanley*,⁵⁸ which, the *Quilloin* Court opined, had held "that the State of Illinois was barred, as a matter of both due process and equal protection, from taking custody of the children of an unwed father, absent a hearing and a particularized finding that the father was an unfit parent."⁵⁹ *Stanley* found "a father's interest in the 'companionship, care, custody, and management' of his children to be 'cognizable and substantial.'"⁶⁰ The earlier decision, however, "left unresolved" the rights of the unwed father who was not unfit, in a case "in which the countervailing interests are more substantial."⁶¹

The trial court apparently found that Mr. Quilloin had not abandoned the child.⁶² The child visited him intermittently and Mr. Quilloin gave him gifts; however, the mother had become concerned that these contacts were disruptive for the child and for her whole family.⁶³ The child himself, although wishing to keep contact with his biological father,⁶⁴ wanted the adoption to go through and wished to assume his stepfather's name.⁶⁵

Because the trial court denied legitimization based solely on a finding of "best interests of [the] child," and then denied the putative father standing to block the adoption, Mr. Quilloin complained that he could not be shut out in this way without a showing that he was unfit.⁶⁶ While the Court easily acknowledged that the due process clause would be offended if the state sundered a recognized parental relationship merely on the basis of "best interest of the child" without a showing of unfitness, this case was different.⁶⁷ The distinction was three-fold: this father never "had, or

58. *Id.* at 247-48 (discussing *Stanley*, 405 U.S. 645).

59. *Id.*

60. *Id.* at 248.

61. *Id.*

62. *Id.* at 251.

63. *Id.*

64. *Id.* at 251 n.11.

65. *Id.* at 251. Despite this observation, the Court has never recognized any constitutionally-based right enjoyed by a child to a relationship with certain adults. *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110, 130-31 (1989) (rejecting such a due process argument, the Court has never ruled on whether a child has a liberty interest in the relationship, symmetrical with a parent's); *cf. Troxel v. Granville*, 530 U.S. 57, 89-90 (2000) (Stevens, J., dissenting) (arguing that invalidating a statute that allows visitation to any person on grounds that it infringes parental rights does not take into account circumstances in which the child might have an interest in maintaining a relationship with a certain person).

66. *Quilloin*, 434 U.S. at 251 (alteration in original).

67. *Id.* at 255; *cf. Armstrong v. Manzo*, 380 U.S. 545, 550 (1965) ("failure to give [the divorced father] notice of the pending [stepfather] adoption proceedings violated the most rudimentary demands of due process of law."). The Manzos had alleged that for the two years preceding their motion, Mr. Armstrong failed to support his child in a manner

sought, actual or legal custody of his [daughter]⁶⁸; the stepparent adoption would not serve to break up a pre-existing family unit; and “the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except [Mr. Quilloin].”⁶⁹

The equal protection challenge to the disparate treatment of married and unmarried fathers was to no avail. The Court presumed that a married father who now lived apart from his children, nonetheless had some period of responsibility for care and custody during the pendency of the marriage.⁷⁰ It emphasized, however, that Mr. Quilloin never sought any such responsibility, not even legal custody.⁷¹ “Under any standard of review,” therefore, the Court found Georgia’s distinction defensible.⁷²

The next term, in *Caban v. Mohammed*,⁷³ the Court took on a New York statute that allowed a stepfather to adopt his wife’s nonmarital child without the consent of the biological father.⁷⁴ Unlike *Quilloin*, however, this was a facial challenge to the statute itself, and the Court reached the gender equality issue reserved in the earlier case.⁷⁵ The majority opinion made much more explicit the distinction between the nonmarital father who steps forward and the reluctant father.⁷⁶ Under the statute, the unmarried mother

“commensurate with his financial ability.” *Id.* at 546. Pursuant to Texas law, if proven against Mr. Armstrong, this circumstance would eliminate the need to obtain his written consent to the stepfather adoption. *Id.* Mr. Armstrong never knew that the proceeding was pending until after its completion, when Mr. Manzo told him what had happened. *Id.* at 548. The natural father then filed to have the stepfather’s adoption set aside. *Id.* Although the district court afforded him a factual hearing on that set-aside, it denied him relief. *Id.* at 549. He then appealed, urging, among other grounds, that the failure to set aside a decree entered in the first instance without any notice to him “deprived him of his child without due process of law.” *Id.* at 549. This issue went to the Supreme Court. The Court found that “as to the basic requirement of notice itself there can be no doubt, where, as here, the result of the judicial proceeding was permanently to deprive a legitimate parent of all that parenthood implies.” *Id.* at 550. Nothing could cure that initial failure of notice, not even the after-the-fact hearing on the set-aside, because in that proceeding the initial burden of persuasion had changed from the Manzos to Mr. Armstrong himself. *Id.* at 551. Thus, the Texas court’s judgment was vacated, the status quo ante restored, and the case remanded for further action. *Id.* at 552.

68. *Quilloin*, 434 U.S. at 256.

69. *Id.* at 255.

70. *Id.* at 256.

71. *Id.*

72. *Id.*

73. 441 U.S. 380 (1979).

74. See, N.Y. DOM. REL. L. §111 (McKinney 1976-1977).

75. Compare *Quilloin*, 434 U.S. at 253 n.13 (issue not presented in jurisdictional statement, therefore not addressed by Court), with *Caban*, 441 U.S. at 389 n.7 (expressly rejecting gender-based distinction of unwed parents).

76. *Caban*, 441 U.S. at 389 n.7.

had an absolute right to veto consent to the adoption of her children, while the unmarried father, even though he had an established relationship with them, had a right to be heard, but could not block an adoption.⁷⁷ With the consent of his wife, the stepfather Mr. Mohammed could adopt her two children while the nonmarital, biological father, Mr. Caban, could only contest on the grounds that it was not in "the best interests of the child[ren]" even if he was a perfectly fit father.⁷⁸

Abdiel Caban lived with Maria Mohammed in New York City from September 1968 through the end of 1973.⁷⁹ Although they apparently held themselves out as married, legally they could not be a married couple.⁸⁰ In every other respect, Mr. Caban functioned as a father to his two children: his name was on their birth certificates,⁸¹ he lived with them and their mother as a family unit until the separation in 1973,⁸² and he contributed to their support.⁸³ A month after Maria left Abdiel, she married Kazim Mohammed.⁸⁴ Even after the marriage, their father continued to see the children at their maternal grandmother's house on a weekly basis.⁸⁵ When she returned to her home in Puerto Rico nine months later, the grandmother took the children with her, at the request of the Mohammeds,⁸⁶ who planned to retrieve them as soon as their fledgling business got off the ground in New York City.⁸⁷ Mr. Caban visited Puerto Rico in November 1975, ostensibly to spend some time with the children.⁸⁸ Instead, he returned to New York City with them, and their mother was unable to get police assistance to get them back.⁸⁹ She then filed proceedings which initially gave her temporary custody and him visiting rights.⁹⁰ The subsequent

77. *Id.* at 386-87.

78. *Id.* at 387.

79. *Id.* at 382.

80. Their marriage was not valid because New York is not a common-law marriage state. *See, e.g.,* *People v. Vespucci*, 745 N.Y.S.2d 391, 393 (2002) ("claim[ing] to have a common law marriage, a concept not recognized in New York state."). Moreover Caban was married to someone else the whole time he lived with Mohammed, which would make the second relationship a void marriage. *Caban*, 441 U.S. at 382.

81. *Caban*, 441 U.S. at 382 (noting that the children, born in 1969 and 1971, bore his last name).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 383.

89. *Id.*

90. *Id.*

hearing, however, resulted in a stepfather adoption which entirely cut off Mr. Caban's "parental rights and obligations."⁹¹

In the Supreme Court, the New York scheme fell to a gender-based equal protection challenge.⁹² Using the intermediate standard for such gender-based classifications that the Court had embraced in 1976,⁹³ the majority found that the distinction in the consent to adoption law between unmarried mothers and unmarried fathers did not bear the required "substantial relation to some important state interest."⁹⁴ The Court did not accept the argument that unwed fathers could never be as close to their older children as were unwed mothers.⁹⁵ Indeed, the Justices found that the facts of this case amply refuted that stereotypical generalization.⁹⁶ The other justification offered by the state also failed: the distinction between unmarried mothers and fathers is "substantially related to the state's interest in promoting . . . adoption[s]."⁹⁷ Interestingly, this seemingly more substantial and practical argument also received short shrift. In each case, the "over-broad generalizations"⁹⁸ were undermined by the Court's gloss on *Quilloin* as containing a critical distinction between reluctant putative fathers, and those who have come forward and have a substantial relationship with their children.⁹⁹

In those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child But in cases such as this, where the father has established a substantial relationship with the child and has admitted his paternity, a state should have no difficulty in identifying the father even of children born out of wedlock. Thus, no showing has been made

91. *Id.* at 383-84. Mr. Caban's cross-petition to adopt was denied because it failed to satisfy the statutory requirement of consent by the biological mother. *Id.*

92. In order to reach this result, the Court had to effectively overrule their previous decision in *Orsini v. Blasi*, 423 U.S. 1042 (1976), which involved the same statute. In *Orsini*, there was no opinion, but the appeal was dismissed for lack of a substantial federal question. *Caban*, 411 U.S. at 390, n. 9. Although such dismissals are entitled to precedential value, the Court often affords them less deference because of the absence of a full review.

93. *See, Craig v. Boren*, 429 U.S. 190, 197 (1976) (stating that a gender-based distinction in drinking age was not "substantially related" to "important governmental objectives").

94. *Caban*, 441 U.S. at 388.

95. *Id.* at 389 (explaining that the children were 4 and 6 at time of the adoption proceedings). The issue of newborn adoptions was reserved. *Id.* at 392 n. 11.

96. *Id.* at 389. ("We reject, therefore, the claim that the broad, gender-based distinction of §111 is required by any universal difference between maternal and paternal relations at every phase of a child's development.").

97. *Id.* at 389.

98. *Id.* at 394.

99. *Id.* at 389 n.7, 393 n.14.

that the different treatment afforded unmarried fathers and unmarried mothers under §111 bears a substantial relationship to the proclaimed interest of the State in promoting the adoption of illegitimate children.¹⁰⁰

In other words, all unmarried fathers are not alike, (even if all unmarried mothers are assumed to care about and be connected to their children). For putative fathers who step forward, the state cannot deny them the right to block an adoption of their children or impose the loss of all parental relationship on them based merely on a showing of the 'best interest of the child.' Others, however, are reluctant, and their fate is not entirely clear in Justice Powell's opinion.¹⁰¹ The unmarried mother in this case and the unmarried father who has a relationship with his children are similarly situated and may not be treated differently under New York law.¹⁰² The Court founded its opinion on gender classifications, not reaching either the equal protection distinction between unmarried and married fathers, or the substantive due process claim that a state may never terminate parental rights without a finding of parental unfitness.¹⁰³

The dissenters, however, insisted that men and women were different.¹⁰⁴ They were concerned about the impact on adoption, especially involving newborn or very young children.¹⁰⁵ The differences for those children were manifold: "Only the mother carries the child; it is she who has the constitutional right to decide whether to bear it or not."¹⁰⁶ Indeed, at birth, the mother may be the only one who knows who the father is, and she can conceal that fact from him, if she chooses.¹⁰⁷ She is together with the child during the birth and immediately thereafter; her identity is obvious,¹⁰⁸ but the father may always be an unknown.¹⁰⁹ The consequence of these differences is that unmarried mothers have to make immediate decisions about adoption on their own. Unmarried fathers may marry the mothers and gain full rights; otherwise, they may attempt to show it is in the best interest of the child for

100. *Id.* at 392-93 (citations omitted).

101. *Id.* at 394.

102. *Id.* at 391-92.

103. *Id.* at 394 n.16; *cf. Troxel v. Granville*, 530 U.S. 57, 72-73 (2000) (concluding that the parent has the substantive right to decide with whom his or her child has contact).

104. *Caban*, 441 U.S. at 404 (Stevens, J., dissenting).

105. *Id.*

106. *Id.*

107. *Id.* at 405.

108. *Id.*

109. *Id.*

adoption of their children to be denied, but they should not be able to interfere with a 'streamlined' adoption system with all the very important interests it represents.¹¹⁰ For fear of interfering with this more common newborn scenario, the dissenters rejected the majority's invalidation of the whole general rule in the New York statute.¹¹¹ They were even willing to apply New York's rule to older children because they were persuaded that men and women generally were different in that situation as well.¹¹²

In *Lehr v. Robertson*,¹¹³ the last of the official series of stepfather adoption cases, Justice Stevens, the dissenter in *Caban*, wrote an opinion for the Court upholding New York State's shortcut solution to the problem of putative fathers and adoption.¹¹⁴ The Court permitted New York State to terminate whatever inchoate interests were possessed by unmarried fathers who failed to place their names on the putative father registry.¹¹⁵ Rejecting due process and equal protection claims alike,¹¹⁶ the Court expanded on its distinction between the reluctant father and the father who grasps the opportunity biology gives him and develops a relationship with his child.¹¹⁷

Lorraine Robertson was not married when her daughter was born in November of 1976.¹¹⁸ Although Jonathan Lehr lived with Lorraine before the birth, and visited her in the hospital, his name did not appear on the baby's birth certificate.¹¹⁹ He did not live with the mother and child after the birth, provide financial support, or offer to marry the mother.¹²⁰ Finally, he had not been adjudicated the father, nor had he entered his name in the state's putative father registry.¹²¹ Within eight months of the birth, Lorraine

110. *Id.* at 407-08.

111. *Id.* at 411-12.

112. *Id.* at 412 n.20

113. 463 U.S. 248 (1983).

114. New York State's putative father registry law was enacted in 1976 and amended in 1979. See, N.Y. SOC. SERV. LAW § 372-c (McKinney 2003). The *Lehr* dispute arose before the Court's final decision in *Caban*. *Lehr*, 463 at 254 n.7. The New York appellate court ruled that *Caban* was not to be applied retroactively. *Lehr*, 463 at 253-54.

115. *Lehr*, 463 U.S. at 248-49.

116. *Id.* at 250.

117. *Id.* at 261-62.

118. *Id.* at 250.

119. *Id.*

120. *Id.* at 248. Lehr claimed that he and the mother had lived together for some time before the child's birth and that he offered financial aid to the mother and stepfather afterwards. *Id.* at 269.

121. *Id.* at 251. The New York statute also provided that the following persons would be entitled to notice: (1) a person adjudicated to be the father; (2) a person identified as father on birth certificate; (3) a person who lived openly with child and child's mother and held himself out as the child's parent; (4) a person who has been identified as the father by the mother in a sworn written statement; or (5) a person who was married to the child's

married another man, Mr. Robertson, who subsequently sought to adopt her daughter, unbeknownst to Mr. Lehr.¹²² Still in the dark about the adoption proceeding in the Ulster County Court, the putative father filed an action in Westchester for the determination of paternity and for visitation rights.¹²³ Subsequently, the Ulster County judge entered the adoption judgment without notice to Mr. Lehr, even after learning of the pending paternity suit.¹²⁴ The judge believed that notice to Mr. Lehr was not required.¹²⁵ The putative father first complained to the United States Supreme Court that this sequence of events, and the statute which allowed it to occur, deprived him of a liberty interest protected under the Due Process Clause of the United States Constitution.¹²⁶ Secondly, he argued the statute's interpretation constituted gender-based discrimination in violation of the Equal Protection Clause, and he sought to vacate the adoption.¹²⁷

For the first time since *Stanley*, the Court closely examined the nature of the liberty interest at stake. It embraced and elaborated the due process position of the four dissenters in *Caban*.¹²⁸ The paradigm of the reluctant father became fixed in constitutional jurisprudence. According to the Court, while the line of cases beginning with *Meyer* and *Pierce* established that parents have a protected relationship with their children, it also established that this was a function "of the responsibilities they have assumed."¹²⁹ The rights of nonmarital fathers in particular were limned in "precisely three cases": *Stanley*, *Quilloin*, and *Caban*.¹³⁰ These were the putative fathers whose fates set the stage for the Court's ultimate conclusion in *Lehr*:

When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point, it may be said that he "act[s] as a father

mother before the child was six months old. *Id.* at 251-52 n.5.

122. *Id.* at 250.

123. *Id.* at 252-53.

124. *Id.* at 253.

125. *Id.* at 253 (finding that the adoption had the effect of terminating the Ulster County paternity suit).

126. *Id.* at 255.

127. *Id.*

128. *Id.* at 257-62 (claiming to be at liberty to do this because the earlier decision was based on equal protection and the majority allegedly did not address due process claims).

129. *Id.* at 257.

130. *Id.* at 258.

toward his children." But the mere existence of a biological link does not merit equivalent constitutional protection.¹³¹

The biological relationship alone could not create a strongly protected interest. Rather, its significance was "that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring."¹³² After that, it is up to him; a putative father may either grasp the opportunity and responsibility of parenthood, and gain parental standing, or not.¹³³ If he does not, if he is a reluctant father, then the Constitution will not force the state to afford him any greater protection than it chooses.¹³⁴

The Court found that Mr. Lehr did not grasp his opportunity in any of the ample ways provided by New York State; therefore, the Court did not recognize any special relationship.¹³⁵ The State's putative registry scheme, which required Mr. Lehr merely to mail in a postcard if he wanted notice, was not arbitrary, and this standard was all that was called for under these circumstances.¹³⁶ Even the actual knowledge of the adoption court that Mr. Lehr was concurrently seeking to establish his paternity did not alter the Court's conclusion that Lehr was not entitled to notice of the adoption.¹³⁷ Nor did the majority find that there was any significant difference in this regard between a stepfather adoption, as in this case, and a stranger adoption.¹³⁸ Indeed it was easier to justify this situation on a pure "best interest of the child" standard and to keep intact what already amounted to a functional family.¹³⁹ The due process argument in *Lehr* prefigured the equal protection rationale: since this case involved a reluctant father, who had not come forward to grasp his opportunity, he could not be similarly situated with the mother.¹⁴⁰ Thus, the Court disposed of gender-based equal protection with dispatch, leaving no need to discuss the difficulties of the intermediate standard of review. Moreover,

131. *Id.* at 261 (alteration in original) (citations omitted).

132. *Id.* at 262.

133. *Id.*

134. *Id.*

135. *Id.* at 264-65.

136. *Id.* at 264. The purpose of the putative registry law, according to the Court, is to "dispel uncertainties" by giving clear guidance for who gets notice. *Id.* It provides to unwed fathers a simple means to show their interest. *Id.* at 263 n.20. Furthermore, "[t]he measure is intended to codify the minimum protections for the putative father which *Stanley* would require." *Id.*

137. *Id.* at 264-65.

138. *Id.* at 262 n.19.

139. *Id.*

140. *Id.* at 267-68.

the distinction between married and unmarried fathers was clearly "rational."¹⁴¹

Justices White, Marshall, and Blackmun dissented because they were unhappy with the easy dismissal of notice and an opportunity to be heard. They also viewed the facts quite differently.¹⁴² In the dissent's narrative, Lehr was not a reluctant parent, but rather, a thwarted father. He had lived with the mother for two years, right up until the birth of their child.¹⁴³ He visited her every day at the hospital, but when she was discharged, she hid from him.¹⁴⁴ He searched and occasionally located them, only to lose track again.¹⁴⁵ He finally hired a detective agency, only to find that Lorraine was already married to Mr. Robertson.¹⁴⁶ Lehr claimed that Lorraine refused his offers of financial aid for the child and forced him to stay away from her.¹⁴⁷ It was after he was frustrated that he retained counsel who wrote to the mother to inform her that if she did not let Lehr visit his child, he would seek legal action.¹⁴⁸ At that point, perhaps in reaction, the Robinsons commenced the stepfather adoption petition.¹⁴⁹

On an abstract level of constitutional jurisprudence, the dissenting Justices afforded the "mere biological relationship" more weight than the majority, although they did not really explain their decision to do so. Justice White opined, "I reject the peculiar notion that the only significance of the biological connection between father and child is that 'it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring.'"¹⁵⁰ In his view, "[a] 'mere biological relationship' is not as unimportant in determining the nature of liberty interest as the majority suggests."¹⁵¹ Where there was no doubt about the identity or location of the putative father, the dissenting Justices found it difficult to accept such cavalier treatment of procedural protections and insistence on "the sheerest formalism to deny him a hearing because he informed the State in the wrong manner."¹⁵² The dissenters objected to this "grudging and crabbed approach to due

141. *Id.* at 268 n.27.

142. *Id.* at 268-76 (White, J., dissenting).

143. *Id.* at 268-69.

144. *Id.* at 269.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 269.

150. *Id.* at 271 (citation omitted).

151. *Id.*

152. *Id.* at 275.

process.¹⁵³ They also recognized that the child was not really at risk while these proceedings went on: she was with her mother, and would stay with her mother even if a hearing were to be held on Lehr's claims.¹⁵⁴ Aside from illustrating how easy it is to paint a different picture of a man's behavior, the dissent seems focused primarily on the majority's dilution of procedural due process.¹⁵⁵

Even though the Court affirmed the rights of unmarried fathers who stepped forward, those men lost when they competed against what the plurality in *Michael H. v. Gerald D.*¹⁵⁶ called the "unitary family."¹⁵⁷ *Michael H. v. Gerald D.* involved a substantive due process challenge¹⁵⁸ to a California statute that denied a putative father the right to establish a relationship with his child if the mother was married to another man and both she and her husband insisted that the child was born of their marriage.¹⁵⁹ Victoria was born while her mother was living with her husband Gerald D.¹⁶⁰ However, her mother was having an adulterous affair with Michael H., and during the first three years of Victoria's life, she and her mother resided intermittently with Michael and with Gerald.¹⁶¹ Eventually, the mother returned to her husband with the child and subsequently cut off all contact between Michael and Victoria.¹⁶² Her husband stood in solidarity with her, as a unified marital family, claiming young Victoria as a product of the marriage.¹⁶³ California law provided that only a mother or her husband could deny the paternity of a child born into a marriage.¹⁶⁴ Absent the mother's consent, Michael H. lacked standing to establish his paternity or to seek any kind of visitation. In a sense, *Michael H.*

153. *Id.*

154. *Id.* at 275. Applying the "risk of error" test from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the balance leaned toward providing additional procedural safeguards to the putative father. He had a lot to lose, but granting him the hearing mistakenly was not going to disturb the status quo in the child's life with her mother and stepfather.

155. *Lehr*, 463 U.S. at 276 (White, J., dissenting).

156. *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989) (plurality opinion) (upholding California statute denying standing to nonmarital father of married woman's child).

157. *Id.*

158. *Id.* at 111. The Court did not consider an equal protection claim because it was not raised or reached below. *Id.* at 116-17.

159. *Id.* Michael H. had taken blood tests which showed him to be the father of Victoria with a high probability of accuracy, had lived with the child and her mother, and the little girl called him "Daddy" (as she also did her mother's husband). *Id.* at 143-44.

160. *Id.* at 113-14.

161. *Id.* at 114.

162. *Id.* at 115.

163. *Id.* The mother withdrew her stipulation to the results of the blood tests which showed a high degree of likelihood that Michael was Victoria's father. *Id.* at 114-15.

164. *Id.* at 117.

could be considered a backwards stepfather 'adoption' case. Blood tests later repudiated by the mother had shown Michael H. to be the biological father to a high degree of certainty,¹⁶⁵ and the child called him "Daddy."¹⁶⁶ Victoria also lived with her mother and her mother's husband, who held her out as his own child.¹⁶⁷ By precluding the putative father from establishing any legal relationship to the child, the Court elevated the mother's husband from stepfather to legal father without terminating any other man's rights or going through an adoption proceeding.

Michael argued that he had developed a parental relationship with his daughter during the first three years of her life by living with her, visiting her, holding her out as his own, and caring for her.¹⁶⁸ This should have put him squarely on the protected side of the line drawn in *Stanley*, *Quilloin*, *Caban*, and *Lehr*.¹⁶⁹ In an opinion written by Justice Scalia, however, the plurality disagreed with the putative father and opined that this argument "distorts the rationale of those cases."¹⁷⁰ The Justices' new gloss on the old cases was that they "rest not upon . . . isolated factors but upon the historic respect — indeed, sanctity would not be too strong a term — traditionally accorded to the relationships that develop within the unitary family."¹⁷¹ *Stanley*, for example, was reinterpreted to have been about the destruction of such a family upon the death of the unmarried mother.¹⁷² *Michael H.*, however, involved a unique factor: that Victoria's mother was married to another man at the time that the child was conceived, a fact that made this case quite different from the preceding paternity cases under the plurality's analysis. Tradition dictated a preeminence of protection for the marital family.¹⁷³ From this observation, Justice Scalia segued into a debate about substantive due process methodology and about how the Court should derive new fundamental rights in general.¹⁷⁴ It concluded that the only way that a family consisting of Michael H. and his biological daughter could be recognized was if it did not compete with a family consisting of the girl, her mother, and the man who was married to her mother at the time of the child's

165. *Id.* at 114-15.

166. *Id.* at 144 (Brennan, J., dissenting).

167. *Id.* at 110.

168. *See id.* at 143-44 (Brennan, J., dissenting).

169. *Id.*

170. *Id.* at 123.

171. *Id.* (citations omitted).

172. *See id.*

173. *Id.* at 124. *See also id.* at 124 n.4.

174. *Id.* at 123-27.

birth.¹⁷⁵ By contrast to a traditional family, the relationships in the nontraditional unit lacked a fundamental liberty interest. The plurality even suggested that without this level of substantive recognition, Michael H.'s interests enjoyed *no* protection at all.¹⁷⁶ Justices O'Connor and Kennedy, however, declined to join the strict version of due process methodology¹⁷⁷ expressed in footnote six of the plurality opinion.¹⁷⁸ The reduced plurality would have relied on the most narrowly stated and specific historical traditions to determine which interests are fundamental and thus, which family was protected, but the concurring Justices found such an approach inconsistent with past decisions of the Court.¹⁷⁹

The child's interest in having a relationship with Michael H. also received short shrift. Although observing that the United States Supreme Court has "never had [the] occasion to decide whether a child has [a] liberty interest, symmetrical with that of her parent, in maintaining her filial relationship," the plurality found that the girl's due process claim was even weaker than her putative father's claim, and must fail as well.¹⁸⁰ Children had no traditional right to multiple fathers.¹⁸¹

175. *Id.* at 129. *See also, id.* at 124.

176. The opinion does not acknowledge that nonfundamental liberty interests exist, or that they enjoy some protection, albeit, at a much reduced level. *See, Laura Oren, Section 1983 and Sex Abuse in Schools: Making a Federal Case Out of It*, 72 CHI.-KENT L. REV. 747, 759-61 (explaining that a liberty interest is necessary for due process protection, but substantive review is only cursory unless the liberty involved is held to be fundamental).

177. *Michael H.*, 491 U.S. at 127 n.6.

178. *Id.* at 132 (O'Connor, J., joined by Kennedy, J., concurring in part) (joining all but footnote 6). Justice Stevens, who concurred in the judgment only, also clearly did not embrace the hoary tradition-only approach to deriving liberty interests. Although he thought that the biological father received an opportunity to establish the best interest of the child in this particular case, he opined that he would not foreclose the possibility that a constitutionally protected relationship between a biological father and child might exist in another such case. *Id.* at 133 (Stevens, J., concurring in judgment).

179. *Id.* at 132. (O'Connor, J., joined by Kennedy, J., concurring in part). Justice Kennedy's recent passionate invocation of liberty in the case overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), and declaring that Texas could not criminalize private homosexual sodomy between consenting adults, illustrates the significance of the reservation about due process methodology. *See, Lawrence v. Texas*, 539 U.S. 558 (2003). *Bowers* had relied on an argument based upon specific tradition to uphold Georgia's sodomy law. *Id.* at 566-67. *Lawrence*, however, cast its due process liberty interest net more broadly. *See id.* at 575.

180. *Michael H.*, 491 U.S. at 130.

181. *Id.* at 130-31. Taken in isolation, the child's claim to a relationship with her biological father failed for the same reasons his did. *Id.* at 131. Finally, Justice Scalia's opinion dismissed her equal protection argument as not entitled to heightened scrutiny because she was not claiming discrimination on the basis of her *illegitimacy* but rather, on the basis of her *legitimacy*. *Id.* at 131-32. Preservation of the harmony of the marital family therefore prevailed as a rational state interest. *Id.*

Justice Brennan's dissent in *Michael H.* was mostly about the methodology of constitutional decision-making.¹⁸² Justice Brennan opined that the exclusive reliance on "tradition" at the most specific level was both "novel" and "misguided."¹⁸³ He found this interpretive approach particularly "troubling" because it was "unnecessary."¹⁸⁴ Indeed, the interest in the relationship between *Michael H.* and his daughter so closely resembled prior jurisprudence, that the dissent found it easy to link this case with those through a unifying theme. In the words of *Lehr*, quoting *Caban*, "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child' . . . his interest in personal contact with his child acquires substantial protection under the Due Process Clause."¹⁸⁵ This is the line between mere biology and a developed relationship drawn by previous cases. Justice Brennan rejected the notion that concern for the "unitary family" somehow transformed the meaning of this line of cases.¹⁸⁶ Finally, Justice Brennan distinguished between *Michael's* ability to get a meaningful hearing on his liberty interest, that is, his procedural due process claim, and his ability to ultimately prevail on the merits.¹⁸⁷ He noted that *Quilloin* endorsed the use of the "best interest [of the child] standard," rather than the "unfitness standard," for a putative father who opposed adoption of his child by another man.¹⁸⁸ *Michael H.*, due to a conclusive statutory presumption, never had the opportunity to argue the issue.¹⁸⁹

Despite the dissenters' well-taken arguments, *Michael H.* was not really about repudiating the line between a reluctant unwed father and a man who steps forward to grasp the unique opportunity of biology. Rather, through *Michael H.* the emerging Court of the 1990s signaled the remaining Justices of the Warren Court that there was going to be a new way of doing business.¹⁹⁰

182. *Id.* at 137-11 (Brennan, J., dissenting, joined by Marshall, J. and Blackmun, J.).

183. *Id.* at 140.

184. *Id.* at 141.

185. *Id.* at 143 (alteration original) (citations omitted). In a separate dissent, Justice White similarly had no difficulty in construing the line of personal relationship cases to establish that a man who has a developed relationship with his nonmarital child also acquires a liberty interest in maintaining that relationship. *Id.* at 157 (White, J., dissenting).

186. *Id.* at 143-47 (Brennan, J., dissenting).

187. *See id.* at 146.

188. *Id.* at 147 n.5.

189. *Id.* at 148-50.

190. *See, e.g.,* Hon. Stephen Reinhardt, *Whose Ox is Gored?*, 35 GONZ. L. REV. 1, 5 n.33 (1999/2000) (explaining that the Rehnquist Court has limited Warren Court decisions in areas of due process, equal protection, and individual liberties); Edward McGlynn Gaffney, Jr.,

The plurality characterized the claim as substantive, thereby requiring the kind of super-liberty interest designated as "fundamental" in order for the putative father even to get his foot in the door. Having set the bar this high, it was easy to dispose of Michael's effort to be heard. The Brennan dissenters disliked both what they saw as a conflation of two questions (whether a liberty interest exists at all and what procedures may validly terminate that interest) and the new due process methodology of relying on tradition and history to define liberty interests, and articulating recognized interests as narrowly as possible. Viewed outside the context of the plurality's promotion of the traditional "unitary" marital family, Michael H. clearly was not a reluctant father. He also was not a thwarted father who had been denied the opportunity to develop a relationship with his child in the first place. However, this new methodology allowed the plurality to strip his efforts at fatherhood of any significance and deny him the right to pursue his paternity.

Although *Michael H.* first used the language, the entire line of personal relationship cases from *Stanley* through *Michael H.* touches on the "unitary family." These cases all concern an existing family that generally conforms to the normative ideal of a private family. Even though his family apparently received public assistance and was formed without the stamp of legal approval, Peter Stanley headed a *de facto* family comprised of himself and the three children he had "sired and raised" over the preceding eighteen years.¹⁹¹ With the death of his children's mother, the state sought to upset that family structure, but the majority of the Supreme Court protected the Stanley family, finding it quite comparable to other private family arrangements. There was also an existing *de facto* family in each of the *Quilloin*, *Caban*, and *Lehr* stepfather adoption cases. In each case, the child's home was not at issue: the child would continue living with its biological mother.¹⁹² The real issue was whether one 'father' could be rejected in favor of another 'father,' leaving mother, child, and father as a normative private family which could be called 'unitary.' Whatever the motives for the switch, the end result would be a traditional family, albeit with some of the actors moved around.

Removing the Blindfold from Lady Justice, 88 GEO. L.J. 115, 137 (1999) (concluding the Warren Court began the Due Process Revolution, the Burger Court slowed it, and the Rehnquist Court is moving in a very different direction).

191. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

192. *But see, Caban*, 441 U.S. at 383-84 (showing that the biological father and his wife unsuccessfully cross-petitioned for adoption).

This suggests the following observations about the children in those families. First, that the children's living arrangements with their biological mothers would be undisturbed regardless of the results may imply that time was not of the essence as in the newborn, thwarted father cases discussed below. Second, the child's wishes do not occupy center stage insofar as they might lead to a more complicated pattern of family life. For example, in *Michael H.*, little Victoria lived with two men at different times, her biological father and her mother's husband. Each one claimed her as his daughter, but there was no room for a solution that recognized a *de facto* family with two fathers. One 'father' had to be chosen over the other. Mr. Quilloin's child stated that he wished both to continue intermittent contact with his biological father — and to be adopted by his stepfather.¹⁹³ His mother rejected that proposition because she thought that occasional visits were disruptive for the child.¹⁹⁴ Here too, the constitutional model of the 'natural family' allowed only one father at a time, a normative private family. Accordingly, if the biological father fell down on the job, he could be replaced entirely and easily by a stepfather, preserving a 'unitary family.' This approach to personal relationships is also consonant with another family policy priority: ensuring that there is one man financially responsible for each child, thereby relieving the public fisc of that economic burden.

III: UNMARRIED FATHERS AND THE INTEREST IN PROTECTING THE PUBLIC FISC

In the constitutional jurisprudence of nonmarital fathers' rights to personal relationships with their children, all putative fathers were not equal. Biology alone did not reign supreme. Rather, the Court emphasized the distinction between willing and reluctant putative fathers, albeit with a side trip for a paean to the "unitary family." In another series of cases, the Court showed little hesitation in imposing financial obligations on reluctant putative fathers based on the biological connection *simpliciter*. State laws that differentiated between a marital and a nonmarital child's ability to seek child support from her father were struck down as violations of the Equal Protection Clause of the Fourteenth Amendment.¹⁹⁵ Although the prevailing distinctions based on the

193. *Quilloin*, 434 U.S. at 251 n.11.

194. *Id.* at 251.

195. See, *Gomez v. Perez*, 409 U.S. 535 (1973) (finding a law that denied the right of paternal support to nonmarital children unconstitutional); *Mills v. Habluetzel*, 456 U.S. 91

parents' marital status could hardly be justified, the Court's motives may be read as less than child-friendly. In view of developments in public assistance, these decisions ultimately protected the State's interest in safeguarding the public fisc as much as, or perhaps even more than, the child's private interest in receiving support from her father. When considering the cost of blood tests to resist the establishment of paternity, the Court recognized unmarried fathers' private interests in order to ensure the accuracy of the biological tie.¹⁹⁶ The Court was less concerned, however, with biological accuracy when it came to the burden of proof in paternity cases.¹⁹⁷ The dominance of the state's financial interest over any personal association concern was especially clear in a public assistance household income case.¹⁹⁸ Regardless of the impact on familial relationships, Congress could freely decide that an unmarried father's child, whom he was supporting, needed to be included in an Aid to Families with Dependent Children (AFDC) income qualifying unit along with half-siblings whose fathers had not stepped forward.¹⁹⁹ Finally, for an unmarried father seeking citizenship benefits for his child, stepping forward provided no advantage.²⁰⁰ This too, may be seen as protection of the public fisc, albeit in less overtly financial terms.

In the succinct 1973 opinion of *Gomez v. Perez*,²⁰¹ the majority of the Court brushed aside Texas' objections to granting nonmarital children the same "judicially enforceable right to support from their natural fathers" as that enjoyed by "legitimate" children.²⁰² The

(1982) (holding that a one year limit on a nonmarital child's right to bring a paternity suit unconstitutional); *Pickett v. Brown*, 462 U.S. 1 (1983) (invalidating a two year limit); *Clark v. Jeter*, 486 U.S. 456 (1988) (finding even a six year statute of limitations invalid). *But see* *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) (concluding that a mother had no standing to complain that a Texas statute allowed prosecution of only *marital* fathers for nonpayment of child support).

196. *Little v. Streater*, 452 U.S. 1 (1981) (determining that a Connecticut statute, which allocated the cost of blood grouping tests in paternity actions to the party requesting them, denied due process when applied to indigent defendant).

197. *Rivera v. Minnich*, 483 U.S. 574 (1987) (considering preponderance of the evidence a sufficient standard for establishing paternity).

198. *See Bowen v. Gilliard*, 483 U.S. 587 (1987).

199. *Id.*

200. *Nguyen v. INS*, 533 U.S. 53 (2001).

201. *Gomez* 409 U.S. 535 (denying right of paternal support to nonmarital children while granting it to marital children violates the Equal Protection Clause).

202. *Id.* at 535. At the time of the ruling, Congress had not yet authorized states to require cooperation in identifying putative fathers and establishing paternity as a condition of receiving public assistance. *See* Jacqueline M. Fontana, *Cooperation and Good Cause: Greater Sanctions and the Failure to Account for Domestic Violence*, 15 WIS. WOMEN'S L.J. 367, 370 (discussing 1967 statute requiring states to set up paternity establishment procedure, however, no cooperation sanction was imposed on recipients) (citing *Meyers v.*

Court easily found that its recent private benefits cases, *Levy v. Louisiana*²⁰³ and *Weber v. Aetna*,²⁰⁴ led inexorably to the conclusion that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally."²⁰⁵ Once Texas created a right to seek child support from a "natural father," that right could not be denied merely because that father had failed to marry the child's mother.²⁰⁶ While recognizing "lurking" proof of paternity problems, the Court determined that those problems were insufficient to justify Texas' absolute barrier to the child's claim.²⁰⁷

After the Social Security Amendments of 1974, pursuant to "cooperative federalism," states had to require that mothers receiving AFDC cooperate in establishing the paternity of putative fathers.²⁰⁸ Despite the Social Security Amendments of 1974 and *Gomez*, Texas grudgingly opened only a small window of opportunity to sue reluctant putative fathers to establish paternity and seek child support. It enacted a law that provided only one year to bring such a suit against the natural father of an "illegitimate" child.²⁰⁹ This statute was challenged in *Mills v. Habluetzel*,²¹⁰ and the Court struck it down as well.

Juras, 327 F. Supp. 759, 761 (D.Or. 171), *aff'd*, 404 U.S. 803 (1971)). Fontana observes, however, that many individual states enacted cooperation requirements that were subsequently voided by the courts. *Id.* (listing decisions).

203. 391 U.S. 68 (1968) (finding a violation of equal protection in the creation of a cause of action for wrongful death of a parent on behalf of marital children but not on behalf of nonmarital children).

204. 406 U.S. 164 (1972) (determining that exclusion of nonmarital children from sharing equally with marital children in recovery of workers' compensation benefits upon the death of a parent violated equal protection).

205. *Gomez*, 409 U.S. at 538.

206. *Id.*

207. *Id.* (citing *Stanley*, 405 U.S. at 656-57 and *Carrington v. Rash*, 380 U.S. 89 (1965)). But see *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) (establishing that a mother lacked standing to challenge a similar distinction in a criminal nonsupport statute in Texas).

208. Social Security Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 (1975); see S. REP. NO. 93-1356 (1974), reprinted in 1974 U.S.C.C.A.N. 8133, 8154-55 (cooperation requirement for AFDC); cf. 45 CFR § 232.12(b), 233.10(a)(1)(B); 42 U.S.C. 608(a)(2), (requirement of cooperation for Medicaid); 42 U.S.C. 1396k (cooperation requirement for Food Stamps). But see 7 U.S.C. 2011-2030 (waiver of cooperation requirement for good cause); 42 U.S.C. § 602(a)(7)(A)(iii) (good cause waiver of cooperation requirement in domestic violence situations).

209. *Mills v. Habluetzel*, 456 U.S. 91, 95 (1982). The legislature first provided only a procedure for voluntary legitimization, but the Texas courts found that this did not meet the strictures of *Gomez*. *Id.* at 93. After the Texas appellate court decision in *Mills*, the Texas legislature expanded the one-year statute of limitations to four years. *Id.* at 95 n.1. Nonetheless, the United States Supreme Court did not consider the case to be moot because it effectively barred the claims of the child who filed suit under the one year provision. *Id.*

210. *Id.* at 91.

In *Mills*, the chief justification offered by Texas for allowing marital children to seek support at any time during their minority, even though nonmarital children had only a "truncated" opportunity to do so, was the interest in avoiding stale or fraudulent claims.²¹¹ Then-Justice Rehnquist noted in his opinion for the Court that the mother of this child had applied for AFDC, which required her to assign any rights to support held by the child and "to cooperate with the State" in the paternity suit.²¹² Recognizing the State's concerns regarding stale or fraudulent claims and proof problems,²¹³ the Court held that Texas did not provide a "bona fide opportunity to obtain paternal support" with its one-year window to file paternity suits, and thus violated the Equal Protection Clause of the Constitution.²¹⁴ The Court noted that "traditional" blood tests did not establish paternity, but rather non-paternity through exclusion.²¹⁵ A man who was not excluded might be, but also might not be, the father of the child.²¹⁶ When the Court rendered its decision in 1982, then-Justice Rehnquist observed that the evidentiary value of the newer Human Leucocyte Antigen (HLA) testing, which could be used to reach a probability of paternity statistic, was "still a matter of academic dispute."²¹⁷

211. *Id.* at 96. The Court dismissed out of hand the further justification of the "State's interest in the continuation of the institutions of family and marriage," by discouraging out-of-wedlock births. *Id.* at 101, n.8. Punishing the innocent children for their parents' wrongdoing, the Court noted, had been rejected in *Weber v. Aetna*, 406 U.S. 164 (1972), *Lalli v. Lalli*, 439 U.S. 259 (1978), *Trimble v. Gordon*, 430 U.S. 762 (1977), and *Mathews v. Lucas*, 427 U.S. 495 (1976).

212. *Mills*, 456 U.S. at 96, n.2 (citing 42 USC § 602(a)(26)(A), (B)(i)).

213. *Id.* at 97-100.

214. *Id.* at 97. The Court found it unnecessary to reach the further due process claim in light of its equal protection conclusion. *Id.*

215. *Id.* at 98 n.4.

216. *Id.*

217. *Id.* (citing Paul I. Terasaki, *Resolution by HLA Testing of 1000 Paternity Cases Not Excluded by ABO Testing*, 16 J. FAM. L. 543 (1978) (pro-test); Leonard R. Jaffee, *Comment on the Judicial Use of HLA Paternity Test Results and Other Statistical Evidence: Response to Terasaki*, 17 J. FAM. L. 457 (1979)). For example, Texas' law of paternity has been totally revamped more than once. The state has adopted the Uniform Parentage Act of 2000, with significant variation. Section 160.505 of the Texas Family Code provides:

A man is rebuttably identified as the father of a child under this chapter if the genetic testing complies with this subchapter and the results disclose:

(1) that the man has at least a 99 percent probability of paternity, using a prior probability of 0.5, as calculated by using the combined paternity index obtained in the testing; and

(2) a combined paternity index of at least 100 to 1.

(b) A man identified as the father of a child under Subsection (a) may rebut the genetic testing results only by producing other genetic testing satisfying the requirements of this subchapter that:

(1) excludes the man as a genetic father of the child; or

Under Texas law, "the only paternity cases which actually go to trial . . . are those in which the putative father has refused to submit to blood tests or has not been excluded by their results"²¹⁸, therefore, other forms of evidence remained important for those cases.²¹⁹ This conventional testimony could become stale or suborned, so the state's interest was not insubstantial.²²⁰ Nonetheless, the Court found an equal protection violation in these circumstances. Using the standard of "substantially related to a legitimate state interest"²²¹ as derived from *Lalli*,²²² *Trimble*,²²³ and *Mathews v. Lucas*,²²⁴ then-Justice Rehnquist found that the one year statute of limitations failed two preconditions of constitutionality. First, the period for filing suit had to be long enough to provide a genuine opportunity to claim paternity.²²⁵ Second, the length of any such time limitation had to be "substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims."²²⁶ Texas' one year provision did not afford enough of an opportunity for a mother to file suit on her own. Significantly, the majority also noted that even if the state intervened and brought the law suit, administrative delays could use up the statutory time period.²²⁷ Moreover, this "unrealistically short time limitation" did not bear a substantial relationship to the legitimate problems of stale or

(2) identifies another man as the possible father of the child.

(c) Except as otherwise provided by Section 160.510, if more than one man is identified by genetic testing as the possible father of the child, the court shall order each man to submit to further genetic testing to identify the genetic father.

In other words, the prior exclusion approach has given way to a probability of paternity evidentiary standard. The term "genetic testing" includes more than just the initial HLA blood groupings standard. TEX. FAM. CODE § 160.503 (Vernon 2001). Genetic testing is the only way to rebut the paternity of a child with a "presumed, acknowledged, or adjudicated father." TEX. FAM. CODE § 160.631 (Vernon 2001).

218. *Mills*, 456 U.S. at 98 n.4.

219. The Court cited lack of access as a factor. *Id.*

220. *Id.* at 98-99.

221. *Id.* at 99.

222. *Lalli v. Lalli*, 439 U.S. 259, 269 (1978) (recognizing proof problems for an inheritance issue).

223. *Trimble v. Gordon*, 430 U.S. 762, 772 (1977) (recognizing proof problems for an inheritance issue).

224. 427 U.S. 495 (1976) (regulating social security benefits). Justice Rehnquist found no significant distinction based on the specific interest at stake. *Mills*, 456 U.S. at 99 n.5.

225. *Mills*, 456 U.S. at 99.

226. *Id.* at 99-100.

227. *Id.* at 100.

fraudulent claims.²²⁸ The Court found no reason for this haste, which effectively precluded many claimants, nor any reason to believe such claims became stale in only twelve months.²²⁹

In her concurrence in *Mills*, Justice O'Connor was concerned that the majority opinion did not clearly state that a four year statute of limitations would not fix the problems identified by the Court.²³⁰ She observed that the state had another interest that was counter to the avoidance of stale or fraudulent claims: the "desire to reduce the number of individuals forced to enter the welfare rolls."²³¹ If unwed mothers found it more difficult to seek child support, then the burden on the state welfare system would increase.²³² "Thus, while the State surely has an interest in preventing the prosecution of stale and fraudulent claims, at the same time, it has a strong interest, peculiar to the State itself, in ensuring that genuine claims for child support are not denied."²³³ In addition to emphasizing this countervailing interest, the concurrence expressed greater comfort with the scientific developments in blood testing.²³⁴ Justice O'Connor also observed that marital children typically had their causes of action tolled for their entire minority in Texas, raising questions about the motives behind this disparate treatment of marital and nonmarital children.²³⁵ Finally, she opined that the practical difficulties of filing suit that are recognized within the first year of birth persisted beyond that time.²³⁶

In *Pickett v. Brown*,²³⁷ decided in 1983, the Court invalidated a Tennessee statute with a two year limitation period. Tennessee's law incorporated an exception related to the state's interest in defending its welfare rolls from claims. The state could bring suit any time before a child's eighteenth birthday if a child was a public

228. *Id.* at 101.

229. *Id.* at 102.

230. *Id.* at 102. (O'Connor, J., concurring).

231. *Id.* at 103.

232. *Id.* at 104.

233. *Id.*

234. *Id.* at 104 n.2 (citing *Little v. Streater*, 452 U.S. 1 (1981) (discussing American Bar Association and American Medical Association report indicating that a series of blood tests could have a ninety percent probability of negating a finding of paternity for erroneously accused men)). See Miale, et al., *Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage*, 10 FAM. L.Q. 247, 258 (1976). See also Terasaki, *supra* note 30, and Ira Mark Ellman & David Kaye, *Probabilities and Proof: Can HLA and Blood Group Testing Prove Paternity?*, 54 N.Y.U. L. REV. 1131 (1979) (discussing blood test developments).

235. *Mills*, 456 U.S. at 104-05.

236. *Id.* at 105-06.

237. 462 U.S. 1, 18 (1983).

charge, or was liable to become one.²³⁸ Nearly all other parties, however, faced a two year statute of limitations.²³⁹ Justice Brennan wrote for a unanimous Court that the two year period did not provide a reasonable opportunity for those affected to bring their claims.²⁴⁰ The strength of the state's asserted interest in preventing stale or fraudulent claims, moreover, was undercut by the exception for children receiving public assistance.²⁴¹ If they could litigate older claims in one instance, why not the other? While conceding the state's interest in protecting the public fisc, Justice Brennan understandably stressed the *child's* interest in obtaining support and in "establishing a relationship to his father."²⁴²

In the last of this series of cases, a unanimous Court firmly closed the door on statutes of limitations for establishing paternity. By 1988, when *Clark v. Jeter*²⁴³ was decided, it was merely a constitutional coda, made unnecessary by federal statutory developments. The Child Support Enforcement Amendments (CSEA) of 1984 already required all states wishing to retain their Title IV-D funding to allow paternity suits during the entire minority of nonmarital children.²⁴⁴ This question of federal preemption had not been properly addressed in the case;²⁴⁵ therefore, the Court addressed constitutional doctrine again: it found that Pennsylvania's six year statute of limitations on bringing paternity actions also violated equal protection.²⁴⁶ The rationale of stale and fraudulent claims could not uphold the limitation, even for an arguably more reasonable time period. Pennsylvania did not limit the period for proof of paternity in intestacy cases or when the father himself sought to establish his paternity.²⁴⁷ It tolled all other civil causes of action for the minority of the child, and it had only recently revised its statute to comply with the eighteen year old federal requirement.²⁴⁸ The state apparently was not daunted by proof problems in other contexts. Moreover, "increasingly sophisticated tests for genetic markers" put to rest many doubts about stale and

238. *Id.* at 12.

239. *Id.*

240. *Id.* at 12-13.

241. *Id.* at 15. In addition, the availability of scientific blood tests alleviated any concern. *Id.* at 17. On the growing acceptance of blood testing, see also Stroud et al., *Paternity Testing: A Current Approach*, 16 TRIAL 46 (1980).

242. *Pickett*, 462 U.S. at 14, n.13. See also *id.* at 16, n.15.

243. 486 U.S. 456 (1988).

244. *Id.* at 459 (citing 42 U.S.C. § 666(a)(5)(1982 ed., Supp. IV)).

245. *Id.* at 459.

246. *Id.* at 463.

247. *Id.* at 464.

248. *Id.*

fraudulent claims.²⁴⁹ The congressional drafters of the federal CSEA reported in 1983 that such tests permitted the exclusion of over ninety-nine percent of putative fathers, and could be used regardless of the age of the child.²⁵⁰ Thus, the Pennsylvania provision could not survive "heightened scrutiny" under the Equal Protection Clause.²⁵¹

An interesting thread runs through the cases invalidating statutes of limitations for paternity and child support. In each situation, the state limited the ability to file suit against unmarried fathers, which paradoxically cuts against its own interest in maximum collection. The Justices focused on the rights of nonmarital children, but they clearly considered the impact of their decisions on the public fisc. At the same time, the increasing evidentiary credibility of blood tests may have contributed to a greater willingness to establish the father-child relationship through proof of biology alone. Apparently, the child's entire minority could pass without any personal contact, but financial obligations could not be escaped so long as there was factual proof of paternity.

The private interests of the unmarried father, however, prevailed under limited circumstances in the public fisc cases. For a reluctant father who wanted to avoid the imposition of the financial obligations arising from the establishment of paternity, blood tests could be critical as a defense. The unmarried father in *Little v. Streater*²⁵² succeeded on a procedural due process claim because his indigency denied him access to the all-important blood tests necessary to defend against a paternity suit filed against him under Connecticut law.²⁵³ In order to qualify her child for public assistance, Gloria Streater identified Walter Little as the girl's father.²⁵⁴ The state then provided an attorney for the mother to

249. *Id.* at 465. In this case, the tests showed Gene Jeter to have 99.3% probability of being the child's father. *Id.* at 456.

250. *Id.* (citing H.R. Rep. No. 98-527, at 38 (1983)). The Court noted at the outset that while illegitimacy classifications, in general, were subject to intermediate scrutiny (substantially related to important governmental objective), the Court previously had acknowledged that concern about proof problems might justify a somewhat different treatment in the support context. *Id.* at 461.

251. *Id.* at 463.

252. 452 U.S. 1 (1981).

253. *Id.* at 17 n.13 (discussing the Court's failure to reach Little's equal protection claim).

254. *Id.* at 3. The Connecticut statute's disclosure and cooperation requirement derived from 42 U.S.C. § 654 (4) reads:

as to any child born out of wedlock for whom benefits under the Aid to Families with Dependent Children program are claimed, the states must undertake 'to establish . . . paternity . . . unless . . . it is against the best interests of the child to do so' and 'to secure support for such child from his parent.'

Id. at 9 n.6. See also 45 CFRC.F.R. § 232.12 (1980). A mother who failed to disclose the name of the nonmarital father could be fined or imprisoned for contempt. *Little*, 452 U.S. at 9

bring a paternity suit against the alleged father and to establish his child support obligation.²⁵⁵ At the time of the litigation, the putative father was in jail and unable to pay for the costs of blood testing.²⁵⁶ Unfortunately for him, Connecticut law put the burden on the defendant to show his innocence once he was named as the father.²⁵⁷ After the case went forward without the blood tests, Little's paternity was adjudicated and a judgment rendered against him for almost \$7000, plus the costs of suit and attorneys' fees.²⁵⁸ The court ordered him to pay child support and the arrears at the rate of \$2.00 a month directly to the state, which was supporting his child.²⁵⁹

The Court considered whether, under all the circumstances of the case, the state's refusal to pay for the blood tests resulted in a denial of a "meaningful opportunity to be heard" and therefore a denial of procedural due process.²⁶⁰ *Mathews v. Eldridge*²⁶¹ used a balancing test for determining what process is due: weigh the private interest at stake; the risk of error of present procedures and the likelihood of reducing that through introducing additional safeguards; and the government's interest, including administrative efficiency.²⁶²

As applied in Mr. Little's case, these three factors led the Court to conclude that he did not receive a meaningful opportunity to be heard.²⁶³ In that assessment, the Court emphasized the "unique quality of blood grouping tests as a source of exculpatory evidence, the State's prominent role in the litigation, and the character of paternity actions under Connecticut law."²⁶⁴ The private interest at stake was none other than the "creation of the parent-child relationship," a relationship that was so important to both parent and child that the Court was willing to say, at this juncture and in

(citing CONN. GEN. STAT. § 46b-169 (1981)). The State's Attorney General automatically became a party to the paternity action and any settlement agreement needed state approval. *Little, id.* (citing CONN. GEN. STAT. §§ 46b-160, 46b-170 (1981)).

255. *Little*, 452 U.S. at 9.

256. *Id.* at 3-4. He was represented by Legal Aid. *Id.*

257. *Id.* at 11-12.

258. *Id.* at 3-4.

259. *Id.* at 4.

260. *Id.* at 6.

261. 424 U.S. 319, 335 (1976).

262. *Little*, 452 U.S. at 6 (citing *Mathews*, 424 U.S. at 335).

263. *Id.* at 16-17.

264. *Id.* at 6 (citing Miale, et al., *supra* note 234; see Mark Edward Larson, Jr., *Blood Test Exclusion Procedures in Paternity Litigation: The Uniform Acts and Beyond*, 13 J. Fam. L. 713 (1973-1974); Cortese v. Cortese, 10 N.J. Super. 152, 156, 76 A.2d 717, 719 (1950) (an opinion by then-Judge Brennan)).

this context, that it created a "compelling" private interest in the "accuracy" of its determination.²⁶⁵ The State shared the interest in accuracy, but most importantly it had "legitimate" financial interests where children born out of wedlock relied on public assistance.²⁶⁶ Given the high risk of error in Connecticut's statutory scheme, however, this governmental interest was not sufficient to justify refusing to advance the costs of a blood test to an indigent defendant.²⁶⁷ Indeed, much of the opinion was taken up with an evaluation of the significance of human blood grouping evidence to *exclude* alleged fathers.²⁶⁸ The rest of the emphasis was on the integral role the state played in this paternity proceeding.²⁶⁹ Despite the nominal parties, it was the state who was the moving force of this paternity action. The state compelled the mother, "upon penalty of fine and imprisonment for contempt," to identify the father as a pre-condition of receiving public assistance. The state's Attorney General automatically became a party to the suit, and that official's approval was required before settlement would be approved. The state located and assigned the lawyer and paid the attorney's fees. And finally, the state would collect any support payments that the litigation compelled.²⁷⁰ This was no ordinary dispute between private parties, but rather, a matter of public family law. In addition, the statute created an unusual burden on the defendant in a paternity action. So long as the mother of the nonmarital child remained steadfast in her accusation, the burden was placed on the defendant man to prove he was *not* the father of the child.²⁷¹

The Court also sensed quasi-criminal overtones in the nature of the proceeding in Connecticut, because a man found guilty of paternity could be punished by imprisonment for refusing to pay the ordered child support.²⁷² Blood tests, therefore, became even more important to a man placed in this position. Without them, the risk of error was high, but with them, there would be a "valuable

265. *Little*, 451 at 13. In *Little*, the Court likened the importance of creating the parent-child relationship to *terminating* that relationship, but in *Rivera v. Minnich*, 483 U.S. 574 (1987), which approved a preponderance of the evidence standard for establishing paternity, that equivalency disappeared.

266. *Little*, 452 U.S. at 14.

267. *Id.* at 15-16.

268. *Id.* at 6-8.

269. *Id.* at 9-12.

270. *Id.* at 9 ("State action' has undeniably pervaded this case.").

271. *Id.* at 10-11.

272. *Id.* at 10.

procedural safeguard.²⁷³ Thus, while eschewing any sweeping statement about costs in a privately initiated paternity suit, this case, with its strong public law overtones, required the state to advance an indigent man the costs of the blood tests that might exculpate him from the paternity charge.²⁷⁴

The *Little* Court concluded that the private interests were strong, the public interests relatively weaker, and the risk of error was high with current procedures.²⁷⁵ Therefore, as applied to Mr. Little, Connecticut's refusal to pay for blood tests violated his procedural due process rights under the Constitution.²⁷⁶ The dispute about blood tests costs clearly arose in the context of state efforts to protect the public fisc by imposing financial obligations on men shown to be biological fathers. The Court did not find the state concerns with the public fisc to be misplaced, but rather it objected to a procedure which stacked the deck against the unmarried father to an unreasonable degree. The Justices opined that the "creation of the parent-child relationship" required the same procedural fairness as did "termination of such bonds."²⁷⁷ They even found "both the child and the defendant in a paternity action have a compelling interest in the accuracy of such a determination."²⁷⁸

The Court's nod to the strength of the relationship interest did not stop it from concluding subsequently that, unlike in *termination*

273. *Id.* at 14.

274. Apparently, the State could demand reimbursement for the blood test costs if the defendant was established as the father. *Id.* at 15.

275. *Id.* at 13-16.

276. *Id.* at 16-17.

277. *Id.* at 13. The cases establishing the significance of termination of parental rights and the consequent special procedural safeguards necessary started with the Court's five to four decision in *Lassiter v. Dep't of Soc. Serv. of Durham City, North Carolina*, 452 U.S. 18 (1981). In *Lassiter*, the Court held that the Constitution does not require appointed counsel to represent indigent parents in every termination proceeding where the child was a public charge. *Id.* at 24-32. The mother, who was in jail, displayed little interest in the child's welfare. *Id.* at 21. She received notice of the hearing, but failed to inform her court-appointed criminal lawyer about it. *Id.* The child was living with foster parents who wanted to adopt him, but his status was in limbo until the termination suit was decided. *Id.* at 19-24. Another split decision followed, with different results, when the Court ruled in *Santosky v. Kramer* that termination of parental rights requires proof of grounds by clear and convincing evidence, regardless of whether the suit was initiated privately or publicly. 455 U.S. 745 (1982). In 1996, in *MLB v. S.L.J.*, the Court required the state to pay the cost of a trial transcript which was necessary to make a meaningful appeal in a termination lawsuit prosecuted by a father against his ex-wife, where the appellant was indigent. 519 U.S. 102 (1996). The Court was once again divided. *See id.* at 129. The termination cases, however, presuppose that the defendant legally satisfies the definition of 'parent,' which unmarried fathers may not. Thus, statutory definitions of 'parent' and the constitutional personal relationship cases control the relevance of the termination decisions to unmarried fathers.

278. *Little*, 452 U.S. at 13.

cases, a simple preponderance of the evidence was enough to establish paternity. The majority in *Rivera v. Minnich*²⁷⁹ made it clear that this was actually about money, and not about precious personal associations. The *Rivera* decision meant that it was easier to establish paternity than to terminate parental rights.²⁸⁰ In his opinion, Justice Stevens observed that the termination cases were distinguishable because there was no equivalence between "the State's imposition of the legal obligations accompanying a biological relationship between parent and child and the State's termination of a fully existing parent-child relationship," at least for purposes of the required burden of proof.²⁸¹ The Court opined that in the 'typical' contested paternity proceeding, the man who did not admit paternity was in fact a reluctant father.²⁸² He was *ipso facto* not interested in "providing the training, nurture, and loving protection that are at the heart of the parental relationship, protected by the Constitution."²⁸³ His real interest was in not paying child support.²⁸⁴ By contrast, something "more precious than any property right" was at risk when the state sought to permanently put an end to the parent-child relationship.²⁸⁵ Because of this difference in interests, there was no necessity to require the same standard of proof in paternity as in termination proceedings.²⁸⁶

Somewhat disingenuously, the *Rivera* Court contrasted the public nature of termination law — the state against the individual — to the private law dispute of mother against father in a paternity proceeding.²⁸⁷ As we have seen, however, many of these private disputes were in fact suits instigated by the state out of a welfare collection rationale. On pain of penalty of both federal and state law, mothers who needed public assistance for their children had to identify putative fathers and either bring lawsuits against those men or cooperate in the state's filing such suits.²⁸⁸ The Court,

279. 483 U.S. 574 (1987).

280. *Id.* at 579.

281. *Id.*

282. *Id.*

283. *Id.* at 580 (citing *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) and *Caban v. Mohammed*, 441 U.S. 380, 392 (1979)).

284. *Rivera*, 483 U.S. at 580.

285. *Id.* (citing *Santosky*, 455 U.S. at 758-759).

286. *Id.*

287. *Id.* at 580-81.

288. For the introduction of the cooperation requirement into the AFDC program, see Social Security Amendments (SSA) of 1974, Pub. L. No. 93-647, 88 Stat. 2337 (1975); see also Senate Report on SSA of 1974, S. Rep. No. 93-1356 (1974), reprinted in 1974 U.S.C.A.N. 8133, 8154-55 (the requirement could be waived for "good cause"); see also 42 USC § 602 (7)(A)(iii).

however, eschewed consideration of any state interest in avoiding financial responsibility for nonmarital children, claiming instead to judicially resolve such disputes without reference to the state's interest in limiting welfare expenditures.²⁸⁹

Justice Brennan's dissent neither minimized the financial burden imposed by a finding of paternity, nor ignored its "legal and moral dimensions."²⁹⁰ A man found to be the father of a nonmarital child could face eighteen years of open-ended liability for support, enforceable through all kinds of potent measures.²⁹¹ Beyond that, he assumed the status of being a parent, with all the moral implications attendant thereto.²⁹² Blood tests, on the other hand, were accurate enough to ensure that the higher standard of clear and convincing evidence could be met.²⁹³ Practical difficulties with the heightened standard would only arise in those few cases where blood test evidence was unavailable or unavailing for some reason.²⁹⁴ Justice Brennan, however, dissented alone, the rest of the *Rivera* Court having reduced the putative father's relationship with his child to a question of financial obligation.²⁹⁵

Indeed, the Court was willing to approve the dominance of the money concern even where it threatened to interfere with the personal relationship that the Justices said was so important. *Bowen v. Gilliard*²⁹⁶ challenged a provision in the 1984 Deficit Reduction Act (DFRA) requiring states to "take into account, with certain specified exceptions, the income of all parents, brothers, and sisters living in the same home" when calculating a family's eligibility for benefits.²⁹⁷ This meant that in applying for AFDC benefits, a custodial mother could no longer exclude from the filing unit a child whose father supported him or her.²⁹⁸ Instead, all income on behalf of all children must be included, and she must seek public assistance for all the children in the household.²⁹⁹ For one of the

289. *Rivera*, 483 U.S. at 581, n.8.

290. *Id.* at 583 (Brennan, J., dissenting).

291. *Id.* at 584 (stating that possible penalties include attachment of income, penalty for arrears, confiscation of income tax refunds and incarceration for contempt).

292. *Id.* at 584-85.

293. *Id.* at 586.

294. *Id.*

295. *See id.*

296. 483 U.S. 587 (1987).

297. *Id.* at 589 (citing The Deficit Reduction Act of 1984, 98 Stat. 494; 98 Stat 1145; amended Section 402(a)(38) of the SSA, 42 U.S.C. § 602(a)(38)(1982 ed., Supp. III); cf. *Lyng v. Castillo*, 477 U.S. 635 (1986) (declaring food stamp household rules not unconstitutional)).

298. *Bowen*, 483 U.S. at 590.

299. For sibling 'income deeming' rules and their effect on poor families, see, for example, Amy E. Hirsch, *Income Deeming in the AFDC Program: Using Dual Track Family Law to*

named plaintiffs in the class, this meant not only a financial loss, but a loss of a child's relationship to his father.³⁰⁰ The nonmarital father of Sherrod visited him and was proud to say that he supported his child without public assistance.³⁰¹ Financially, the deemed income rule meant that Sherrod had to be included in the household unit.³⁰² His father's contributions of \$200 a month were counted against the family's income,³⁰³ and the family's grant was reduced correspondingly.³⁰⁴ Even with him as part of the filing unit, Sherrod received no benefit, and his family suffered a loss of income.³⁰⁵ Worse still, his mother testified that Sherrod's father began to withhold his usual support payments and ceased to visit his son.³⁰⁶ As Sherrod's mother stated,

[his father] is extremely opposed to his son being on welfare benefits, and has told me that he stopped seeing his son because I now receive AFDC for Sherrod . . . [The boy] is very upset that his father no longer visits him. He frequently asks me why his daddy does not come to see him anymore. Since the time his father has stopped visitation, Sherrod has begun to wet his bed on a frequent basis. Also since the visitation stopped, Sherrod has become much more disruptive, especially in school. Furthermore, his performance in school seems to have declined.³⁰⁷

While the dissent cited Sherrod's family as an example of a deep intrusion into a constitutionally protected parent-child relationship,³⁰⁸ the majority decided this was a question of the rationality of welfare collection devices.³⁰⁹ As a result of this characterization, the Court's review was deferential.³¹⁰ The Court reasoned that since the amendment "unquestionably serves Congress' goal of decreasing federal expenditures,"³¹¹ the rationality test was met by "saving huge sums of money."³¹² The amendment was rationally related to a second purpose of spreading welfare

Make Poor Women Poorer, 16 N.Y.U. REV. L. & SOC. CHANGE 713 (1987-88).

300. Bowen, 483 U.S. at 621-22 (Brennan, J., dissenting).

301. *Id.* (Brennan, J., dissenting).

302. *Id.* at 591.

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.* at 621-22 (Brennan, J., dissenting).

307. *Id.* (Brennan, J., dissenting).

308. *Id.* at 612 (Brennan, J., dissenting).

309. *Id.* at 596-97.

310. *Id.* at 598.

311. *Id.* at 599.

312. *Id.*

dollars around fairly between needy families in situations where budget cuts were necessary.³¹³ The majority rejected the argument that something more than rational basis review was implicated because of the burden on "a family's fundamental right to live in the type of family unit it chooses."³¹⁴ This was not like *Moore v. East Cleveland*,³¹⁵ in which the state directly regulated the family, but instead the income calculation rules were merely a part of a social welfare program.³¹⁶ The equal protection and due process challenges failed under the deferential standard of review.³¹⁷ Furthermore, the Court rejected the complaint about the assignment provision of the amendment.³¹⁸ The Court noted that when the state pays the AFDC benefit, it bears the risk of noncollection of the child support obligation.³¹⁹ The majority proudly recounted that between 1975, when the assignment provision was added, and 1985 "legal paternity was established for more than 1.5 million children, more than 3.5 million support orders were established, and \$6.8 billion in support obligations was collected on behalf of children in AFDC families."³²⁰ By instituting a social welfare program, Congress did not work a "taking."³²¹ The Court eschewed any role in determining the wisdom of the congressional rules.³²² Rather, it was up to Congress to fulfill "the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."³²³

In *Bowen*, the distinction between the reluctant nonmarital father and the one who steps forward is insignificant. Even if there is some interference with what otherwise might be considered a constitutionally protected relationship, the intrusion is not serious or direct enough to trigger heightened scrutiny. Rather, when enforcing obligations and collecting money, Congress and the states enjoy broad discretion, within the bounds of rationality. Of course,

313. *Id.*

314. *Id.* at 588.

315. 431 U.S. 494 (1977) (invalidating zoning rules that prevented grandmother from living with her grandsons by two different sons).

316. *Bowen*, 483 U.S. at 602.

317. *Id.* at 603.

318. *Id.* at 603 n. 19; see also *id.* at 591-92 (requiring recipients to assign their right to receive child support payments for any member of the family included in the filing unit as a condition for eligibility); see 42 U.S.C. § 602(a)(26)(B) (1982 ed. Supp. III).

319. *Bowen*, 483 U.S. at 603 n.19.

320. *Id.* (citing 1 Office of Child Support Enforcement, U.S. Dept. of Health & Human Services, A Decade of Child Support Enforcement 1975-1985: Tenth Annual Report to Congress for the Period Ending September 30, 1985, pp. iii, 6, 9-10 (1985)).

321. *Bowen*, 483 U.S. at 605-06.

322. *Id.*

323. *Id.* at 607 (citing *Dandridge v. Williams*, 397 U.S. 471, 487 (1969)).

Bowen was neither brought by nonmarital fathers nor framed by their concerns. Children and mothers whose public assistance payments were reduced challenged the household income sharing rules. Nor is it unusual for the Court to distinguish levels of scrutiny for the myriad of regulations that affect the family. Some trigger a fundamental rights analysis,³²⁴ while most do not.³²⁵ The drive to establish paternity and assign the proceeds of subsequent child support orders over to the state clearly provides a context to other jurisprudential developments in the 1970s and 1980s.

Nguyen v. INS,³²⁶ decided in 2001, demonstrates just how far the Court has come in public fisc cases from *Stanley's* relationship values. *Nguyen* is not, strictly speaking, a financial obligation dispute. Indeed, Nguyen's father, Joseph Boulais, supported him to his majority and continued supporting him even after the son got into serious criminal trouble.³²⁷ But it is appropriate to view this citizenship case against a public fisc backdrop, because it is about to whom and how often the United States will give away the valuable resource of citizenship. Federal law provides that children born abroad to unmarried parents, one of whom is a United States citizen and the other of whom is an alien, derive their citizenship depending upon which parent was the United States citizen.³²⁸ Unmarried mothers may pass their citizenship merely upon proof of the biological relationship plus a year of continuous physical residence in the United States sometime prior to the child's birth, but without more, unmarried fathers may not.³²⁹

324. For example, *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (establishing that Virginia's anti-miscegenation laws also fail due process by interfering with a right long deemed fundamental); *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977) (stating that zoning rules that prevented a grandmother from living with her grandsons by two different sons intruded too deeply into the family unit and should not be afforded judicial deference); *Zablocki v. Redhail*, 434 U.S. 374, 384-86 (1978) (declaring a state law which denied the right to marry to a man who could not prove that he could support children from a previous relationship, impermissibly interfered with the fundamental right to marry).

325. *Zablocki v. Redhail*, 434 U.S. 374, 386-87 (1978) ("By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed."). See also *Califano v. Jobst*, 434 U.S. 47 (1977) (deciding that a provision of the Social Security Act which terminated benefits for a permanently disabled child who married a spouse not receiving disability benefits, was rationally related to a legitimate governmental purpose).

326. 533 U.S. 53 (2001).

327. *Id.* at 57.

328. *Id.* at 59-60. An earlier case which involved the same provision at issue in *Nguyen*, failed to resolve the issue at bar in *Nguyen*. *Id.* at 58. See also *Miller v. Albright*, 523 U.S. 420 (1998) (discussing citizenship of a child with a military father).

329. 8 U.S.C. § 1409(c) (1988) (providing, in pertinent part, that where a nonmarital child

In 1969, Joseph Boulais was a civilian employee in Vietnam where he fathered a son out of wedlock with a Vietnamese woman.³³⁰ After the end of the parents' relationship, the child lived with "the family of [his father's] new Vietnamese girlfriend."³³¹ At the age of six, Boulais brought his son to Texas where he raised him.³³² The son held permanent legal resident status, which was not enough to protect him from deportation when, at the age of 22, he was found guilty of serious crimes involving sexual assault on a child.³³³ While deportation was pending, Boulais established his paternity in a state court through DNA testing.³³⁴ Father and son thereafter appealed the deportation order, arguing that the gender-based distinction in the immigration statute violated equal protection.³³⁵

Although the unmarried American biological father stepped forward and raised his child from infancy while the alien mother faded from the picture, that was not enough to satisfy the derivative citizenship statute in light of his failure to legitimize his offspring before his son reached the age of eighteen.³³⁶ A majority of the Court ruled this sex-based distinction valid, based on an ad hoc explanation. Congress, the Court opined, was entitled to rely on a presumed 'opportunity' that a citizen mother automatically enjoyed to form a relationship with her nonmarital child, while refusing to credit a developed relationship between a citizen father and his child born out of wedlock.³³⁷

is born abroad to a *citizen mother* and noncitizen father, the child:

shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.).

See also 8 U.S.C. § 1409(a) (1988) (stating that a child born out of wedlock abroad to an American *citizen father* and noncitizen mother can acquire citizenship only if

(1) a blood relationship between the person and the father is established by clear and convincing evidence, (2) the father had the nationality of the United States at the time of the person's birth, (3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and (4) while the person is under the age of 18 years — (A) the person is legitimated under the law of the person's residence or domicile, (B) the father acknowledges paternity of the person in writing under oath, or (C) the paternity of the person is established by adjudication of a competent court.).

330. *Nguyen*, 533 U.S. at 57.

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.* at 58.

336. See statutes cited *supra* note 329.

337. *Nguyen*, 533 U.S. at 64-65.

The opportunity rationale was the second of two “important governmental interests”³³⁸ that the *Nguyen* Court said were implicated. The first was the proof problem. This had been raised with varying effect in earlier cases regarding benefits derived through the unmarried father’s relationship to his child.³³⁹ In *Weber v. Aetna Casualty*,³⁴⁰ Louisiana excluded nonmarital children from eligibility for workers’ compensation benefits upon the death of their father even where the children were actually dependent upon him for support during his lifetime.³⁴¹ While conceding that in some situations there may be “potentially difficult problems of proof,”³⁴² Justice Powell opined that by “limiting recovery to dependents of the deceased, Louisiana substantially lessen[ed] the possible problems of locating illegitimate children and of determining uncertain claims of parenthood.”³⁴³ Given that the requirement for dependency in the statute itself obviated the worst of the proof problems, the distinction between ‘legitimate’ and ‘illegitimate’

338. *Id.* at 54. A gender-based equal protection challenge cannot pass muster without an important governmental interest and the classification must be substantially related to that interest. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (adopting intermediate scrutiny for gender-based classifications); *U.S. v. Virginia*, 518 U.S. 515, 533 (1996) (applying heightened scrutiny to a gender-based policy of admission exclusion in a public university).

339. See *Labine v. Vincent*, 401 U.S. 532, 533 (1971), (upholding Louisiana law barring a nonmarital child from intestate succession to share in the estate of a man who died after publicly acknowledging her but who never included her in a will). The *Labine* Court distinguished *Levy v. Louisiana*, 391 U.S. 68 (1968) and *Glonn v. American Guarantee*, 391 U.S. 73 (1968) by claiming neither of those cases established the proposition that states could not ever treat marital and non-marital children differently. *Id.* In *Labine*, only Justice Brennan, dissenting, rejected the rationality of the state’s alleged proof problem in a case where there was no dispute over parentage and the father had actually acknowledged his child. *Id.* at 552. In any case, it is not clear in *Nguyen* if the INS actually relied upon the alleged proof problems. See 533 U.S. at 53, 79 (O’Connor, J., dissenting). Rather, the dissenters noted that the INS’ argument focused on “ensuring that children who are born abroad out of wedlock have, during their minority, attained a sufficiently recognized or formal relationship to their United States citizen parent — and thus to the United States — to justify the conferral of citizenship upon them; and second, preventing such children from being stateless.” *Id.*

340. 406 U.S. 164 (1972).

341. *Id.* at 167-68.

342. *Id.* at 174.

343. *Id.*

children was not justified.³⁴⁴ It did not outweigh the injustice of placing the 'sins' of their parents on innocent children.³⁴⁵

Justice Powell found the proof problems more persuasive in another case, *Lalli v. Lalli*.³⁴⁶ His opinion for the Court upheld New York's intestate succession act because he believed that its requirement for adjudication of paternity before the death of the putative father was fine-tuned enough to deal with spurious claims.³⁴⁷ While "[e]stablishing maternity is seldom difficult,"³⁴⁸ there were "peculiar problems of proof" when it came to the fathers of out of wedlock children.³⁴⁹ The father might not be a functioning part of the family unit, or even know about the birth of his biological child.³⁵⁰ Thus, because the state's interests in settling estates and the "orderly disposition of a decedent's property at death" were substantial³⁵¹ and the reach of the statute was not unnecessarily broad,³⁵² the Court upheld, in a sharply divided opinion, the distinction between classes of 'illegitimate' children.³⁵³

The statute in *Nguyen* required proof of the biological connection between child and citizen parent.³⁵⁴ For citizen mothers, proof consisted of little more than giving birth.³⁵⁵ Nonmarital children of citizen *fathers* had to show the blood relationship by clear and convincing evidence, but they also had to do more.³⁵⁶ These add-ons included a choice of legitimization, acknowledgment of paternity, or adjudication by a competent court, which had to occur before the child's eighteenth birthday.³⁵⁷ Unfortunately for *Nguyen*, his citizen father did not obtain the order of parentage from a state

344. *Id.* at 171-72.

345. *Id.* at 174-75. In *Trimble v. Gordon*, 430 U.S. 762 (1977), Justice Powell insisted that although he was aware of the need to be sensitive to "lurking problems . . . [of] proof of paternity," these difficulties should not be "made into an impenetrable barrier that works to shield otherwise invidious discrimination." *Id.* at 771 (citing *Gomez v. Perez*, 409 U.S. 535, 538 (1973)). In *Trimble*, the Court ruled that the Illinois Probate Act which allowed intestate succession for nonmarital children only through their mothers, was unconstitutional. *Id.*

346. 439 U.S. 259 (1978).

347. *Id.* at 269.

348. *Id.* at 268.

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.* at 271-73.

353. *See, id.* at 276 (Blackmun, J., concurring in judgment); *see also id.* at 278-79 (Brennan, J., dissenting, on the grounds that this was an unjustified departure from the principles of *Trimble* which would be most likely to exclude the most involved fathers who took care of their children without the necessity of a paternity suit against them.)

354. *Id.*

355. *Id.*

356. *See* 8 U.S.C. § 1409(a) (1988).

357. *Id.*

court (based on DNA testing), until the son was already twenty-eight years old.³⁵⁸ Mr. Boulais had, in fact, complied with every condition in the statute, other than the timing of the adjudication of his biological connection to his son.³⁵⁹

In the absence of special considerations such as the need for orderly disposition of an estate, the passage of time is unimportant.³⁶⁰ As the dissent observed, DNA testing is as accurate after the age of eighteen as it is prior to that time.³⁶¹ The Court's analysis in *Nguyen* displays the same crude, overbroad approach to problems of proof of paternity that it condemned in *Weber*. Just as Louisiana exaggerated the problems of proof under its own statutory scheme, so did Congress.

The second purported governmental purpose in *Nguyen*, the 'opportunity' rationale, is more important for the purposes of this article's exploration of the intersection of the personal relationship and public fisc cases. The *Nguyen* Court explicitly eschews any extra deference based on the subject matter of immigration,³⁶² and instead addresses the "basic biological differences" between women and men.³⁶³ In theory, therefore, *Nguyen* is an application of the heightened scrutiny that gender-based distinctions merit.³⁶⁴ The "important governmental interest" presented by the government in its briefs and emphasized above all other interests was

the determination to ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States.³⁶⁵

According to the majority, the 'opportunity' to develop such a meaningful relationship between a citizen mother and her child born overseas is automatic, given the fact of birth itself; that is, there is an "initial point of contact" which provides that chance ('opportunity') to develop the requisite "real, meaningful relationship."³⁶⁶

358. *Nguyen*, 533 U.S. at 80-81 (O'Connor, J., dissenting).

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.* at 72-73.

363. *Id.* at 73.

364. See, e.g., *id.* at 60.

365. *Id.* at 64-65.

366. *Id.* at 65.

The biological fact of birth, however, does not create this same opportunity for a citizen father, who may not be present at the birth or even know about it.³⁶⁷

For the narrow majority in *Nguyen*, Justice Kennedy also opined that Congress did not have to ignore the 'reality' of the millions of American men in the armed services who travel to foreign countries and who may not even know about children that they leave behind.³⁶⁸ That reality seemed to include a Johnny-Appleseed-like vision of American servicemen spreading their progeny throughout the world. Justice Kennedy observed that in 1969 when *Nguyen* was conceived, there were almost 3.5 million active duty military personnel, mostly men, and more than one million of them were stationed in foreign countries.³⁶⁹ Even in 1999, there were more than 250,000 military personnel overseas.³⁷⁰ He also noted that civilian travel also creates the potential for unknown American-sired children throughout the world.³⁷¹ Congress did not have to ignore the 'reality' that the father might sow his seed but never even know about the birth of his child or meet his offspring.

With no biologically determined "initial point of contact" with the child, there is no necessary opportunity for a man to develop a relationship with his offspring. While the "mother and child reunion" is apparently "only a motion away,"³⁷² the nonmarital father's contact with his child is assumed to be unlikely. Even if genetic testing proves the fact of paternity, according to the majority in *Nguyen*, Congress may demand more, defined as an 'opportunity' to develop a relationship that automatically 'arises' out of the mother-child bond of birth.³⁷³ The Court's reasoning rejected any notion that this was merely a stereotype of the difference between men and women, insisting rather that it reflected the 'enduring' differences between men and women that Justice Ginsburg celebrated in the VMI military academy case.³⁷⁴

The second part of the equal protection inquiry is whether the means chosen substantially promote the asserted important governmental interest. The *Nguyen* majority skates over what the dissent identifies as another real problem in its analysis: an

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*

372. Paul Simon, *Mother and Child Reunion*, on PAUL SIMON (Warner Bros. 1972).

373. 533 U.S. at 68.

374. *Id.* (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

unsatisfactory fit between the means and the end.³⁷⁵ The Court finds the fit between a "policy which seeks to foster the opportunity for meaningful parent-child bonds to develop" and "the governmental interest in the actual formation of that bond" to be "almost axiomatic."³⁷⁶ The "basic biological differences" between men and women, "such as the fact that a mother must be present at birth but the father need not be," convinced the majority that the congressional scheme did not violate equal protection.³⁷⁷ The dissent, however, questioned why the 'opportunity' was more important than the developed reality.³⁷⁸ Where was the sex neutral alternative that is appropriate under heightened scrutiny? Why did Congress fail to focus on the opportunity for a relationship that each parent might have, depending on the circumstances? These omissions suggested to Justice O'Connor that Congress had relied on just the sort of stereotypical thinking that the gender equal protection cases condemn: that mothers always care about their children, while unmarried fathers typically do not.³⁷⁹

Mr. Boulais, much like Peter Stanley, had "sired and raised" his son.³⁸⁰ As such, the State could not have removed the boy when he was under the age of eighteen from his father's custody without the same fitness hearing that would be afforded an unmarried mother or married parents. Like Mr. Caban, Boulais had stepped forward in the years of his son's minority and developed a relationship with him, and the state could not have dispensed with his consent if another man had tried to adopt his young child.³⁸¹ Mr. Boulais' biological parentage created "an opportunity that no other male possesses to develop a relationship with his offspring."³⁸² Nonetheless, the *Nguyen* Court did not examine whether Mr. Boulais seized that opportunity (because he clearly had). Rather, the majority emphasized the 'opportunity' of a child's mother, present at birth, to develop such a relationship.³⁸³ It held that Congress could focus solely on that potentiality and ignore the reality of a biological father's developed relationship with his son.³⁸⁴ Amazingly, the Court did so without invoking any special deference,

375. *Id.* at 84-91 (O'Connor, J., dissenting).

376. *Id.* at 70.

377. *Id.* at 73.

378. *Id.* at 84 (O'Connor, J., dissenting).

379. *Id.* at 89.

380. See discussion of *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), *supra* pp. 49-53.

381. See discussion of *Caban v. Mohammed*, 441 U.S. 380, 392-93 (1979), *supra* pp. 56-60.

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

383. *Nguyen*, 533 U.S. at 64-68.

384. *Id.* at 66-70.

due to the federal government's control over immigration, and without admitting to any dilution of the Court's previous equal protection jurisprudence, concerning either gender or illegitimacy.³⁸⁵

In one sense, the *Nguyen* 'opportunity' argument rejects mere biology as a rationale, but in another, deeper sense, it embraces it. Just as the citizen mother's rights are determined by mere biology, so too are the citizen father's. For her, all she needs is birth and, *ipso facto*, the 'opportunity' for a relationship; for him, birth alone prevents him from proving that he had a real relationship with his nonmarital child. Despite the "exceedingly persuasive" burden that the government should have met in order to justify this gender-based distinction, the Court accepted this post-hoc explanation rather easily.³⁸⁶ Thus, the opinion is consistent with the unmarried father public fisc cases and their general tendency to afford biology the dominant role when the question concerns preserving public goods.

IV: 'BIOLOGY PLUS' OR BIOLOGY ALONE?: THE APPARENT PARADOXES OF NONMARITAL PATERNITY

A New York family court case encapsulates the apparent paradox of 'biology plus' versus biology *simpliciter* in the jurisprudence of unmarried fathers.³⁸⁷ "In a classic situation of the right hand not knowing what the left hand is doing," two units of the Orange County Social Services Department in New York State initiated contradictory proceedings.³⁸⁸ Robert S. had a nonmarital relationship with Dawn H., which led to the birth of a child on February 26, 2000.³⁸⁹ Allegedly, when he was told of Dawn's pregnancy, Robert urged her to "have an abortion, to give the child up for adoption or to sell the child."³⁹⁰ As a result, Dawn ended her relationship with Robert in her third month of pregnancy.³⁹¹ When she gave birth, Dawn told the social worker at the hospital that she was prepared to relinquish her parental rights and have the child adopted.³⁹² The baby was placed in foster care, the mother signed relinquishment papers, and the social worker then sent Robert a

385. *Id.* at 71-73.

386. When heightened scrutiny is applied, the state's rationale must be genuine, not offered as an after-the-fact invented justification in the face of litigation. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

387. *Robert S. v. Orange County Dep't of Soc. Serv.*, 725 N.Y.S. 2d 183 (Fam. Ct. 2001).

388. *Id.* at 185.

389. *Id.* at 184.

390. *Id.*

391. *Id.*

392. *Id.*

notice dated March 15, 2000, which he received but ignored.³⁹³ When the surrender instrument was approved, Dawn's parental rights were ceded to the Department of Social Services, which took custody and guardianship and placed the child in a pre-adoptive home.³⁹⁴ Less than two months later, however, the Support Collection Unit of the same department filed a petition to have Robert adjudicated to be the child's father.³⁹⁵ Robert denied paternity, but after blood tests showed a high probability that he was indeed the father, he withdrew his denial and admitted paternity.³⁹⁶ When the Department realized the mix-up, it withdrew its paternity petition, but then Robert requested a permanent order of support.³⁹⁷

The court adjudicated Robert to be the father on October 19, 2000, and along with his sister, he filed for custody of the child.³⁹⁸ In this proceeding, the family court held that Robert had forfeited his opportunity interest in developing a relationship with his biological child³⁹⁹ and that Robert had not responded to the biological mother's announcement of her pregnancy or to the notice he received from the Department of Social Services about the proceeding to approve the surrender instrument.⁴⁰⁰ When a different unit of the agency accidentally summoned Robert to court, he first denied paternity and then admitted it.⁴⁰¹ By this time, the child was over six months old.⁴⁰² The court further found it "telling" that it was Robert's sister who sent the child letters and gifts, and that she apparently was childless and had some interest in adopting the child herself. The court also emphasized other 'facts' showing that Robert had no personal contact with his biological child, nor had he displayed any great interest in the infant in the first six months.⁴⁰³ The net result of the court's analysis was that it upheld the surrender, ruled that "care, custody and guardianship" remained with the Department of Social Services, and dismissed Robert's petition.⁴⁰⁴ While the court would have adjudicated Robert a father on pure biology if the Department of Social Services had persisted

393. *Id.* at 184-85.

394. *Id.* at 185.

395. *Id.*

396. *Id.*

397. *Id.*

398. *Id.*

399. *Id.* at 187.

400. *Id.* at 186.

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.* at 188.

with its support effort, biology alone was not enough to ripen Robert's inchoate interest into a recognized interest in a personal relationship with his biological child.⁴⁰⁵

Like the conflicting actions by social services in Robert's case, the apparently paradoxical judicial doctrines on unmarried fathers represent two sides of the same coin: the state's enforcement of the prevailing model of the private family. Family law has been aptly described as the most private of public law and the most public of private law.⁴⁰⁶ Both the relationship, 'biology plus' line of cases and the public fisc, biology alone line of cases rest on a vision of the perfect, private family in which an identifiable man (or substitute for him) takes financial responsibility for his children. Individual rights and public policy are modeled on that same view. This makes some sense, but it also incorporates a punitive and coercive approach to the legal treatment of unmarried women and their children, and it entirely fails to consider other possibilities that might recognize a broader societal responsibility for the welfare of children.

Currently, policymakers in Washington are pursuing paternity establishment requirements with increased vigor, using a biological determinist model of private responsibility.⁴⁰⁷ At the same time, state courts and legislatures are feeling their way through the implications of the 'biology plus' requirement for relationship issues in the nonmarital family.⁴⁰⁸ States must engage in *Lehr* line-drawing and resolve the problem of the 'thwarted father' who does not fit easily into the *Lehr* paradigm.

A. The Public Fisc and Paternity Establishment: Biology Reigns

Ever since 1975, with increasing vehemence, federal policy has encouraged and, indeed, coerced the identification of the biological fathers of nonmarital children.⁴⁰⁹ This trend began with the amendments to the Social Security Act of 1974 and related legislation.⁴¹⁰ These legislative changes followed a period of extraordinary growth in the welfare rolls in the 1960s, an increase

405. *Id.* at 187.

406. MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA xi-xii (1985).

407. For a discussion of how biological relationships affect the welfare system, in particular TANF, see Anne Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121 (2002).

408. See *infra* Part I.

409. See, e.g., Smith, *supra* note 407, at 143-44; see also Fontana, *supra* note 202, at 369-77 (delineating the history of the cooperation requirement).

410. Smith, *supra* note 407, at 143-44.

fueled more by political than economic factors.⁴¹¹ In contrast to the slow growth of the prosperous postwar 1950s, the increases in the welfare rolls accelerated significantly in the 1960s.⁴¹² The characteristics of families on welfare were also changing: many of the additional families receiving public assistance were concentrated in five heavily populated urban counties.⁴¹³ At the same time, black families began to overtake the predominantly white families that characterized the program in the beginning.⁴¹⁴

In their famous exposé, Frances Fox Piven and Richard A. Cloward attributed this striking increase to political influences rather than to any economic downturn, the purported attractiveness of increased benefit levels, or the supposed crisis in "the Negro family."⁴¹⁵ In their view, "expansion of the welfare rolls was a political response to political disorder. Moreover, it was a matter of black politics."⁴¹⁶ The political context of the mid-1960s included the modernization of Southern agriculture, a great migration of black families to the cities, the creation of a political base there, and unprecedented rioting and civil disorder.⁴¹⁷ The National Welfare Rights Organization created a militant grassroots movement of the poor that challenged the multitude of harassing welfare regulations and restrictions.⁴¹⁸ They were aided in this effort by community activists and professionals for whom the Great Society's local programs created opportunities and leverage to help people get the relief to which they were entitled.⁴¹⁹

Legal decisions, no doubt, also contributed to this trend. For example, in 1968 and 1970, the Supreme Court declared that "substitute father," man-in-the-home restrictions had no statutory authorization.⁴²⁰ The Court also declared that state residency requirements for receiving assistance violated the right to travel

411. FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* 198 (2d ed. 1993).

412. In the 1950s, public assistance rolls increased by seventeen percent, but between December 1960 and February 1969, 800,000 additional families swelled the rolls, an increase of 107% in little more than eight years. *Id.* at 183.

413. *Id.* at 185.

414. *Id.* at 193-94.

415. *Id.* at 189.

416. *Id.* at 198.

417. *Id.*

418. *Id.* at 320-30.

419. *Id.*; see also William E. Forbath, *Constitutional Welfare Rights: A History, Critique, and Reconstruction*, 69 *FORDHAM L. REV.* 1821, 1850-55 (2001) (describing NWRO and the welfare rights movement).

420. *King v. Smith*, 392 U.S. 309, 311 (1968).

and were unconstitutional.⁴²¹ In addition, by the early 1960s, scholars, practitioners, and activists had laid the legal groundwork for procedural due process protections for recipients of public assistance. In two famous articles, Professor Charles Reich promulgated his theory of the 'new property' in government entitlements of various kinds.⁴²² Legal services attorneys and the National Welfare Rights Organization led a campaign which culminated with the 1970 ruling that "when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process."⁴²³ The *Goldberg* ruling, in turn, created a veritable cottage industry of 'fair hearings' at which AFDC beneficiaries could represent themselves or be represented by legal aid attorneys or welfare rights organizers.⁴²⁴

As the economy faltered in the 1970s, however, and the political environment and the personnel on the Court changed,⁴²⁵ a conservative backlash gathered force.⁴²⁶ On one hand, the 1970s was the time of the "newer equal protection"⁴²⁷ when the Court afforded more recognition to the rights of nonmarital children and

421. *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969).

422. See Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964); Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1966).

423. *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

424. See Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 148 n.1073 (1984) (noting an increase in requests for hearings after *Goldberg*); see also *The Supreme Court, 1969 Term: Right to Hearing Before Termination of Welfare Payments*, 84 HARV. L. REV. 100 (1970) (analyzing *Goldberg*); Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975) (discussing the due process explosion since *Goldberg*); Project, *Procedural Due Process and the Welfare Recipient: A Statistical Study of AFDC Fair Hearings in Wisconsin*, 1978 WIS. L. REV. 145, 160-69 (analyzing the impact of *Goldberg* on fair hearings).

425. Warren Burger became Chief Justice in 1969; Justices Blackmun, Powell, and Rehnquist took the bench in the early 1970s; Justice Stevens joined in 1975; and Justice O'Connor joined in 1981. *Members of the Supreme Court of the United States*, at <http://www.supremecourtus.gov/about/members.pdf>.

426. Joanna Brenner argues that welfare policy in the period of the early 1970s was at a 'stalemate': economic pressure on corporate profits led to attacks on the bloated bureaucracy and to state-based taxpayer revolts; while this put a halt to any expansion in welfare, liberal interests and an "organized social welfare lobby" could only temporarily contain the attacks. Johanna Brenner, *Towards a Feminist Perspective on Welfare Reform*, 2 YALE J.L. & FEMINISM 99, 115 (1989).

427. Gerald Gunther, *The Supreme Court, 1971 Term Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) (coining the term).

nonmarital parents.⁴²⁸ On the other hand, it was also a predecessor period of so-called 'welfare reform.' The 1974 amendments to the Social Security Act were "explicitly sold on the basis of reducing welfare costs and caseloads."⁴²⁹ Among other provisions, the legislation required mothers on AFDC to 'cooperate' in establishing paternity for their nonmarital children.⁴³⁰

With the election of Ronald Reagan and the advent of a Republican Congress in 1980, AFDC came under heightened attack, and the interest in paternity establishment grew correspondingly.⁴³¹ The 1988 Family Support Act required states to establish paternity in "a certain percentage of cases of children receiving AFDC or child support services" and provided federal funds to pay ninety percent of the cost of paternity establishment.⁴³² By 1986, according to the Supreme Court in *Bowen v. Gilliard*, more than 1.5 million paternity establishments were achieved, with 3.5 million child support orders and \$6.8 billion worth of collections "on behalf of children in AFDC families."⁴³³

In 1996, Congress enacted a major departure in federal welfare policy⁴³⁴ designed in the words of President Clinton to "end welfare

428. See, e.g., *N.J. Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973) (holding that a New Jersey public assistance program, which confined benefits to children in households with ceremonially married parents and therefore denied benefits to nonmarital children, violated the Equal Protection Clause). Justice Rehnquist dissented from the per curiam opinion on the grounds that it was rational for the New Jersey legislature to target certain kinds of family units that it was trying to protect. *Id.* at 621-23 (Rehnquist, J., dissenting).

429. Joel F. Handler, *The Transformation of Aid to Families with Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457, 510 (1987-1988). The 1974 amendments "required the federal government to pay seventy-five percent of the costs of establishing paternity, locating absent fathers, and collecting child support" and "authorized the use of IRS data to aid in collecting support for AFDC recipients." *Id.*

430. Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337, 2359 (1975); see also S. REP. NO. 93-1356, at 52 (1974), reprinted in 1974 U.S.C.A.N. 8133, 8155 (establishing cooperation requirement for AFDC eligibility).

431. See Brenner, *supra* note 426, at 116 (noting that the Omnibus Budget Reconciliation Act of 1981 (OBRA) succeeded in cutting the welfare rolls by eight percent in just one year).

432. Handler, *supra* note 429, at 510; see Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343, 2348-50 (1988).

433. *Bowen v. Gilliard*, 483 U.S. 587, 603 n.19 (1987). This does not necessarily mean that children benefitted. In *Bowen*, for example, the Supreme Court approved an "income deeming rule" for the family filing unit which netted many families less income than if they had not requested benefits for the children whose fathers were voluntarily paying child support. *Id.* at 594. In *Blessing v. Freestone*, the Court declined to permit individuals to use the civil rights statute, 42 U.S.C. § 1983, to enforce benefits under Title IV-D. 117 U.S. 329, 348 (1997). Taken together, these cases protected the interests of the state, but not those of poor children.

434. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended at 42 U.S.C. § 1305 (2000))

as we know it."⁴³⁵ Paternity establishment was a critical element of this reform, which one commentator described as moving all states toward "a common set of paternity establishment protocols,"⁴³⁶ "through a combination of substantive requirements and financial penalties/incentives."⁴³⁷

Section III of PRWORA is designed to promote male responsibility through more effective establishment of legal paternity, entering of child support orders, and tougher enforcement of those orders.⁴³⁸ Establishment of paternity is touted as a critical link to alleviating child poverty through child support orders.⁴³⁹ Under PRWORA, states are required to have an in-hospital 'voluntary' paternity establishment procedure which has the force of a legal adjudication.⁴⁴⁰ Paul Legler believes that this requirement reflects the reality that the time to strike while the iron is hot is at the birth itself, when many unmarried fathers are still involved in

[hereinafter PRWORA]. The Ninth Circuit described the significance of the changes as follows:

PRWORA signaled a major shift in welfare law and policy, jettisoning the old Aid to Families with Dependent Children ("AFDC") program in favor of TANF TANF was intended to increase the flexibility of States in operating welfare programs by shifting administration of welfare benefits almost entirely from the federal government to the states.

Navajo Nation v. Dep't of Health & Human Serv., 325 F.3d 1133, 1134-35 (9th Cir. 2003). "In order to receive funds under TANF, states must submit a plan and apply for block grants In other words, TANF is simply a pass-through program that funnels federal money to states for state-run welfare programs." *Id.* at 1135 (citing 42 U.S.C. §§ 602-03).

435. Francis X. Clines, *Clinton Signs Bill Cutting Welfare; States In New Role*, N.Y. TIMES, August 23, 1996, at A1. The 1996 law replaced AFDC with TANF and devolved the federal program into block grants, which the states could run more flexibly. Operation of these grants is subject to the broad purposes of the Act, including work programs and a time limitation on welfare payments. *Id.* Peter Edelman, a key advisor in Clinton's Department of Health and Human Services (and husband of Marian Wright Edelman of the Children's Defense Fund), resigned after Clinton signed off on the largely conservative-fashioned and much-criticized (in liberal circles) welfare bill. See Brendon O'Connor, *The Protagonists and Ideas Behind the Personal Responsibility and Work Opportunity Reconciliation Act of 1996: The Enactment of a Conservative Welfare System*, 28 SOC. JUST. 4, 6-7 (2001) (reporting on interviews with protagonists of the welfare reform battle).

436. Paula Roberts, *Biology and Beyond: The Case for Passage of the New Uniform Parentage Act*, 35 FAM. L.Q. 41, 46 (2001) [hereinafter Roberts, *Biology and Beyond*].

437. *Id.*

438. See PRWORA, *supra* note 434, § III.

439. See Paul K. Legler, *The Impact of Welfare Reform on the Child Support Enforcement System*, in CHILD SUPPORT: THE NEXT FRONTIER 46, 47 (J. Thomas Oldham & Marygold S. Melli eds., 2000). Legler is the Assistant Commissioner of the Office of Child Support Enforcement, U.S. Department of Health and Human Services. *Id.* at 58. He characterizes PRWORA's child support approach as a revolution that includes an "increased focus" on paternity establishment. *Id.* at 57. He anticipates striking results, including more child support orders, better enforcement, and ultimately "soaring[ing]" collections. *Id.*

440. 42 U.S.C. § 666(a)(5)(C) (2002).

a relationship with the mother.⁴⁴¹ In addition to this voluntary program, states must have simple administrative procedures for ordering genetic testing.⁴⁴² States are required to have procedures for paternity establishment up to age eighteen, and the federal government picks up a significant percentage of the laboratory and other costs of the procedure.⁴⁴³ The longstanding requirement that mothers 'cooperate' in identifying nonmarital fathers continues, with the states having more flexibility to define 'cooperation,' but only in a stricter sense.⁴⁴⁴ Non-cooperation with paternity establishment carries an even bigger price tag than before: welfare recipients (read: women) who do not cooperate with the state in establishing paternity lose at least twenty-five percent of their (read: their children's) monthly cash assistance.⁴⁴⁵ A state's success in paternity establishment directly affects the 'incentive' funding it gets from the federal government.⁴⁴⁶

Paternity establishment has long been a feature of efforts to control welfare costs. In PRWORA, this strategy plays an enhanced role that, along with other reforms, carries the conservative hopes and dreams that the welfare problem will go away by privatizing the problem and by removing people in need from visibility. Thus, in evaluating the 'success' of the 1996 change, supporters point with pride to paternity statistics: the Office of Child Support Enforcement (OCSE) reported that "paternity was established or acknowledged for over 1.5 million children in fiscal year 2002, a 3.2% decrease from fiscal year 2001."⁴⁴⁷ Of this number, 46% were

441. See Legler, *supra* note 439, at 47-48.

442. *Id.* at 48-49. There is a presumption of paternity based on genetic test results. *Id.* at 49.

443. *Id.* at 48-49; see also PRWORA, *supra* note 434.

444. See, e.g., Mark Matthew Graham, *Domestic Violence Victims and Welfare 'Reform': The Family Violence Option in Illinois*, 5 J. GENDER RACE & JUST. 433, 450 (2002); Fontana, *supra* note 202, at 374-80 (describing the problems created when domestic violence is present and a waiver of cooperation for good cause is requested).

445. Legler, *supra* note 439, at 49.

446. The incentive formula is a complex one which also involves other factors. The Child Support Performance and Incentive Act of 1998, Pub. L. No. 105-200, 112 Stat. 645 (1998), reformed federal incentive payments for an effective child support program by requiring a performance-based incentive system.

447. Dep't of Health & Human Serv., Child Support Enforcement (CSE) FY 2002 Preliminary Data Report (April 29, 2003), available at http://www.acf.hhs.gov/programs/cse/pubs/2003/reports/prelim_datareport/ [hereinafter CSE Report]. *Hearing on Child Support Enforcement Legislation Before the United States Senate Comm. On Finance*, 107th Cong. 3 (2003) (testimony of Marilyn Ray Smith, Deputy Commissioner and IV-D Dir., Child Support Enforcement Div., Massachusetts Dep't of Revenue), available at <http://finance.senate.gov/hearings/testimony/2003test/031203mstest.pdf> [hereinafter Smith Testimony].

There has been a similar increase in paternity establishments nationwide. In 1994, states established paternity for just 659,000 children. Each year since 1999, states have established paternity for approximately 1.6 million children per year. As states work through

Title IV-D (public assistance) "legal paternity establishments," and around 55% were in-hospital or other similar paternity acknowledgments.⁴⁴⁸ The OCSE reported that the increase in paternities established was "largely due to the in-hospital paternity acknowledgment program."⁴⁴⁹ Paternity establishment is supposed to yield enhanced child support collections, presumably for the benefit of children.⁴⁵⁰ That assumption is questionable at best. The OCSE reported that of the accumulated \$90 billion worth of arrears in child support, about half of the debt submitted for enforcement is owed to state governments to reimburse prior welfare costs; only the other half is owed to families.⁴⁵¹ Even this figure has to be evaluated in light of another fact: "about 2/3 of the debt and about 2/3 of the people who owe it earned less than \$10,000 last year."⁴⁵² In other words, much of this debt is realistically uncollectible and will bring no benefit to poor children.

Although paternity establishment clearly is driven by welfare concerns, its proponents also insist that it is about more than mere money. In testimony before Congress about the reauthorization of PRWORA, a director of Massachusetts' welfare program claimed that "the heart follows the money," that is, fathers who pay support "are more likely to make an emotional commitment to their children."⁴⁵³ By that rationale, in-hospital paternity establishment and "effective child support enforcement" yield a relationship as well as a monetary payoff.⁴⁵⁴

the backlog of establishing paternity for older children, however, this number is likely to decline in the future, making it difficult for states to maintain paternity establishment rates of ninety percent — the current standard. Since 1994, states have helped more than ten million children make a binding legal connection with their fathers. *Id.*

448. See CSE Report, *supra* note 447. Although the Office of Child Support Enforcement (OCSE) reported that the distribution of its services is changing in general, the strong welfare tie still exists. The OCSE bragged that "the child support enforcement program is becoming less a revenue stream to reimburse governments for welfare expenditures, and more a source of income for families," to the tune of 89% of the collections in 2002. *Id.* The "largest group" of the clients they served, or 46%, were "welfare leavers," relying on those payments to "prevent them from becoming welfare 'returners.'" *Id.* In other words, to the extent that the program helps those not actually on welfare, it is still directed toward the near-poor, those teetering on the edge, or those just recently ejected from the public assistance rolls. *Id.*

449. *Id.*

450. *Id.*

451. *Id.*

452. *Id.*

453. Smith Testimony, *supra* note 447, at 7. This connection was important to the Deputy Commissioner because she believed that "there is no longer any debate that responsible father involvement has a significant positive impact on child well-being." *Id.*

454. The data on the correlation between payment of support and relationship measures such as visitation has been mixed in general. See Judith A. Seltzer, *Child Support and Child*

It is clear that child support enforcement, and, therefore, the interest in paternity establishment, are closely tied to public fisc concerns about welfare recipients, welfare "leavers," or those on the edge. Paternity establishment lies at the conjunction of concerns about the public fisc, the notion that children's welfare should be ensured chiefly through the mechanism of the private family, and the idea that, for the purpose of financial responsibility, family is defined by biology alone.⁴⁵⁵ The quick establishment of a paternal relationship has the primary effect of fixing financial responsibility within a normative private family with a father who supports his children, and the secondary effect of mooting any relationship issues between these fathers and children. Once a father, always a father, for all purposes.

B. The Unmarried Father's Opportunity Interest in Developing a Personal Relationship: "Biology Plus" After Lehr

i. Contemporary Context: The Supreme Court Declines to Get Involved

In contrast to the clear direction of public policy on paternity establishment, since *Lehr v. Robertson*,⁴⁵⁶ the Supreme Court has yet to fill in the contours of 'biology plus' and the opportunity interest acknowledged in that case. This has left state courts and legislatures (and the Uniform Commissioners) with the job of defining an unmarried father's 'right' to seize the opportunity created by biology and transform it into something more. In particular, it is unclear what should happen when the facts are outside of the status quo paradigm, including stepfather adoptions where children continue to live with their biological mothers. What happens when the biological mother instead chooses to surrender her parental interests to a proposed new private family, which

Access: *Experiences of Divorced and Nonmarital Families*, in CHILD SUPPORT: THE NEXT FRONTIER 69, 70-72 (J. Thomas Oldham & Marygold S. Melli eds., 2000). The Massachusetts Deputy Commissioner also testified that her own state's experience had shown that while fathers are often "romantically involved" with mothers at the time of the birth of their non-marital children, they tend to "drift away" later. Smith Testimony, *supra* note 447, at 7. This observation underscores the advice to strike while the iron is hot. See Legler, *supra* note 439, at 47.

455. See PRWORA, *supra* note 434.

456. 463 U.S. 248 (1983).

comes complete with new mother and new father? What kind of notice is due the putative father, under which circumstances can he withhold his consent and block the adoption, and with what result?

In *Lehr*, a case involving a stepfather adoption, the Court approved the failure to provide notice of a pending adoption to a man who had not entered his name in New York's putative father registry.⁴⁵⁷ The majority characterized him as a reluctant father who had not stepped forward to grasp the opportunity presented by biology.⁴⁵⁸ Thus, another man could replace him without his consent, reaffirming a unitary family without his participation.⁴⁵⁹ The dissenters in *Lehr* believed that Mr. Lehr was not a reluctant father at all, but rather a thwarted father deprived of his opportunity to turn biology into 'biology plus,' thereby creating a constitutional right to withhold consent.⁴⁶⁰ Subsequent to *Lehr*, and after two infamous failed adoption cases in the early 1990s and the promulgation of the Uniform Adoption Act in 1994,⁴⁶¹ putative father registries spread. These registries served as a mechanism for separating the wheat from the chaff, the reluctant from the thwarted, mere biology from 'biology plus.' Moreover, they were endorsed by the 2000 version of the Uniform Parentage Act.⁴⁶² At least twenty-eight states have some form of a putative father registry that provides notice to registrants and an opportunity to be heard in court. In contrast, men who fail to register or perform any of the specified parenting behaviors do not receive these procedural protections.⁴⁶³

457. *Id.* at 264.

458. *See id.* at 267-68.

459. *Id.*

460. *Id.* at 269, 274 (White, J., dissenting).

461. *See* UNIF. ADOPTION ACT, 9 U.L.A. 11 (1994).

462. UNIF. PARENTAGE ACT §§ 401-23, 9B U.L.A. 295, 321-27 (2000) (last amended or revised in 2002), available at <http://www.aaml.org/Articles/2000-11/UPA%20FINAL%20TEXT%20WITH%20COMMENTS%20.htm> (last visited Jan. 6, 2004). The National Conference of Commissioners on Uniform State Laws (NCCUSL) convened in 1997 to draft the 2000 version of the Uniform Parentage Act (UPA). Roberts, *Biology and Beyond*, *supra* note 436, at 43. The new UPA subsumes and replaces the previous Uniform Putative and Unknown Fathers Act of 1988 and the Uniform Status of Children of Assisted Conception Act of 1988. *Id.* The UPA also contains all provisions necessary to be "eligible for federal funding for their child support and TANF programs." *Id.* Roberts reported that the 2000 UPA version was endorsed by leading organizations such as the Family Law Section of the American Bar Association, the American Academy of Matrimonial Lawyers, the National Child Support Enforcement Association, the Eastern Regional Interstate Child Support Association, the Academy of American Adoption Attorneys, and the Organization of Parents Through Surrogacy. *Id.* at 44.

463. *Id.* at 43 n.5, 72-73.

In 1988, around the same time that the Court was considering the *Michael H.* case,⁴⁶⁴ it also heard oral arguments in a California adoption case.⁴⁶⁵ This dispute involved the ultimately unsuccessful efforts of an unmarried father, who claimed to be thwarted in his parenting efforts, to block the adoption of his child by strangers.⁴⁶⁶ In the end, the Court avoided the potential equal protection and due process issues, dismissing the case "for want of a properly presented federal question."⁴⁶⁷ In the 1990s, the Supreme Court again avoided getting involved: it refused to intervene in two highly publicized failed adoption cases, the "Baby Jessica"⁴⁶⁸ and "Baby Richard"⁴⁶⁹ controversies. In both cases, thwarted unwed fathers successfully claimed parentage and custody of children who had spent the first few years of their lives in adoptive homes. The facts of the "Baby Jessica" case were disputed, and neither party's hands were entirely clean.⁴⁷⁰ The little girl's dilemma became a focus of media attention, ending with her on the cover of *Newsweek Magazine*.⁴⁷¹ She became a veritable poster girl for the conflict between birth parents and the fathers' rights movement versus adoptive parents and children's rights advocates.⁴⁷² The Iowa Supreme Court (where

464. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

465. *McNamara v. City of San Diego Dep't of Soc. Serv.*, 488 U.S. 152 (1988).

466. *In re Baby Girl M.*, 688 P.2d 918 (Cal. 1984) (in bank), *aff'd*, 236 Cal. Rptr. 660 (Cal. App. 4th Dist. 1987), *dismissed sub nom. McNamara v. City of San Diego Dep't of Soc. Serv.*, 488 U.S. 152 (1988). The California Supreme Court's remand to the trial court was based on state law. See *In re Baby Girl M.*, 688 P.2d 918 (Cal. 1984) (in bank). On remand, the trial court considered itself precluded from addressing the constitutional issues. *In re Baby Girl M.*, 236 Cal. Rptr. 660, 663 n.2 (Cal. App. 4th Dist. 1987). But see *id.* at 667-70 (Work, J., concurring) (discussing constitutional issues raised in *Elizabeth Buchanan, The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson*, 45 OHIO ST. L.J. 313 (1984)).

467. *McNamara*, 488 U.S. at 152. Appellants questioned whether it violated equal protection "to terminate the parental rights of an unwed father who promptly manifested a significant parental interest in his child and would be a good parent" solely on the grounds of "best interests of the child," and without any finding adverse to his parenting skills (in contrast to other fathers or unwed mothers). Brief for Appellant, *McNamara v. City of San Diego Dep't of Soc. Serv.*, 1988 WL 1026144 (1988). Appellee questioned, *inter alia*, whether the Court even had jurisdiction when, it alleged, the California Supreme Court had "remand[ed] the case to the trial court on state law issues only," and the Appellant had waited to raise constitutional claims until too late in the appellate process. Brief of Appellee, *McNamara v. City of San Diego Dep't of Soc. Serv.*, 1988 WL 1026151 (1988).

468. *In re Baby Girl Clausen*, 502 N.W.2d 649 (Mich. 1993).

469. *In re Doe*, 638 N.E.2d 181 (Ill. 1994), *cert. denied*, 513 U.S. 994; *habeas granted*, *In re Kirchner*, 649 N.E.2d 324 (Ill. 1995), *cert. denied*, 515 U.S. 1152 (1995).

470. *In re Baby Girl Clausen*, 502 N.W.2d 649 (Mich. 1993).

471. Michele Ingrassia & Karen Springer, *She's Not Baby Jessica Anymore*, 1 *NEWSWEEK*, Mar. 21, 1994, at 60.

472. "Baby Girl Clausen" was born to a twenty-eight year old unmarried woman named Cara Clausen who agreed to place the child for private adoption with a Michigan couple, Roberta and Jan DeBoer. Cara named Scott Seefeldt as the father of her baby, and both of them relinquished their rights in an Iowa court proceeding. See *In re Baby Girl Clausen*, 502

the child was born) ruled that Daniel Schmidt, whom the mother had failed to properly identify on the baby's birth certificate, was the biological father, that he had not consented to the adoption, that he was not shown to be unfit, and that he was entitled to physical custody of his daughter.⁴⁷³ The adoptive family, however, went to court in Michigan, where they resided with the girl.⁴⁷⁴ Once the Michigan Supreme Court determined that Iowa had exclusive jurisdiction under the federal Parental Kidnapping Prevention Act (PKPA), the battle was over.⁴⁷⁵ The United States Supreme Court refused to issue a stay of the Michigan jurisdictional order,⁴⁷⁶ and custody of the now two-and-a-half year old girl the Schmidts called "Anna"⁴⁷⁷ was physically transferred to them in a very dramatic and public episode.⁴⁷⁸

"Baby Richard," also known as Danny, was the second child in a two year period whose failed adoption attended by "wrenching factual circumstances . . . arrived on [the] doorstep" of the United

N.W.2d 649, 652 (1993). Although the DeBoers took the girl back to their home in Michigan, adoption proceedings were halted in Iowa after Cara reneged on her identification of Scott and claimed that Dan Schmidt was actually the child's biological father. (Blood tests later confirmed a 99.9% probability of Dan Schmidt's paternity). *Id.*; see Marian L. Faupel, *The "Baby Jessica Case" and the Claimed Conflict Between Children's and Parents' Rights*, 40 WAYNE L. REV. 285 (1994) (written by counsel for Dan and Cara Schmidt, the biological parents); Gregory A. Kelson, *In the Best Interest of the Child: What Have We Learned from Baby Jessica and Baby Richard?*, 33 J. MARSHALL L. REV. 353 (2000).

473. *In re B.G.C.*, 496 N.W.2d 239, 241 (Iowa 1992).

474. *In re Baby Girl Clausen*, 502 N.W.2d 649 (Mich. 1993).

475. *Id.* at 652.

476. *In re Baby Girl Clausen*, 509 U.S. 1301, 1303 (1993) (application for stay denied on grounds that the Michigan Supreme Court correctly ruled that it was obligated to give effect to Iowa orders).

477. Ingrassia & Springer, *supra* note 471, at 60.

478. Geoffrey Cowley et al., *Who's Looking After the Interests of Children?*, NEWSWEEK, Aug. 16, 1993, at 54.

The media frenzy frightened families such as my own. During the height of the Baby Jessica controversy, I asked my pre-teenaged child for an opinion from the perspective of someone who had been adopted. The conflicting views expressed by someone who could visualize a personal connection to the situation demonstrate that the thwarted father-failed adoption conundrum cannot be remedied with simple emotional or legal solutions. My child was angry that the toddler Jessica was being "thrown around like a sack of potatoes" and felt that the adults who created the mess deserved to be "shot." Notes of an Interview, 12/26/93, on file with author. My child was upset with both sets of parents: the birth mother lied about the identity of the birth father, while the birth father failed to support other children and threatened the security of the adoptive family by pressing his claim; the adoptive parents wrongfully obtained premature consent from the birth mother and insisted on dragging the dispute out for more than two years, even though they were aware of the misidentification almost immediately. My child felt that none of the adults behaved properly. It was like the presidential election, a choice between a "liar (Bush), a quitter (Perot), and a loser (Clinton)." *Id.*

States Supreme Court.⁴⁷⁹ The Court twice declined to intervene to change the result of the state court proceedings.⁴⁸⁰ Otakar (Otto) Kirchner was an unidentified biological father who claimed to have been deceived and thwarted of his opportunity interest in developing a relationship with his child.⁴⁸¹ The Illinois Supreme Court agreed and ruled that Otto could not be deprived of his child without a showing that he was unfit.⁴⁸² After an unseemly dispute between the judge who wrote the opinion, a columnist in the Chicago Tribune, and the Governor and state legislature, who unsuccessfully tried to intervene to change the result, the Court ordered that the then three-year-old boy be turned over to his father's custody within seventy-two hours.⁴⁸³ The United States Supreme Court denied a stay of this order, although Justices O'Connor and Breyer dissented from the denial.⁴⁸⁴ Negotiations between the families for a gradual transition collapsed, and "Richard" left his childhood home to become "Danny," amidst a melee of some 200 shouting neighbors.⁴⁸⁵

479. *O'Connell v. Kirchner*, 513 U.S. 1138 (1995) (O'Connor, J., joined by Breyer, J., dissenting) (dissenting from denial of stay application).

480. *Baby "Richard" v. Kirchner*, 513 U.S. 994 (1994); *Doe v. Kirchner*, 515 U.S. 1152 (1995). The Court also refused a stay in *O'Connell v. Kirchner*, 513 U.S. 1138 (1995).

481. *In re Kirchner*, 649 N.E.2d 324, 326-28 (1995). Although the biological parents lived together before the birth of the child and had intermittent plans to marry, they had a troubled relationship and in fact had not married. *Id.* at 326. While Otto Kirchner was overseas visiting ill relatives, Daniella Janikova received a phone call that led her to believe that Otto had married an old girlfriend while he was away. *Id.* Although Otto denied this story over the phone, Daniella told him she did not want to see him again, and she moved out of his apartment and into a women's shelter. *Id.* She made arrangements for a private adoption with the Does. *Id.* The majority and the dissent of the Illinois Supreme Court disagreed over whether the adopting parents and their lawyer knew that Daniella intended to lie to Otto and tell him that the baby had died because she believed he would never consent to the adoption. *Id.* at 326; *id.* at 344-45 (McMorrow, J., dissenting). In any case, Daniella went through with her adoption plans and told Otto that the child had not survived. *Id.* at 327. Eventually, after the baby had been living with the adoptive parents, Otto learned of the deception. *Id.* He also reconciled with Daniella, who apparently had come to regret her decision but had no basis to repudiate it on her own behalf. *Id.* Otto, however, took his battle to the Illinois courts and won. *Id.* at 328. See also Steven R. White, "Baby Richard" FAQ - 1 of 3: Current Events, at <http://www.webcom.com/kmc/adoption/br-faq-1.html> (last visited Jan. 15, 2004) (summarizing the facts of the case).

482. *In re Kirchner*, 649 N.E.2d. at 328. See also *In re Doe*, 638 N.E.2d 181 (Ill. 1994).

483. Mike Robinson, *Biological Parents Take Baby Richard*, AUSTIN AMERICAN-STATESMAN, May 1, 1995, at A9.

484. *O'Connell v. Kirchner*, 513 U.S. 1138 (1995).

485. Robinson, *supra* note 483. The Illinois legislature amended the Adoption Act in reaction to the case, establishing a Putative Father Registry, a best interests of the child custody hearing in disputed adoption proceedings, and "a number of fast-track provisions intended to bring closure to adoption proceedings on an expedited basis." Diane S. Kaplan, *The Baby Richard Amendments and the Law of Unintended Consequences*, 22 CHILD. LEGAL RTS. J. 2 (2002-2003).

By staying out of these cases, the United States Supreme Court left the nation in the dark about the full constitutional dimensions of the unmarried father's 'opportunity interest,' especially in the more troublesome circumstances of a newborn adoption that does not involve stepfather adoption of an older child.⁴⁸⁶ Moreover, neither of these disputes involved a putative father registry scheme, so there is no further guidance beyond *Lehr* for that issue. Both the Iowa court and the Illinois court, however, seem to have assumed that a biological father who proves that he was thwarted and therefore deprived of his opportunity interest in developing a relationship consequently may prevail on biology alone.

In the wake of these two high-visibility state court cases in which mere biology apparently carried the day, the Uniform Commissioners completed their five-year travail on the Uniform Adoption Act (UAA), and many states adopted versions of a putative father registry scheme.⁴⁸⁷ The UAA reasserted the *Caban-Quilloin-Lehr* 'biology plus' approach to personal relationships, even in the context of newborn adoptions that do not allow much of a look-back period during which to measure the quality of an unmarried father's relationship to his child.⁴⁸⁸ The Act reflected its drafters' conclusion that *Lehr* and the earlier cases created a constitutionally sound distinction between notice and consent for unmarried fathers.⁴⁸⁹ While contending that *Lehr's* lesson was that unmarried fathers do not always get notice, the drafters of the UAA promulgated a model Act that was "generally protective of the interests of unwed fathers in receiving notice of a proposed adoption."⁴⁹⁰

486. See *Rothstein v. Lutheran Soc. Serv. of Wis. & Upper Mich.*, 405 U.S. 1051 (1972) (vacated and remanded in light of *Stanley v. Illinois* "with due consideration for the completion of adoption proceedings and the fact that the child has apparently lived with the adoptive family for the intervening period of time"). *Rothstein* involved a putative father who received no notice of the newborn adoption of his child. The Wisconsin Supreme Court's gloss on *Stanley* gave that case a broad reading that protected this unmarried father initially. *State ex rel Lewis v. Lutheran Soc. Serv. of Wis. & Upper Mich.*, 207 N.W.2d 826, 828-29 (Wis. 1973). The father, however, ultimately lost custody after a fitness hearing and a 'best interests of the child' determination. *State ex rel Lewis v. Lutheran Soc. Servs. of Wis. & Upper Mich.*, 227 N.W.2d 643, 647 (Wis. 1975).

487. UNIF. ADOPTION ACT §§ 1-3, 9 U.L.A. 11 (1994), available at <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/uaa94.htm> (last visited Jan. 5, 2004) [hereinafter UAA]. See Joan Heifetz Hollinger, *The Uniform Adoption Act: Reporter's Ruminations*, 30 FAM. L.Q. 345, 358-63 (1996); see also Herma Hill Kay, *Adoption in the Conflict of Laws: The UAA, Not the UCCJA, Is the Answer*, 84 CAL. L. REV. 703 (1996) (providing commentaries on the UAA by participants and supporters).

488. UAA § 2-404, 9 U.L.A. 53-55 (1994).

489. *Id.* § 2-401 cmt. at 50-51; see also Hollinger, *supra* note 487, at 358-63 (describing the due process considerations of birth fathers).

490. UAA § 2-401 cmt., 9 U.L.A. 51 (1994).

This was not so with consent, however, for the right to withhold consent and veto an adoption, the unmarried biological father needed to have stepped forward with some kind of parenting behavior.⁴⁹¹ The grounds for ending the relationship with an unmarried father who asserted parental rights, moreover, 'supplement' the usual statutory bases for terminating recognized 'parental rights.'⁴⁹² Men who fail to support women during pregnancy, according to their means, may have their rights to their children terminated after birth.⁴⁹³ Putative fathers who, without a compelling reason, fail to support an infant, visit regularly or show a willingness to assume legal and physical custody of an infant not living with the biological mother also may lose these rights.⁴⁹⁴ The UAA even provides for terminating the relationship with a 'thwarted father,' under the right set of circumstances.⁴⁹⁵ If a court finds that there was a compelling reason for the lack of a prior relationship, it nonetheless may terminate if there are "risks of substantial harm" or an "actual detriment" to the child's interests by not severing the relationship.⁴⁹⁶ Thus, the interests of a faultless father might have to yield to the competing interests of a child whose life would be significantly disrupted by any change in custody.⁴⁹⁷

Recent state attempts to resolve the right of unmarried fathers to block adoptions may be likened to 'search and destroy missions.' With the occasional exception, most state court opinions have tended to enforce strictly the time requirements to file in a putative father registry, even for a man who claims to have been 'thwarted' in his efforts to locate the biological mother and his child. Legislatures and courts are requiring 'parenting' behavior, even if that is defined only by attempts to take financial responsibility. In other words, after the somewhat shocking results in the "Baby Jessica" and "Baby Richard" cases there seems to be a general effort to enforce 'biology plus,' even in the newborn adoption situation.

By describing the philosophy as 'search and destroy,' this article does not mean to suggest it is intrinsically the wrong approach. It was difficult to find, in any of the cases, an explicit reference to the "child's sense of time" concept promoted in the 1970s by Freud, Goldstein, and Solnit.⁴⁹⁸ Implicitly, however, the

491. *Id.*

492. *Id.* § 3-504 cmt. at 87.

493. *Id.* § 3-504 at 85-89.

494. *Id.* § 3-504 cmt. at 88-89.

495. *Id.* § 3-504 at 85-89.

496. *Id.* at 88.

497. *Id.* at 89.

498. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 40 (1979).

horrified response to adoptions that come undone after an infant has spent his or her young life in an adoptive family rests on an appreciation of this principle. Furthermore, some of the statutory schemes distinguish between children under six months of age and those over that age in their 'search and destroy' provisions.⁴⁹⁹ Perhaps this is based more on a desire to 'free' very young 'adoptable' children for adoption as quickly as possible,⁵⁰⁰ but it is also consonant with a child's sense of time. Long, dragged-out disputes surely are not in a child's best interest, especially a very young child.⁵⁰¹ Situations in which a biological mother has decided that the adoption choice is in her child's best interest, but the biological father wants to block the adoption without assuming full custodial responsibility for raising his child, are particularly unappealing. Perhaps it is understandable that as an adoptive parent I am a bit defensive about 'pop-up pops' who appear late in the game and upset the new family's life. Finality and stability are very important to children, and the problem is not entirely susceptible to a 'rights' approach. On the other hand, as a former due process lawyer and someone who appreciates that the parent-child relationship should not depend on the marital status of the parents, I have a real conflict.

499. See, e.g., UAA § 3-504, 9 U.L.A. 85-89 (discussing different requirements for children over and under six months of age).

500. The drive to release so-called 'adoptable' children as soon as possible may also reflect an unsavory view of the adoption market, which now reaches overseas as well; cf. *In re L.M.I.*, 119 S.W.3d 707, 709 (Tex. 2003) (refusing to allow revocation of voluntary relinquishment of parental rights of the unwed mother and father in the face of claims of undue influence and fraud of young, Spanish-speaking biological parents). The majority justified their decision in part on concerns about competition from overseas adoptions: "Injecting any greater uncertainty and complexity into the process would only serve to discourage potential adoptive parents, who are already turning to simpler and less expensive foreign adoptions in record numbers." *Id.* The dissent, by contrast, found this to be a "bizarre" argument and blamed the "excruciatingly slow course" of this case in large part on the court's own delay of 524 days. *Id.* at 730-31 (Hecht, J., joined by Jefferson, J., dissenting).

501. This statement does not address or take a position on the distinct issue of family reunification versus permanence planning for children in the foster care system due to absence, neglect, or their parents' inability to take care of them. In 1980, the Adoption Assistance and Child Welfare Act, 42 U.S.C. §§ 620-628, 670-679a, "created a program in which the federal government reimburses states for certain expenses incurred in the administration of state foster care and adoptive services. To qualify for these funds, states are required to make 'reasonable efforts' to reunify children with their parents." *In re M.D.R.*, 124 S.W.3d 469, 475-76 (Mo. 2004) (decision not yet final) (explaining federal law). The Missouri Supreme Court recently opined that the 1980 statute led to unreasonable delays and children being stuck in foster care limbo. *Id.* at 476. As a result, "Congress passed the Adoption and Safe Families Act of 1997 (ASFA) (Pub. L. 105-89) (codified as amended in various sections of 42 U.S.C.)," which specified a period of fifteen months in foster care after which state agencies had to move to terminate parental rights and seek permanent placement elsewhere, or else risk losing federal funds. *Id.* (citing 42 U.S.C. § 675(5)(E)).

In the end, perhaps at least some of the answers lie in intermediate resolutions for ambiguous problems. Those answers, however, largely lie beyond the scope of the present article.

ii. The Thwarted Father in State Court: Some Recent Examples

The 'biology plus' mantra of *Lehr* has been a standard in recent state high court cases. These cases go beyond the stepfather adoptions encompassed by the Supreme Court rulings to date, delving into relatively uncharted territory. The chief disagreements seem to be over (i) how strictly to construe time requirements in putative father registry or other statutes; and (ii) how to evaluate the 'plus' that is required of a thwarted father. In other words, when has a man delayed too long to claim rights as a putative father; and when has he been improperly thwarted of his constitutionally protected opportunity interest? Needless to say, the evaluation of the unmarried man's 'plus' behavior is a value laden factual question that sometimes provokes dissenting opinions from judges who see situations quite differently.

The significance of a putative father's delay in asserting his interest was canvassed in 1996 by the South Dakota Supreme Court. In *Baby Boy K*,⁵⁰² the putative father missed a sixty day statutory deadline after the birth of his child to "affirmatively asser[t] paternity."⁵⁰³ Without satisfying that proviso, he was not entitled to notice of any adoption, dependency, delinquency, or termination of parental rights proceeding.⁵⁰⁴ The alleged father claimed that he was unaware of the mother's pregnancy. He claimed that he was also unaware of the child's birth until one month after it occurred.⁵⁰⁵ He filed a paternity action after another two months had elapsed.⁵⁰⁶ The question the court resolved was "whether W.B.L. timely asserted his opportunity interest so as to trigger greater due process protections than were afforded to him under South Dakota law."⁵⁰⁷ In other words, even if the putative father missed the statutory deadline, he might still have a constitutional right to be heard. The court emphasized that when it comes to children, time is of the essence:

502. *In re Baby Boy K*, 546 N.W.2d 86 (S.D. 1996).

503. *Id.* at 90 (citing 2003 S.D. Law 25-6-1).

504. *Id.*

505. *Id.* at 90-91.

506. *Id.* at 91.

507. *Id.* at 97.

Children are not static objects. They grow and develop . . . A child's need for permanence and stability, like his or her other needs, cannot be postponed. It must be provided early. That need for early assurance of permanence and stability is an essential factor in the constitutional determination of whether to protect a parent's relationship with his or her child. The basis for constitutional protection is missing if the parent seeking it does not take on the parental responsibilities timely. The opportunity is fleeting. If it is not, or cannot, be grasped in time, it will be lost.⁵⁰⁸

Although it observed that the United States Supreme Court "has not articulated a time frame for an unmarried father to assert an opportunity interest in his *newborn* child," the South Dakota court read *Lehr*'s "grasp the opportunity" language to require prompt action.⁵⁰⁹ It also found support for this view in the framework of the UAA and the decisions of other state legislatures and courts.⁵¹⁰ In the end, the putative father's other behavior entered into the court's evaluation as well.⁵¹¹ By contrast to other cases, W.B.L. showed no interest during the period of the pregnancy; he had a very short sexual relationship with the mother; and he did not even take action until more than two months after he learned of the child's birth.⁵¹² So whatever deception the mother may have practiced, he did not meet his burden to inquire and to act. Indeed, by the time the child was three months old and already in an adoptive home, "the State's fully matured interest in protecting the child's permanent home" outweighed the putative father's claim of the mother's dishonesty.⁵¹³

Similarly, an Iowa putative father lost his entitlement to notice and the opportunity to block a Minnesota adoption when he missed the thirty-day deadline to file in that state's Fathers' Adoption

508. *Id.*

509. *Id.*

510. *Id.* at 97-98 (citing UAA § 3-504, 9 U.L.A. 85-89 (favoring the biological father's interest only in the first six months of the child's life)); see also *Robert O. v. Russell K.*, 604 N.E.2d 99, 103 (N.Y. 1992) (favoring an unwed father who asserts his rights during the first six months of his child's life); *In re Adoption of Hudnall*, 594 N.E.2d 45, 47 (Ohio 1991) (upholding an even shorter time frame in a state statute that permitted only thirty days to assert the putative father's interest); UTAH CODE ANN. § 78-30-4.13 (1995) (requiring that a putative father's assertion of rights must occur either prior to the mother's relinquishment of the child to a licensed child placement agency or before the filing of a petition for adoption).

511. *Baby Boy K.*, 546 N.W.2d at 99-100.

512. *Id.* at 100.

513. *Id.* at 101. Justice Sabers was satisfied because there had been notice by publication, which satisfied due process. *Id.* at 102 (Sabers, J., concurring in part and concurring in result in part).

Registry by one day.⁵¹⁴ He argued that he was excused from exact compliance because of fraud on the mother's part and because of "substantial compliance" with the statute.⁵¹⁵ The majority found no fraud and rejected the notion that the mother's failure to let him know where she was (in a state where he knew she had relatives) could be treated as such.⁵¹⁶ The court "decline[d] to impose a fiduciary duty" on the biological mother to inform a putative father of her location, in view of the man's ability to use the registry without any help from her.⁵¹⁷ The Justices observed that they were unaware of any other court which imposed such a fiduciary duty.⁵¹⁸ Moreover, as the court noted:

There are numerous situations in which an unmarried birth mother would be justified in keeping information from a putative father, including situations where the woman has fled an abusive relationship, where the pregnancy was the result of nonconsensual intercourse, or where the putative father poses a danger to the child.⁵¹⁹

The Minnesota court emphasized the importance of timeliness to the child's future and noted that the legislature had amended the law to *shorten* the time frame after concluding that an earlier statute which was more generous to putative fathers "jeopardiz[ed] the state's interest in permanence and stability in adoptions."⁵²⁰ Turning to the constitutional argument that the putative father had satisfied the 'biology plus' standard, the court concluded that the facts did not support such a finding.⁵²¹ The majority found that there was no established relationship between the unwed father and child and that the father had not made an effort to support the mother during the pregnancy; therefore, the court found this case indistinguishable from *Lehr*.⁵²²

514. *Heidbreder v. Carton*, 645 N.W.2d 355 (Minn. 2002). The putative father, who was an Iowa resident, registered in the Minnesota Fathers' Adoption Registry (where the child was born) one day after the thirty day deadline and then started a paternity action to stop the adoption. *Id.* at 362.

515. *Id.* at 362, 369.

516. *Id.* at 367-68.

517. *Id.* at 368.

518. *Id.*

519. *Id.*

520. *Id.* at 364.

521. *Id.* at 372.

522. *Id.* at 373-74.

Justice Page's dissent displayed a different take on the behavior of the mother as well as that of the putative father.⁵²³ The eighteen year old mother hid from the nineteen year old putative father in the later months of the pregnancy and had promised him earlier that she would never consider adoption, which he opposed.⁵²⁴ The young couple even tried living together for a while, but it did not work out.⁵²⁵ The putative father consulted an Iowa attorney about child support payments prior to the birth but did not worry about adoption because the lawyer told him that under Iowa law he had to consent.⁵²⁶ The dissent would excuse the fact that the putative father failed to register in Iowa or another relevant state because it would not have helped him in any case; Minnesota law required his entry into its own registry.⁵²⁷

The dissent concluded, from its reading of the facts, both that compliance should have been excused under the statute and that due process demanded a different result.⁵²⁸ In Justice Page's eyes, the putative father had made a "full commitment to the responsibilities of parenthood"⁵²⁹ because he clearly told the mother that he would not support abortion or adoption and that he would give her a "lot of support for having the child."⁵³⁰ The dissent opined that the majority's disregard for the importance of the biological father's contribution to a child's development led it into "arrogance" stemming from "its hostility to putative fathers generally, and to this father specifically."⁵³¹ Whatever the truth of the dissent's sentiment, however, the majority's strict enforcement of the timeliness requirement and impatience with putative fathers are not unusual in other state court cases.⁵³²

523. *Id.* at 377-78 (Page, J., dissenting).

524. *Id.* at 377 (Page, J., dissenting).

525. *Id.* After they separated, the young woman kept in touch with her former boyfriend by electronic mail, but she refused to reveal where she was. *Id.*

526. *Id.* at 378.

527. *Id.* at 380.

528. *Id.*

529. *Id.*

530. *Id.* at 381.

531. *Id.* at 383 n.5.

532. *See, e.g., In re Baby Girl P.*, 802 A.2d 1192, 1198 (N.H. 2002) (determining that an incarcerated putative father who failed to register before the mother voluntarily relinquished her rights did not satisfy any of the statutory alternatives; therefore, he was not entitled to notice of the adoption, regardless of any improper actions on the part of the mother in falsely stating that she did not know where he was. He also had waived any constitutional arguments). *But see id.* at 1202 (Dalianis, J., concurring in part and dissenting in part) (stating that the majority misinterpreted the statute and the putative father had a constitutionally protected interest pursuant to *Lehr*). *See also Osborne v. Adoption Ctr. of Choice*, 70 P.3d 58, 65 (Utah 2003) (holding that a putative father who actually spent some

The discussion in the South Dakota court, and the differences between the majority and the dissenters on the Minnesota Supreme Court, demonstrate that the 'biology plus' standard can be highly subjective. Moreover, it is clear that there may be competing values at play: a strong priority on timeliness and permanence for the child versus the idea that the biological father has much to contribute and has been unfairly shut out of his child's life. The biological mother's actions also become an issue, which is a peculiar application of the 'rights' approach to a more complex problem. While the mother's fraud or refusal to accept assistance may bolster the claim of a putative father to having been thwarted of his opportunity interest, it has very little to do with the welfare of the child. Moreover, when a nineteen year old young man promises an eighteen year old young woman 'support,' what is he really saying? By blocking adoption, is he not trying to force *her* to raise the child, with some assistance from him? That is hardly the same as taking full parental responsibility upon himself.

Sometimes the failure to search properly leads to a failure to destroy the putative father's protected opportunity interest, especially if a court feels there is any fraud or baby-selling involved. In *Baby Boy W.*,⁵³³ the Oklahoma Supreme Court affirmed the trial court's ruling, holding that the thwarted putative father had been deprived of his 'parental opportunity interest' and thus, his due process rights, after the biological mother had placed their child for

time living with his child is not entitled to notice or consent because he failed to take the necessary timely steps required by the registry). *But see id.* at 72 (Durham, C.J., dissenting) (questioning whether the putative father registry strictures may be applied to a developed relationship). *See also In re Adoption of Baby Girl H.*, 635 N.W.2d 256 (Neb. 2001). Because he filed in the wrong court, the putative father failed to comply with Nebraska's statute, NEB. REV. STAT. § 43-104.05 (1998), which requires a putative father to file a petition for adjudication of paternity within thirty days of filing notice of intent to claim paternity in order to preserve his rights to notice of an adoption hearing. *Id.* at 260. The Nebraska Supreme Court upheld the statute in the face of equal protection and due process challenges by a man they viewed as having no established relationship with the child, although the putative father had complied with the first part of the statute by filing notice of intent within five days but had failed to follow up with a timely petition for adjudication of paternity. *Id.* at 263-64. Thus, there was no need for his consent under state law. *Id.* at 264. The Nebraska court held that the thirty day filing requirement did not facially violate substantive due process or the equal protection clause. *Id.* at 264-65. The court explained that the provisions for treating biological mothers and fathers differently were justified and substantially related to the important state interest of the speedy determination of placement for children. *Id.* at 265. Moreover, the father lacked an established relationship with his child that would trigger due process protection. *Id.* Cf. *Friehe v. Schaad*, 545 N.W.2d 740 (Neb. 1996) (upholding the five day notice provision when the biological parents engaged in on-and-off discussions about what course of action to follow, but the father had no established relationship with the child and was ignorant of the statutory requirement).

533. *In re Baby Boy W.*, 988 P.2d 1270 (Okla. 1999).

adoption through an agency.⁵³⁴ Oklahoma law then provided for a preadoption "Section 29.1 hearing," to be held when a nonmarital mother relinquished her parental rights.⁵³⁵ The statute required notice of the hearing to any putative father, at which the court, "if it is in the best interest of the child,"⁵³⁶ could "accept a relinquishment or consent . . . executed by the father or putative father of the child, or . . . determine that the consent . . . is not required or [t]erminate the parental rights of the father or putative father, . . . or . . . grant custody of the child" to that man.⁵³⁷ A man who could show that he was in fact a thwarted father enjoyed a defense to termination on the grounds of failure to exercise parental rights and duties.⁵³⁸ He also had to show that he tried to find out if he had fathered a child and that he tried to exercise his rights and duties.⁵³⁹

By contrast to the cases discussed above, in which courts were very unsympathetic to putative fathers regardless of the mother's conduct, the *Baby Boy W.* court took a stiffer line with what it interpreted as the misconduct of the adoption agency.⁵⁴⁰ When the mother failed to identify the father even though she had engaged in an extensive sexual relationship with him and knew his whereabouts even afterwards, and the adoption agency compounded this default by failing to notify him in a timely manner even after she relented and told them his name, the majority found a due process violation.⁵⁴¹ The agency's misconduct was particularly blatant: it filed an affidavit for notice by publication identifying the putative father as "Jody last name unknown," even after it actually knew his identity.⁵⁴² The court was livid in responding to this egregious behavior: "These actions of the Agency at best demonstrate a lack of due diligence and candor. At worst, they indicate complicity in Natural Mother's denial of Natural Father's right to

534. *Id.* at 1272.

535. *Id.* at 1273. See OKLA. STAT. tit. 10, § 29.1(F)(1) (Supp. 1996) (outlining the provision of a pre-adoption hearing). The action was brought a few days before the provision was revised by a new Adoption Code, which became effective Nov. 1, 1997. OKLA. STAT. tit. 10, § 7505-2.1 (Supp. 1997) (retaining the hearing with more particularized conditions). Cf. *Adoption of Kelsey S.*, 823 P.2d 1216 (Cal. 1992) (discussing the California hearing that establishes the constitutional standing of a putative father).

536. *Baby Boy W.*, 988 P.2d at 1273.

537. *Id.* (quoting OKLA. STAT. tit. 10, § 29.1 (Supp. 1996) (*repealed by* OKLA. STAT. tit. 10, § 7505-2.1 (Supp. 1997))).

538. *Baby Boy W.*, 988 P.2d at 1274.

539. *Id.*

540. *Id.*

541. *Id.*

542. *Id.*

notice of the distinct possibility that he had fathered a child.⁵⁴³ Although the Oklahoma Supreme Court was particularly angry about the adoption agency's duplicity, it also emphasized that during the relationship the father claimed to have expressed a desire to parent any child should the mother become pregnant and remarked that after his treatment for testicular cancer the likelihood of that happening was very slim.⁵⁴⁴ Furthermore, the father had responded promptly upon receipt of actual notice.⁵⁴⁵ Even though the Oklahoma court conceded that the father also knew the location of the mother, had left her a birthday message on her voice mail, and had never tried to find out if she was pregnant, those facts apparently paled in significance beside the deceitful actions of the mother and the agency.⁵⁴⁶

In a private adoption with no agency involvement, the Louisiana Supreme Court similarly seems to have been very concerned with the strong overtone of gross misbehavior, in this case baby-selling, on the part of the biological mother.⁵⁴⁷ Quite a bit of money changed hands, pocketed by either the mother or the man she had initially deliberately misidentified as the father of the child.⁵⁴⁸ Under these circumstances, the putative father fared better than in some other timeliness cases, considering he actually knew about the birth but failed to respond within the statutory period after receiving a defective 'notice.'⁵⁴⁹ The notice given was ineffective because it failed to comply strictly with the service of process rule and to contain all the advisements specified by law.⁵⁵⁰ Citing the sentiments of *Lehr* about the unique opportunity afforded a biological father, the Louisiana Supreme Court found the failure to give the exact notice required to be fatal.⁵⁵¹

The Louisiana Supreme Court also credited the putative father's showing of "commitment to parental responsibilities and fitness to assume legal and physical care" of the child.⁵⁵² The biological father was a former gang member who had been arrested for breaking down the maternal grandfather's front door to stop the

543. *Id.*

544. *Id.* at 1271.

545. *Id.* at 1272.

546. *Id.* at 1271. By the date of the appeal decision, the child was nearly two years old and had been living with prospective adopting parents while being visited by the biological father. *Id.* at 1272.

547. *In re A.J.F.*, 764 So.2d 47, 52 (La. 2000).

548. *Id.* at 49.

549. *Id.* at 57.

550. *Id.*

551. *Id.* at 57-58.

552. *Id.* at 61.

mother from having an abortion.⁵⁵³ There was disputed testimony about his relationship with his other two children.⁵⁵⁴ The mother clearly had troubled relationships with the men in her life, leaving the putative father during her pregnancy, resuming a liaison with another man who previously had fathered a child by her, then leaving the second man briefly to come back to the putative father after an incident of domestic violence, and finally returning to the second man and living with him through the birth of the child in question.⁵⁵⁵ The other man falsely swore to be the father of the child and may have benefitted financially from payments by the adoptive parent.⁵⁵⁶

Despite the questions raised by testimony, the trial court concluded that the putative father met the requisite standards for commitment and fitness.⁵⁵⁷ He provided food, clothing and shelter to the mother for the time she lived with him in the first part of the pregnancy, prepared a baby's room in his home and maintained contact with the mother's grandmother to stay informed about the pregnancy.⁵⁵⁸ The lower court believed that he did not approach the mother directly while she was living with the other man because he feared that doing so could put her in physical danger.⁵⁵⁹ Immediately upon learning of the child's birth, the putative father went to a lawyer.⁵⁶⁰ By contrast, the mother seemed to thwart his "ability to establish his commitment to his parental responsibilities"⁵⁶¹ at every turn, and she "fraudulently surrendered [the child] to the prospective adoptive parent."⁵⁶² Despite his former gang affiliation and allegations of substance abuse, the juvenile court also found the putative father to be willing and fit to assume custody of his child.⁵⁶³ Furthermore, the Louisiana Supreme Court clearly endorsed the juvenile court's emphasis on the mother's deceit and the \$4000 payment that went to the mother and her boyfriend (and co-participant in the fraud).⁵⁶⁴ With all this evidence, given that the standard for reversal on appeal was 'manifest error,' the Louisiana Supreme Court reversed the appellate court and reinstated the trial

553. *Id.* at 49.

554. *Id.* at 52.

555. *Id.* at 49.

556. *Id.*

557. *Id.* at 52.

558. *Id.* at 51.

559. *Id.*

560. *Id.* at 51-52.

561. *Id.* at 52.

562. *Id.*

563. *Id.*

564. *Id.* at 51-52.

court's decision allowing the father's objection to the adoption and granting him custody.⁵⁶⁵

While these examples do not summarize everything that is happening in state courts, they give a sense of the attitudes toward allegedly thwarted putative fathers and what is seen as the misbehavior of mothers and others in those situations. While baby-selling and fraud on the court are not behaviors that should be rewarded, many of the other circumstances of these cases are quite ambiguous. Although *Lehr* and the grasp-the-opportunity line is always invoked, these cases in which putative fathers prevailed do not seem to provide much concrete guidance on what it takes to establish the 'plus' of the 'biology plus' standard by a thwarted father. At least when it comes to the threshold issue of who is the 'father' with protected rights to withhold consent, the analysis is also always unitary. Even more than in the stepfather adoptions, these situations entail a complete substitution of one private family for another, i.e., substituting the birth mother and a birth father with rights with a new legally constructed mother and father.⁵⁶⁶ There is no consideration of the possibility of multiple parental relationships, such as allowing a thwarted putative father to participate to some lesser degree in his child's life while not disturbing the adoption.

V: CONCLUSION: WHAT MAKES A MAN A FATHER?

What makes a man a father in a constitutional sense? The United States Supreme Court seems to answer that question by saying, "it depends." In some cases biology alone and in others 'biology plus' is required. Since the mid-1970s, biology alone usually satisfies the constitutional test, where there are benefits to give out and where those emoluments cost the state money or something

565. *Id.* at 62. The case was actually remanded, because by operation of Louisiana law, if the father successfully contests the adoption, then the mother's otherwise irrevocable surrender is dissolved. *Id.* While conceding that the United States Supreme Court had never decided the issue, the concurring opinion questioned whether Article 1138 of the Louisiana Children's Code would survive equal protection analysis, because it distinguished between unwed mothers who could automatically withhold consent, and unwed fathers who had to prove their fitness. *Id.* at 62-63 (Victory, J., concurring). In light of constitutional developments, the concurrence believed that an unwed father should be presumed fit. *Id.* at 63-64. See also *Petrosky v. Keene*, 898 S.W.2d 726, 728 (Tenn. 1995) (holding, in a contest between the putative father and maternal grandmother for custody and legitimization, that the father's "fundamental interest in parenting" precludes depriving him of custody on a best interest standard).

566. See generally GROSSBERG, *supra* note 406 (giving a history of the legal construction of the adoptive family in the nineteenth century).

else of value. It is apparently not permissible to give either the indigent father or the indigent mother a choice in this matter. Involuntary paternity establishment, with the coerced 'cooperation' of the mother, is permissible. Even if paternity establishment is a waste of state resources, a futile attempt to 'get blood out of a stone,'⁵⁶⁷ the state may proceed with it. In fact, in order to keep its Title IV-D funding, the state *must* do this.⁵⁶⁸ According to this approach, there is but one family structure, normatively private, and it requires a single financially responsible father. If he balks at that responsibility, then the state can thrust it upon him based simply upon proof of his biological paternity.

On the other hand, a biological father's personal relationship to his child may turn on whether a 'biology plus' standard has been satisfied, especially where there is another man prepared to take up financial responsibility in his stead. After *Lehr*, line-drawing is necessary to determine just how much 'plus' is enough to ripen the inchoate claims of an unmarried father into mature rights to notice, a hearing, and the ability to withhold consent to the adoption of his child by another man. What should we make of this apparent paradox of paternity? In particular, how does the distinction apply to the putative father who claims to have been thwarted and deprived of his 'opportunity interest' to develop a relationship with his newborn child? The Court has provided little or no guidance for *Lehr* line-drawing in this context.

567. Absent fathers are often too poor to contribute to their children's support. See, e.g., Ira Mark Ellman, *Thinking About Custody and Support in Ambiguous-Father Families*, 36 FAM. L.Q. 49, 69-70 (2002) (noting that "researchers have estimated that thirty percent of the nonpaying fathers of nonmarital children are 'poor' or 'near-poor,'" citing Irwin Garfinkel et al. *A Patchwork Portrait of Nonresident Fathers*, in FATHERS UNDER FIRE: THE REVOLUTION IN CHILD SUPPORT ENFORCEMENT 31, 51 (Irwin Garfinkel et al., eds., 1998)); see also Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L.Q. 519, 562 n.222 (1996) (citing study suggesting that absent parents of children on welfare are so poor that even if a child support order is established and enforced, the TANF caseload would be reduced by only eleven percent); Handler, *supra* note 429, at 512 (citing a study that showed between 1973 and 1984 the average annual income for men in the twenty to twenty-four year old age bracket, especially for young black men, had actually fallen in real terms); Smith, *supra* note 407, at 140-41 nn.76-80 (citing David L. Chambers, *Fathers, the Welfare System, and the Virtues and Perils of Child-Support Enforcement*, 81 VA. L. REV. 2575, 2594-95 (1995) (noting that many absent fathers of children on AFDC are poor)).

568. With increased devolution to the states, legislatures have a choice and can refuse to implement the mandatory paternity identification and cooperation rule, but at the cost of the federal government withholding five percent of the total TANF funds. See PRWORA, Pub. L. No. 104-193, § 409, 110 Stat. 2105, 2143 (1996); Balanced Budget Act of 1997, Pub. L. No. 105-33, § 5506, 111 Stat. 251, 614-15. No state has decided to refuse this part of the program, even though, based on past federal history, it is unlikely that sanctions would ever be imposed. Smith, *supra* note 407, at 146.

Biological determinism should be rejected as a model where it is used by the state to justify coercing 'cooperation' from women and private responsibility from men who cannot afford it. Thus, although the newer equal protection cases of the 1970s, which expanded the ability of nonmarital children to sue their fathers for child support, generally were well reasoned, all was not well even then. While these cases looked like disputes within private families, after 1975, they often were publicly instigated. It is true that *Gomez v. Perez*,⁵⁶⁹ which struck down a Texas statute barring nonmarital children from suing for child support, was decided in 1973 before enactment of the coercive amendments to the Social Security Act. The next case in this line, however, was a suit by a mother receiving AFDC who had to assign her rights to the state and 'cooperate' in paternity establishment in order to retain those benefits.⁵⁷⁰ The Court then struck down a distinction in the time allotted for filing a suit to establish paternity and seek child support between children who received public assistance and those who did not.⁵⁷¹ By 1988, when *Clark v. Jeter*⁵⁷² was decided, invalidating shorter time limits to file for child support, its issue was a moot point. Congress had just amended the SSA to require all states, on pain of losing their Title IV-D (AFDC) funding, to extend the time to file for child support from nonmarital fathers to the child's eighteenth birthday.⁵⁷³ Therefore, even though *Clark* was correctly decided in its rejection of discrimination against nonmarital children, it was superceded by a congressional statute which reflected concern primarily for the public fisc.

In *Little v. Streater*, the Court ruled that the state had to ensure the accuracy of paternity findings, even if it meant paying for the costs of blood tests sought by indigent fathers.⁵⁷⁴ This ruling reflected the Court's acknowledgment that biological determinism was driving Connecticut's statutory scheme. Notwithstanding that concern, in *Rivera v. Minnich*, the Court held that it was perfectly acceptable to impose this relationship for a lifetime based solely on a mere preponderance of evidence of the biological tie.⁵⁷⁵ Saving the public fisc was so important, in fact, that the Court ruled in *Bowen v. Gilliard* that the state could even devise rules which had the

569. 409 U.S. 535 (1973).

570. *Mills v. Habluetzel*, 456 U.S. 91 (1982).

571. *Pickett v. Brown*, 462 U.S. 1 (1983).

572. 486 U.S. 456 (1988).

573. See Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 42 U.S.C. § 666.

574. 452 U.S. 1 (1981).

575. 483 U.S. 574 (1987).

effect of injuring a substantive parental relationship between a man and his child.⁵⁷⁶ Thus, even though Sherrod's father was driven away by the income sharing rules, the Court was not concerned.⁵⁷⁷ Finally, fixed on an image of the Johnny-Appleseed American servicemen populating the world with children who might claim American citizenship, the Court upheld differential biological determinism as it applied to fathers and to mothers in *Nguyen v. I.N.S.*⁵⁷⁸ Although I would not disagree with the decision in *Little v. Streater*, and maybe not even with the decision in *Rivera*, the decisions in *Bowen* and *Nguyen* are particularly disturbing. The former was just another nail in the coffin of forced 'cooperation' for mothers who must choose between assigning their rights and feeding their children,⁵⁷⁹ and the latter approved the deportation of a man whose American father had actually raised him from infancy.⁵⁸⁰

Biological determinism should also be rejected where it is used to remove real fathers, who have a personal relationship, from the lives of their children. On the other side of the paternity paradox, the Court in *Michael H.* approved the excision of a biological father from his child's life,⁵⁸¹ but mostly the Court has left us with unanswered line-drawing questions. 'Biology plus' is entirely a legal construct. For the married father, the 'plus' is satisfied automatically by being married to the mother.⁵⁸² Even though the states have long since abandoned Lord Mansfield's rule⁵⁸³ and now permit denial of the husband's paternity, they are still constitutionally free to limit who may make this claim. My criticism of the *Michael H.* case is not that the Court should have embraced biological determinism; rather, it is that the Court permitted California to ignore a man's desire to continue contact with his daughter, with whom he shared a personal relationship as well as

576. 483 U.S. 587 (1987).

577. *Id.* at 621-24 (Brennan, J., joined by Blackmun, J., dissenting).

578. *Nguyen v. I.N.S.*, 533 U.S. 53 (2001).

579. *Bowen v. Gilliard*, 483 U.S. 587 (1987).

580. *Nguyen*, 533 U.S. 53.

581. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

582. *See Armstrong v. Manzo*, 380 U.S. 545 (1965); *see also* UNIF. PARENTAGE ACT (2000) §§ 204, 9B U.L.A. 311-12 (delineating the presumption of paternity), 303, 9B U.L.A. 315 (denying paternity when a child has a presumed father), and 607, 9B U.L.A. 341-42 (limiting the time for denial of paternity for a child with a presumed father); *see also* UNIF. PARENTAGE ACT (1973) §§ 4, 9B U.L.A. 393-94 (presuming fatherhood) and 6, 9B U.L.A. 410-11 (denying paternity of a presumed father).

583. *See Goodright v. Moss*, 98 Eng. Rep. 1257, 1258 (1777) (holding by Lord Mansfield that "the declarations of a father or mother cannot be admitted to bastardize the issue born after marriage"); *see also* *Davis v. Davis*, 521 S.W.2d 603, 607 (Tex. 1975) (noting the "widespread denunciation of the Rule").

a biological link.⁵⁸⁴ Rejecting the *Stanley-Lehr* test of 'biology plus,' the Court instead upheld the primacy of marriage, or what they called the 'unitary family.'⁵⁸⁵ This was an act of legal fiction as there was no unitary family in this situation. In reality, the child already called both men "Daddy."⁵⁸⁶

Aside from *Michael H.*'s strange adhesion to old fashioned common law doctrines, the Court has, for the most part, not defined 'biology plus' line-drawing after *Lehr*. In *Lehr*, the Justices gave their approval to the 'search and destroy' methodology of the putative father registry.⁵⁸⁷ While not free from due process difficulties, in light of the importance of time in an infant's life, such an approach may be necessary in the newborn adoption context. However, just how much and what kind of 'plus' merits notice and a hearing, and triggers the right to consent or withhold consent to an adoption, is not clear, especially in the case of the thwarted father. What is clear is that in circumstances where the father has been deprived of his opportunity to develop a relationship, the 'plus' must be satisfied in some other way. State court cases demonstrate concerns about how hard thwarted fathers try to become a part of their children's lives, as well as the misbehavior of mothers and third parties who defrauded fathers of their opportunity interests and the courts of the right to hear all relevant evidence. These two concerns imply two principles: first, that 'biology' counts, and second, that 'justice' counts. How much and how do they count? Biology counts because it potentially gives rise to individual rights *in the father*, just as it gives rise to public rights *against the father*. Justice also counts for the same reason — recognition of *individual rights* that are unfairly stymied.

Consider a different approach, one built on social claims rather than on individual rights. When I first started thinking about 'failed' adoptions, I studied an extreme example to see if it could cast any light on the problem in general.⁵⁸⁸ Families in Argentina were raising children as their own who had actually been kidnapped from parents murdered by the dictatorship of 1976-1983.⁵⁸⁹ Some of the 'adoptive' families were relatively innocent of the horrors of the regime; others were quite complicit.⁵⁹⁰ An

584. *Michael H.*, 491 U.S. 110 (1989).

585. *Id.* at 123.

586. *Id.* at 143-44 (Brennan, J., joined by Marshall, J., and Blackmun, J., dissenting).

587. *Lehr*, 463 U.S. at 263-65.

588. See Laura Oren, *Righting Child Custody Wrongs: The Children of the "Disappeared" in Argentina*, 14 HARV. HUM. RTS. J. 123 (2001).

589. *Id.* at 123.

590. *Id.* at 128.

organization called the *Abuelas* (or "Grandmothers") spent many years tracking down the children of their murdered sons and daughters and trying to reclaim them in some fashion.⁵⁹¹ Biology and justice both counted in this situation, but in a social context, rather than an individual rights context. In order to receive an order for blood tests of a child they believed was an offspring of the 'disappeared' living wrongfully with 'adoptive' parents, the *Abuelas* had to establish a kind of probable cause.⁵⁹² I argued that "the social predicate for this probable cause was created by the revelations" about the human rights violations of the dictatorship and the kidnapping that took place under its aegis.⁵⁹³ Moreover, in each individual case, probable cause to intrude upon an established family by demanding blood tests was satisfied by "the meticulous accumulation of pictures and reports gathered from informants and from their own observations" which made it more likely than not that this particular child was a child of 'disappeared' parents.⁵⁹⁴ Rather than presenting an 'individual rights' claim on behalf of the families of the 'disappeared,' the *Abuelas* made a social (and political) claim on behalf of the children.⁵⁹⁵ Concededly, the *Abuelas* wanted "strict and pure justice" for their murdered children and kidnapped grandchildren.⁵⁹⁶ As I have argued, however, they also operated on the basis of a definition of "best interest of the child" that was "grounded in Argentine social reality and was about the children's right 'to their name, to their heritage, to their identities.'"⁵⁹⁷ It was evident that in the "context of the wrenching and murderous secrets and lies of the nightmare years [of the dictatorship]," the *Abuelas* felt that the best interest of the children would be served by a healing "truth."⁵⁹⁸

Depending on their assessment of the relative guilt of the 'adoptive' parents, the *Abuelas* helped negotiate a variety of custody solutions to problems of wrongful adoptions.⁵⁹⁹ Although transitions could be very dramatic and painful, the *Abuelas'* psychological team tried to pay attention to each child's needs during the transfer

591. *Id.* at 129.

592. *Id.* at 143.

593. *Id.*

594. *Id.*

595. *Id.* at 186.

596. *Id.*

597. *Id.* (quoting James F. Smith, *Sought by Argentina; Children of "Dirty War": Sad Legacy*, L.A. TIMES, Apr. 20, 1988, Part I, at 1).

598. *Id.*

599. *Id.* at 150.

between one household and the other.⁶⁰⁰ The social context for these faulty adoptions was as bad as it could be: the dictatorship had a deliberate plan to kidnap and raise the children of the 'disappeared' (those murdered by that junta) in a social environment hostile to the values of their biological parents.⁶⁰¹ Even so, where there were mitigating factors (an 'adoptive' parent who participated in fraud but not murder; an older child; no biological kin available), the individual solutions might be more nuanced.⁶⁰²

Interestingly, the United States has its own version of a finding of a social predicate for a justice approach to faulty adoptions. Congress passed the Indian Child Welfare Act of 1978 (ICWA),⁶⁰³ based on findings that a social context existed in which "wholesale removal of Indian children from their homes . . . [was] the most tragic aspect of Indian life today."⁶⁰⁴ Testimony before Congress indicated that non-Indian child welfare workers did not understand the family structure and the importance of extended family to the children and to tribal life.⁶⁰⁵ Consequently, the jurisdictional heart of the reforms in the statute required decisions about children domiciled on reservations to be made in tribal rather than state courts.⁶⁰⁶ As a result, the Court did not hesitate to invalidate an adoption of twin babies placed for adoption with both parents' consent but outside of tribal court's jurisdiction.⁶⁰⁷ The Court noted that three years had elapsed while the children lived with their adoptive parents, a time period which clearly made a difference in the lives of the children.⁶⁰⁸ However, the Justices eschewed any responsibility for deciding where the children should live, because the tribe properly had objected to the deliberate bypass of the tribal court and was, therefore, entitled to make this determination.⁶⁰⁹ The claims of justice, of not rewarding those who deliberately

600. *Id.* at 162.

601. *Id.* at 186.

602. *Id.*

603. Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1963).

604. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989) (quoting *Indian Child Welfare Program: Hearings before the Subcomm. on Indian Affairs of the Sen. Comm. on Interior and Insular Affairs*, 93d Cong. 3 (1974) (statement of William Bykr)). A Texas court characterized the congressional findings in even stronger terms: this was a statute designed to "ensure the continued viability of Indian tribes by protecting Indian children from cultural genocide." *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 162 (Tex. App. 1995).

605. *Mississippi Band of Choctaw Indians*, 490 U.S. at 35 n.4.

606. *See id.* at 42.

607. *Id.* at 53.

608. *Id.*

609. *Id.*

evaded the mandate of the ICWA in order to obtain custody and maintain it during this litigation, prevailed in the United States Supreme Court. The Court then passed the ultimate decision back to the tribal court with a wish and a prayer: "It is not ours to say whether the trauma that might result from removing these children from their adoptive family should outweigh the interest of the Tribe — and perhaps the children themselves — in having them raised as part of the Choctaw community."⁶¹⁰ Rather, the Court invoked, and deferred to, "the experience, wisdom, and compassion of the [Choctaw] tribal courts to fashion an appropriate remedy."⁶¹¹

The *Holyfield* case produced two instructive sequelae. After transfer, the tribal court decided that it was in the children's best interest to leave them in place with the adoptive parents.⁶¹² The tribal court also required continuous contact between the twins and their extended family, as well as with the tribe itself.⁶¹³ In other words, just as in the Argentinean situation, there was a nuanced solution to a complicated situation. At the same time, the United States Supreme Court decision, an endorsement of the justice approach that was not universally well received, became what may be called a 'flashpoint' of controversy and compelled demands for amendment of the ICWA itself.⁶¹⁴

Clearly, social context counts in the United States, too. What is the social context of adoptions involving thwarted nonmarital fathers? These are not cases of murder and kidnapping by brutal minions of a military regime dedicated to wiping out the origins and identities of the children, nor are they cases in which Congress has declared its concern about wholesale cultural genocide. Rather, these are cases in which a biological mother, either by accident or by design, fails to identify or misidentifies the biological father of her child when making an adoption plan. The wrong is that this misidentification deprives the thwarted father of a limited individual right, an opportunity interest that the United States Supreme Court recognized in opinions starting with *Stanley* and culminating with *Lehr*. The improper identification may be motivated by one of a variety of reasons — a lack of the mother's relationship with the biological father, her desire to make things

610. *Id.* at 54.

611. *Id.* (quoting *In re Halloway*, 732 P.2d 962, 972 (Utah 1986)).

612. *Prepared Statement of Thomas L. Leclaire, Director of Tribal Justice, Before the Senate Committee on Indian Affairs and the House Committee on Resources*, FEDERAL NEWS SERVICE, June 18, 1997.

613. *Id.*

614. See Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 588 n.5 (2002).

simpler at a traumatic time in her life, or her wish not to involve a biological father with whom she has a troubled relationship. In the Oklahoma *Baby Boy W.* and Louisiana *A.J.F.* cases, darker motives and worse behavior were at play: in *Baby Boy W.*, an adoption agency knowingly connived to misrepresent the father's identity to the court, even after the mother had provided it with accurate information;⁶¹⁵ in *A.J.F.*, the mother seemed to be involved in a baby-selling scheme with the man she deliberately misidentified as the father of her child.⁶¹⁶ The wrong is also a loss of procedural regularity in a legal system which rightfully values this attribute but recognizes a sliding scale to determine what process is due.⁶¹⁷ Thus, while *Lehr* permits a state to cut off an unmarried father's opportunity interest through a truncated procedure such as a putative father registry, the Court in *Santosky* required much more to terminate fully developed parental rights.⁶¹⁸

The contemplation of these wrongs raises the questions of where the child is in the equation and what the child has lost in the thwarted father situation. Because this country still has sealed adoptions,⁶¹⁹ in one sense a child loses his or her identity when, in contrast to a stepparent adoption, an entirely new legal family is substituted for the birth family. Unless open adoption is constitutionally required,⁶²⁰ that substitution is permissible if done lawfully. The child also loses the opportunity to be raised by biological kin in situations in which the biological father is

615. 988 P.2d 1270.

616. 764 So.2d 47.

617. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (explaining that clear and convincing evidence is the process that is due for termination of parental rights); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (outlining a calculus for figuring out what process is due).

618. *Santosky*, 455 U.S. at 769.

619. See, e.g., E. Wayne Carp, *Adoption, Blood Kinship, Stigma, and the Adoption Reform Movement: A Historical Perspective*, 36 LAW & SOC'Y REV. 433 (2002) (reviewing KATARINA WEGAR, *ADOPTION, IDENTITY, AND KINSHIP: THE DEBATE OVER SEALED BIRTH RECORDS* (1997) (giving the history and current status of sealed adoption record disputes)).

620. See, e.g., Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. PA. J. CONST. L. 150, 153 (1999) (reviewing history of closed adoption records in the U.S., "focusing on the post-World War II shift from confidentiality to secrecy," the "constitutional law challenges brought initially by adult adoptees to the sealing of records, and, more recently, the challenges of birth parents to efforts to open records"). Cahn and Singer propose presumptive open records for adult adoptees (but no right to unconsented contact with birth parents). *Id.* Today, Alaska, Oregon, Tennessee and Kansas allow access to original birth certificates upon request. *Id.* at 167. Other states are more controlled. Cahn & Singer also discuss the due process privacy counter-challenges of birth parents and the argument about "adoptees' identity interests," finding current constitutional doctrine inadequate to address identity issues. *Id.* at 190. See also *Alma Soc'y v. Mellon*, 601 F.2d 1225 (2d Cir. 1979) (rejecting adult adoptees' claims that their 'personhood' entitled them to open birth records).

interested in doing the raising himself. On the other hand, if all he wants is to stop the adoption and 'support' a mother who has already decided that she should not raise the child, then there is another issue entirely. Should there be any constitutional protection for a father's interest in throwing a spanner into the works without undertaking a timely and full personal commitment?

In the case of the thwarted father, state court cases suggest that 'biology plus' really means 'biology plus justice.' Up to a point, this is understandable. It would be a poor legal system that routinely rewarded misbehavior designed to deliberately evade constitutional requirements of procedural fairness. It would be a poor legal system that routinely denied any significance to the biological tie between parents and children, regardless of the marital status of those parents. This is, however, an imperfect world in which imperfect solutions may have to be found. In the absence of overwhelming issues of justice, the constitutional questions and answers should be more child-centered. There is no evidence of an epidemic of evil in which committed fathers are deliberately and routinely being thwarted of the opportunity to raise their children (and children correspondingly being deprived of their identity and link to biological kin).⁶²¹ Indeed, the social policy is quite the contrary. Because social policy focuses on concerns about the public fisc and the presumed virtues of the marital family, federal and state legislation coerces identification of fathers or attempts to 'strike while the iron is hot,' procuring in-hospital acknowledgments of paternity, which have the force of law. Thus, I would argue that no social predicate justifies wholesale upsetting of newborn adoptions, even of the children of allegedly thwarted fathers.

This leads to two conclusions about the 'plus' standard as applied to the thwarted putative father who has no developed relationship with his child. First, in order to qualify to withhold consent to an adoption, he must demonstrate a timely willingness to assume full responsibility for raising his child himself. Second, even if he so demonstrates, the character and origin of the 'misbehavior' that thwarted his ability to develop a relationship must count. The legal system rightfully should be more concerned with deliberate evasions of notice and hearing requirements by adoption agencies (or adoptive parents) and with baby-selling than with the biological mother's private choices. Further, in light of the effect on a child of the passage of time, the 'solution' to a faulty

621. Congress has declared the deprivation of tribal identity a serious matter in the ICWA. See *supra* notes 603-14 and accompanying text.

adoption procured without the necessary consent of a thwarted putative father (but also without gross misbehavior on the part of the adopting family) might be an open adoption. Thus, the child's name⁶²² and home would not be disrupted, while the child's identity and link to biological kin would be preserved.

As an adoptive parent who was not involved in an open adoption, this solution makes me nervous. Nonetheless, it seems a positive answer to a faulty adoption, one that transcends parental rights and focuses on the interests of the child. For those who desire an individual rights rather than a social framework for solving the problem of the thwarted father, the child should be the one with the individual right to security within the adoptive family and to the knowledge of and link to a biological parent. Of course, this arrangement requires maturity and effort by both sets of parents, one that perhaps may be enforced by the equivalent of the so-called 'friendly parent' presumption.⁶²³ Families in this situation should also be entitled to receive any necessary counseling services.

Thwarted putative fathers of newborns by definition lack a relationship with their children, which creates difficulties for the due process liberty interest analysis discussed above. Equal protection anomalies also arise. In *Caban*, another stepfather adoption, the Court struck down on its face a New York statute that gave an unmarried mother an absolute right to veto the adoption of her child, while it denied that same right to an unmarried father, regardless of his relationship to the child.⁶²⁴ Mr. Caban's children were four and six years old at the time of the adoption proceedings.⁶²⁵ He had lived with them as a family unit and continued to be a part of their lives even after he and their mother

622. Name changes for three-year old children (such as those endured by Baby Jessica/Anna and Baby Richard/Danny) are troublesome. In each of these cases, when the biological father received parental and custody rights, he instantly imposed a new first name (and surname, of course) on the child. This was as much a denial of identity as any improper suppression of the biological connection. See *Acevedo v. Burley*, 994 P.2d 389, 391 (Alaska 1999) ("We appreciate that the consistent use of a single name is important to the child's emotional development").

623. In custody law, the 'friendly parent' is the parent who does not withhold access from the other parent or discourage the relationship. Presumptions in favor of awarding custody to the 'friendly parent' have been criticized in the context of women who seek to protect themselves from their spouse's domestic violence, thereby seeming to be uncooperative. See, e.g., Nina W. Tarr, *Civil Orders for Protection: Freedom or Entrapment?*, 11 WASH. U. J.L. & POL'Y 157, 171 (2003). The manipulation of the 'friendly parent' pose could be a problem in failed adoptions too. I am suggesting, therefore, that it be the basis for adjustments in the relationships, and not for transfers of custody.

624. *Caban v. Mohammed*, 441 U.S. 380, 394 (1979).

625. *Id.* at 389.

separated and she married another man.⁶²⁶ The Court rejected "the claim that the broad, gender-based distinction of [the statute] is required by any universal difference between maternal and paternal relations at every phase of a child's development"⁶²⁷ and found that the statute was insufficiently related to the important purpose of providing adoptive homes for nonmarital children to survive intermediate scrutiny.⁶²⁸ The majority expressly reserved the question of newborn adoptions.⁶²⁹

The dissenters, on the other hand, focused on newborn adoptions and concluded that unmarried mothers and fathers were not similarly situated during pregnancy and at the birth of the child.⁶³⁰ Therefore, because of the exigencies of newborn adoptions, they would have upheld the statute in its entirety, even if it swept broadly enough to include Mr. Caban's family.⁶³¹ "Men and women are different," Justice Stevens opined, "and the difference is relevant to the question whether the mother may be given the exclusive right to consent to the adoption of a child born out of wedlock."⁶³² Although both parents were present at the conception of the child, "from that point on through pregnancy and infancy, the differences between the male and the female have an important impact on the child's destiny."⁶³³ The dissent continued,

Only the mother carries the child; it is she who has the constitutional right to decide whether to bear it or not. In many cases, only the mother knows who sired the child, and it will often be within her power to withhold that fact, and even the fact of her pregnancy, from that person These differences continue at birth and immediately thereafter. During that period, the mother and child are together; the mother's identity is known with certainty. The father, on the other hand, may or may not be present; his identity may be unknown to the world and may even be uncertain to the mother [A]s a matter of equal protection analysis, it is perfectly obvious that at the time and immediately after a child is born out of wedlock, differences between men and women justify some differential treatment of the mother and father in the adoption process.⁶³⁴

626. *Id.* at 382.

627. *Id.* at 389.

628. *Id.* at 391-92.

629. *Id.* at 392 n.11.

630. *Id.* at 405 (Stevens, J., dissenting); *id.* at 397 (Stewart, J., dissenting).

631. *Id.* at 406-07 (Stevens, J., dissenting); *id.* at 401 (Stewart, J., dissenting).

632. *Id.* at 404 (Stevens, J., dissenting).

633. *Id.*

634. *Id.* at 404-07 (Stevens, J., dissenting).

The interchange between the majority and the dissent in *Caban* demonstrates that the hard questions about adoption and the differences between unmarried men and women remain undecided. The *Nguyen* case, with its apparent endorsement of the sentiments of the *Caban* dissent, demonstrates that one can never tell what the Court might do with biological differences.⁶³⁵

For the thwarted putative father, gender-based equal protection analysis sharpens the paradoxes of paternity. The public fisc biology cases treat unmarried fathers as mere sources of financial responsibility. The 'biology plus' cases imply that such men can be something more than providers, indeed that they *must* be something more in order to qualify as a 'parent.' How is a biological father to establish the 'plus' factor when he has been thwarted of the opportunity to develop a relationship with his child? It seems that the most obvious and 'fatherly' way to do that is to provide financial support, or at least try to do so. The 'resolution' to the apparent paradox therefore also may rest on the obligation of fathers to accept financial responsibility for their children. Although it would be unfortunate, it would not be surprising if the Court adopted this line as the constitutional minimum that would satisfy 'biology plus' in the newborn adoption context. As always, money counts.

Adoption, especially into an entirely new legal family, by its very nature raises questions about nature and nurture and about the proper significance afforded biology. The Supreme Court has addressed these questions in a narrow band of cases that involved unmarried fathers and stepfather adoptions. It has also considered a number of paternity establishment and related public fisc cases. In so doing, it has created an apparent paradox of paternity wherein biology alone suffices in the latter category, while the former requires 'biology plus.' The seeming clarity of this dichotomy disappears quickly, however, when instead of older children who will stay in place regardless of the decision, infants who will go to a new home are involved. This is true because there has been no time for the 'opportunity interest' recognized by the Court to ripen. The 'plus' factor that the Court requires in relationship cases is therefore harder to define and establish in this situation. As a result, outside of the context of an approved putative father registry, the constitutional fate of the thwarted putative father remains to be seen.

635. *Nguyen v. I.N.S.*, 533 U.S. 53 (2001).