

# THE OFTEN ILLUSORY PROTECTIONS OF “BIOLOGY PLUS:” ON THE SUPREME COURT’S PARENTAL RIGHTS JURISPRUDENCE

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INTRODUCTION.....	32
I. THE PARENTAL RIGHTS OF UNWED FATHERS .....	32
A. <i>Family and Parental Rights</i> .....	33
B. <i>The Differing Standards of Proof for Establishing Paternity</i> .....	34
1. <i>Stanley v. Illinois</i> .....	36
2. <i>Quilloin v. Walcott</i> .....	39
3. <i>Caban v. Mohammed</i> .....	42
4. <i>Lehr v. Robertson</i> .....	49
5. <i>Michael H. v. Gerald D.</i> .....	55
II. STATE PROTECTIONS OF UNWED FATHERS’ RIGHTS .....	58
A. <i>Cases More Protective of Non-marital Fathers’ Rights</i> .....	59
B. <i>Courts Less Protective of Non-marital Fathers’ Rights</i> .....	67
C. <i>Re-examining the Supreme Court’s Jurisprudence</i> .....	75
III. CONCLUSION .....	81

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Over the past several decades, state supreme courts have been forced to analyze the degree to which the United States Constitution protects the parental rights of unwed fathers. Two very different interpretations of the relevant jurisprudence have been offered. One suggests that an unwed father will retain his parental rights as long as he does not culpably act or fail to act in a way which deprives him of his rights, while the other suggests that an unwed father will acquire parental rights only if he affirmatively avails himself of the opportunity to establish a relationship with his child. The difference between these two interpretations has sometimes determined whether an individual could block the adoption of his child. Regrettably, the United States Supreme Court has not clearly articulated the conditions under which an unwed father's parental rights are protected, which at least partially explains why the state supreme courts have offered such widely varying interpretations of the relevant jurisprudence.

Part I of this article discusses the United States Supreme Court jurisprudence in this area, arguing that although the Court has left many questions unanswered, the prevailing interpretation of that jurisprudence neither captures what the Court has said nor what it has implied. Part II of this article discusses several state court cases in which unwed fathers attempted to block adoptions of their non-marital children. While some of the protections for non-marital fathers created by the state courts are wise and likely to prevent unfairness and injustice, these protections are not demanded by the Constitution as interpreted by the United States Supreme Court, protestations to the contrary notwithstanding. The article concludes that the best understanding of the current jurisprudence is that the constitutional protections are much less robust than currently thought, and offers some modest suggestions about the protections of the rights of unwed fathers that might be created by statute.

## I. THE PARENTAL RIGHTS OF UNWED FATHERS

The United States Supreme Court has long recognized that parental rights involve very important interests that are afforded constitutional protection. However, the Court's jurisprudence with respect to the rights of non-marital fathers has been inconsistent. Thus, while the Court has recognized that unwed fathers wishing to maintain relationships with their children are afforded some constitutional protection, the Court has offered seemingly contradictory analyses of when that protection will be offered and what will suffice to overcome it. By offering these inconsistent analyses, the Court provides too little guidance<sup>1</sup> and

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1. Cf. Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology 'Plus' Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 WM. & MARY J. WOMEN & L.

virtually guarantees that relevantly similar cases will receive inconsistent treatment in lower courts.

#### A. Family and Parental Rights

The Court has long recognized the importance of family and the robust nature of parental rights.<sup>2</sup> The Court explained in *Meyer v. Nebraska* that the Constitution protects the right of the individual to “marry, establish a home and bring up children,”<sup>3</sup> and in *Prince v. Massachusetts* that “the custody, care and nurture of the child reside first in the parents.”<sup>4</sup> Within broad constraints, parents have the right and duty to raise their children in the way they believe proper, since the “child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”<sup>5</sup>

In *Santosky v. Kramer*, the Court explained that the “fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State,” and that “parents retain a vital interest in preventing the irretrievable destruction of their family life.”<sup>6</sup> Due to the great stakes involved,<sup>7</sup> safeguards against the state are necessary in parental rights terminations. For example, parental rights cannot be terminated absent “clear and convincing evidence” that the state’s allegations of improper care are true.<sup>8</sup>

In *Troxel v. Granville*, the Court reaffirmed the importance of parental rights and that “the relationship between parent and child is constitutionally protected.”<sup>9</sup> The Court noted that “a parent’s interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment.”<sup>10</sup>

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47, 101 (2004) (“[S]ince *Lehr v. Robertson*, the Supreme Court has yet to fill in the contours of ‘biology plus’ and the opportunity interest acknowledged in that case.”).

2. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (discussing “this Court’s historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment”) (citing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978)).

3. 262 U.S. 390, 399 (1923).

4. 321 U.S. 158, 166 (1944).

5. *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925).

6. 455 U.S. 745, 753 (1982).

7. *Id.* at 758 (“In parental rights termination proceedings, the private interest affected is commanding.”).

8. *Id.* at 747–48.

9. 530 U.S. 57, 66 (2000) (citing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978)).

B. *The Differing Standards of Proof for Establishing Paternity*

While the Court has recognized that established parental rights can only be terminated upon a significant showing by the state, the Court has not required the same sort of showing to establish parentage. At issue in *Rivera v. Minnich* was the standard of proof required to establish paternity.<sup>11</sup> Pennsylvania had imposed a preponderance of the evidence standard in paternity cases.<sup>12</sup> The law was challenged on the ground that a clear and convincing standard should instead have been used.<sup>13</sup> The Court rejected the challenge, denying an “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.”<sup>14</sup> The Court implied that the individual’s interest in avoiding being declared the father of a child was primarily economic—“the primary interest of the defendant is in avoiding the serious economic consequences that flow from a court order that establishes paternity and its correlative obligation to provide support for the child.”<sup>15</sup> In contrast, where an individual’s parental rights are being terminated involuntarily, “the State is seeking to destroy permanently all legal recognition of the parental relationship . . . [and] the parent’s desire for, and right to, the companionship, care, and custody of his or her children [i]s ‘an interest far more precious than any property right.’”<sup>16</sup>

The *Rivera* Court characterized the dispute between the mother and the alleged father in a paternity action as primarily private, reasoning that “in a paternity suit the principal adversaries are the mother and the putative father, each of whom has an extremely important, but nevertheless relatively equal, interest in the outcome.”<sup>17</sup> The Court implied that the mother has an interest in establishing paternity so that a support obligation can be imposed, whereas the alleged father has an interest in establishing that he is not the father so that no support obligation will be imposed.<sup>18</sup> Further, the Court reasoned, the parties

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10. *Id.* at 77.

11. 483 U.S. 574, 579–80 (1987).

12. *Id.* at 577.

13. *Id.* at 579–80 (“Appellant’s principal argument is that the standard of proof required by our holding in *Santosky* to terminate the parent-child relationship is also constitutionally required to create it.”); *see also Santosky*, 455 U.S. at 747–748 (“Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.”).

14. *Rivera*, 483 U.S. at 579–80.

15. *Id.* at 580.

16. *Id.* (citing *Santosky*, 455 U.S. at 758–759).

17. *Id.* at 581.

18. Oren, *supra* note 1, at 80–81 (“The Court’s nod to the strength of the relationship interest did not stop it from concluding subsequently that, unlike in termination cases, a simple preponderance of

will be similarly disadvantaged by an adverse ruling, since each will suffer opportunity costs in not having the income that a different ruling might have yielded.<sup>19</sup> Thus, the Court concluded, “it is appropriate that each [parent] share roughly equally the risk of an inaccurate factual determination.”<sup>20</sup>

The *Rivera* Court claimed that it was taking the child’s interests into account in its analysis, reasoning that as far as the child is concerned it will be a matter of indifference whether a higher or a lower standard of proof is required in contested paternity cases:

Surely, from the child’s point of view, a lower standard of proof increases the possibility of an erroneous determination that the defendant is his or her father, while a higher standard of proof increases the risk of a mistaken finding that the defendant is not his or her true father and thus may not be required to assume responsibility for his or her support.<sup>21</sup>

Yet, the Court’s analysis ignores two important points. First, while a higher standard of proof might slightly increase the likelihood that an actual father might escape detection, it is not as if a higher standard of proof would result in as many false negatives as there might have been false positives with the lower standard of proof. The technology at the time would at the very least “provide a 91% cumulative probability of negating paternity for erroneously accused [African-American] men and 93% for white men.”<sup>22</sup>

Second, and more significantly, the Court ignores the factor which might be most important to each of the parties. A higher standard of proof would, as a general matter, yield a much more accurate assessment of paternity—especially given current DNA testing which has made the risk of error in paternity cases quite low.<sup>23</sup> A child who wants to know the identity of his or her biological father will not be indifferent with respect to which standard of proof is employed, given the greater accuracy afforded by the higher standard of proof. So, too, both the mother and the alleged father might not only focus on whose bank account will receive deposits. Each adult might be vitally interested in knowing who the biological father actually is, and that interest is better served by having a higher rather than a lower standard of proof. As

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the evidence was enough to establish paternity. The majority in *Rivera v. Minnich* made it clear that this was actually about money, and not about precious personal associations.”).

19. *Rivera*, 483 U.S. at 581 (“Each would suffer in a similar way the consequences of an adverse ruling.”).

20. *Id.*

21. *Id.*

22. *Little v. Streater*, 452 U.S. 1, 8 (1981).

23. Cf. *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 80 (2001) (O’Connor, J., dissenting) (“Modern DNA testing . . . provid[es] accuracy unmatched by other methods of establishing a biological link.”).

Justice Brennan explained in his dissent, “What is at stake for a defendant in such a proceeding is . . . the imposition of a lifelong relationship with significant financial, legal, and moral dimensions.”<sup>24</sup>

Justice Brennan’s *Rivera* dissent merely echoes the Court’s own stated view in a previous case. At issue in *Little v. Streater* was whether Connecticut’s requirement that the costs of paternity testing be borne by the party requesting them violated constitutional guarantees insofar as it failed to include an exception for indigent defendants.<sup>25</sup> The *Little* Court noted that paternity proceedings in Connecticut “have ‘quasi-criminal’ overtones.”<sup>26</sup> An individual judged to be a father will be ordered to pay support, and his failure to do so might result in imprisonment.<sup>27</sup> Further, the Court noted, both the alleged father and the child have a very important interest in a correct determination of paternity.<sup>28</sup>

In *Little*, the Court recognized the importance of a finding of paternity, both because the father might be subject to criminal penalty for failing to fulfill his support obligations and because such a finding would establish a whole set of rights and obligations. In *Rivera*, the Court merely focused on one type of obligation that would arise from a finding of paternity—support obligations. By narrowly focusing on one aspect of a paternity finding in *Rivera* and more broadly focusing on the panoply of rights and responsibilities resulting from a paternity finding in *Little*, the Court gave contradictory signals about what a finding of paternity involves. Regrettably, this practice of giving contradictory signals about the implications of paternity in the non-marital context also occurs in the Court’s discussion of the conditions under which unwed fathers can prevent others from adopting their biological children.<sup>29</sup>

### 1. *Stanley v. Illinois*

The seminal case in unwed father’s rights jurisprudence is *Stanley*

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24. *Rivera*, 483 U.S. at 583 (Brennan, J., dissenting).

25. 452 U.S. 1, 3 (1981) (“This appeal presents the question whether a Connecticut statute which provides that in paternity actions the cost of blood grouping tests is to be borne by the party requesting them, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment when applied to deny such tests to indigent defendants.”).

26. *Id.* at 10.

27. *Id.*

28. *Id.* at 13 (“Obviously, both the child and the defendant in a paternity action have a compelling interest in the accuracy of such a determination.”).

29. Cf. Laurence C. Nolan, *Preventing Fatherlessness Through Adoption While Protecting the Parental Rights of Unwed Fathers: How Effective Are Paternity Registries?*, 4 WHITTIER J. CHILD & FAM. ADVOC. 289, 314–15 (2005) (“The Supreme Court has not given any more guidance to the states in determining what is required to protect a father’s rights with respect to newborns. . . . The states have been left on their own to interpret what procedures would satisfy the constitutional due process requirement.”).

*v. Illinois.*<sup>30</sup> At issue in *Stanley* was an Illinois law which made children of unwed fathers wards of the state upon the death of their mother.<sup>31</sup> While the unwed father could then seek to adopt his own children,<sup>32</sup> he would be afforded no priority over others who might also seek to adopt them.<sup>33</sup>

Basically, Illinois had a statutory presumption that unwed fathers were not fit to raise their children.<sup>34</sup> The state believed it unnecessary to hold hearings to determine in a particular case whether the unwed father was, in fact, unfit to raise his children,<sup>35</sup> instead suggesting that the better course of action was simply to presume such parents unfit.<sup>36</sup>

When offering the facts of the case, the Court suggested that “Joan Stanley lived with Peter Stanley *intermittently* for 18 years, during which time they had three children.”<sup>37</sup> Such a description would be compatible with a variety of scenarios. For example, two individuals who live together for a month every two or three years might be described as living together “intermittently.”<sup>38</sup> Yet, it is also true that two individuals who live together consistently except for a month every two or three years might also be described as living together “intermittently.” A court examining the record might have very different understandings of the relationship between the adults, depending upon which description of their “intermittent” relationship was more accurate. So too, a court examining the record might have very different pictures of the adult-child relationship at issue depending upon whether the parent was only absent for a month every two or three years or, instead, was only present for a month every two or three years. The *Stanley* Court mentioned in a footnote that Stanley had been living in the household much more than one might have inferred from the Court’s suggestion that the Stanleys had lived together “intermittently.”<sup>39</sup>

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30. 405 U.S. 645 (1972).

31. *Id.* at 646. (“Under Illinois law, the children of unwed fathers become wards of the state upon the death of the mother.”).

32. *But cf. id.* at 648 (“[T]he probation officer, . . . the assistant state’s attorney, . . . and the judge charged with the case . . . made it apparent that Stanley, unmarried and impecunious as he is, could not now expect to profit from adoption proceedings.”).

33. *Id.* (“[U]nder Illinois law, Stanley is treated not as a parent but as a stranger to his children. . . . Illinois law affords him no priority in adoption proceedings.”).

34. *Id.* at 647.

35. *Id.*

36. *Cf. id.* at 654 n.6 (“The State speaks of ‘the general disinterest of putative fathers in their illegitimate children’ and opines that ‘(i)n most instances the natural father is a stranger to his children.’”) (citation omitted).

37. *Id.* at 646 (emphasis added).

38. *Cf.* Scott A. Resnik, *Seeking the Wisdom of Solomon: Defining the Rights of Unwed Fathers in Newborn Adoptions*, 20 SETON HALL LEGIS. J. 363, 381 (1996) (“Having fathered three children with Joan Stanley, the couple lived together on an *on-again, off-again* basis for eighteen years without marrying.”) (emphasis added).

39. *See Stanley*, 405 U.S. at 650 n.4 (“It is undisputed that he is the father of these children, that he lived with the two children whose custody is challenged all their lives, and that he has supported them.”); *see also* Commonwealth v. Hayes, 205 S.E.2d 644, 646 (Va. 1974) (“Although the Supreme

A variety of interests are implicated when nontraditional families are split apart. For example, a man's interest "in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."<sup>40</sup> Further, the family bonds in nontraditional families may be "as warm, enduring, and important as those arising within a more formally organized family unit."<sup>41</sup> This language suggests that the Constitution affords robust protection to existing parent-child relationships whether or not the parents have formalized their ties with one another.

When evaluating the constitutionality of the Illinois statute, the Court examined the state's asserted interest and whether the means employed by the state were well-tailored to promote that interest. Illinois claimed that it wanted to

protect "the moral, emotional, mental, and physical welfare of the minor and the best interests of the community" and to "strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal."<sup>42</sup>

The Court did not contest the legitimacy of the State's ends but, rather, whether the means adopted by the State to achieve those ends passed constitutional muster.<sup>43</sup> The Court suggested that the State would be undermining its own goals if it took children away from a fit parent.<sup>44</sup> Since there was nothing in the record to suggest that Stanley had neglected his children,<sup>45</sup> the State's goal of promoting the interests of children might be furthered by permitting Stanley to retain custody,<sup>46</sup> and the State could not justify its refusal to shoulder the minimal costs implicated in affording Stanley an opportunity to establish his parental fitness.<sup>47</sup> The Court noted that the Illinois statute regarding notice specified several different ways that the notice requirement could be met,<sup>48</sup> and that unwed "fathers who do not promptly respond cannot

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Court's opinion described the parents' relationship as 'intermittent,' it is apparent that there was some semblance of a family unit. In fact, the two children whose custody was challenged had lived with the father all their lives and he had supported them."); Deborah L. Forman, *Unwed Fathers and Adoption: A Theoretical Analysis in Context*, 72 TEX. L. REV. 967, 972 (1994) ("Peter Stanley had lived with and acted as a father to his children for some eighteen years.").

40. *Stanley*, 405 U.S. at 651.

41. *Id.* at 652.

42. *See id.* (citing Ill. Rev. Stat., c. 37, § 701-2).

43. *See id.*

44. *Id.*

45. *Id.* at 655.

46. *Id.* at 652-53 ("[I]f Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family.").

47. *See id.* at 657 n.9 (discussing the "incremental cost of offering unwed fathers an opportunity for individualized hearings on fitness").

48. *Id.* ("The Illinois law governing procedure in juvenile cases, Ill. Rev. Stat., c. 37, § 704-1 et

complain if their children are declared wards of the State.”<sup>49</sup>

*Stanley* is important for several reasons, not least of which is that it establishes that non-marital fathers cannot be deprived of their parental rights without an opportunity for an individualized hearing. Of course, *Stanley* left many questions unanswered, including whether the father and child are required to have an existing relationship in order for the father’s rights to be constitutionally protected and, if so, what kind of relationship would be sufficient to trigger that protection.<sup>50</sup> Subsequent cases helped answer some of the questions left open by *Stanley*, although many areas of uncertainty remain.<sup>51</sup>

## 2. *Quilloin v. Walcott*

In *Quilloin v. Walcott*,<sup>52</sup> the Court suggested some limitations on the unwed fathers’ rights that had been recognized in *Stanley*. At issue in the case was whether Leon Quilloin’s consent was necessary before Darrell, his son, could be adopted by the spouse of Quilloin’s former partner, Ardell.<sup>53</sup> Ardell and Leon had a child together but had neither married nor lived together.<sup>54</sup> Nearly three years after the child’s birth, the mother married Randall Walcott.<sup>55</sup> Eight and a half years after their marriage, Randall Walcott filed a petition to adopt Darrell.<sup>56</sup> At that point, Quilloin sought to block the adoption and to secure the right to visit his son although he did not seek custody of his son or even object to his son’s continuing to live with his mother and her husband.<sup>57</sup>

Quilloin had never been ordered to pay child support.<sup>58</sup> He nonetheless had provided money for his son, although not on a regular basis.<sup>59</sup> Further, he had visited his son on many occasions and, in

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seq., provides for personal service, notice by certified mail, or for notice by publication when personal or certified mail service cannot be had or when notice is directed to unknown respondents under the style of ‘All whom it may Concern.’”).

49. *Id.*

50. Oren, *supra* note 1, at 48 (“[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.”).

51. *See id.* at 106 (“[T]he 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.”).

52. 434 U.S. 246 (1978).

53. *Id.* at 247 (“Although appellant was not found to be an unfit parent, the adoption was granted over his objection.”).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 251 n.9.

59. *Id.* at 251.

addition, had given his son toys and gifts.<sup>60</sup> Thus, *Quilloin* did not involve a father who had failed to support or establish a relationship with his son.<sup>61</sup> At issue in the case was the kind of relationship that needed to have been established in order for *Quilloin* to have been afforded the right to maintain contact with his son.

Darrell's mother, Ardell, believed that Leon *Quilloin*'s contacts with his son were having a disruptive effect on the boy and on the entire *Walcott* family.<sup>62</sup> Regrettably, the Court does not explain the kind of disruption that was caused by the visits. For example, it could be that the father was upsetting his son by continually promising to visit but then failing to show up at the agreed upon time or, perhaps, was setting a bad example for his son,<sup>63</sup> although the Court was careful to note that *Quilloin* had not been found an unfit parent.<sup>64</sup> It also could be that *Quilloin*'s continuing relationship with his son was disruptive in that it prevented *Randall Walcott* from acting as or claiming to be Darrell's "real" father or, perhaps, in that it prevented the *Walcott*s from being a more typical nuclear family composed of a father, mother, and two children.<sup>65</sup> By not explaining what kind of disruptive effect Leon *Quilloin* allegedly had on his son, the Court provided no guidance for subsequent courts with respect to what constitutes a disruptive effect. Darrell, himself, expressed a wish to be adopted by *Walcott*, and there was no question that *Walcott* would be a fit parent.<sup>66</sup> Yet, Darrell also expressed a wish to continue to have contact with *Quilloin* even after the adoption.<sup>67</sup>

When upholding the adoption, the Court chose not to base its decision on *Quilloin*'s having failed to legitimate his son sometime during the eleven years prior to the adoption petition, noting that the appellant had been unaware of that procedure until after the adoption petition had been filed.<sup>68</sup> Rather, the Court seemed to base its decision

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60. *Id.*

61. Sometimes, members of the Court have implied that *Quilloin* did not have a relationship with his son. *See, e.g.*, *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) ("The difference between the developed parent-child relationship that was implicated in *Stanley* and *Caban*, and the potential relationship involved in *Quilloin* and this case, is both clear and significant."); *Hodgson v. Minnesota*, 497 U.S. 417, 484 (1990) (Kennedy, J., concurring in the judgment in part and dissenting in part) ("We have recognized, of course, that there are limits to the constitutional right of parents to have custody of, or to participate in decisions affecting, their children. If a parent has relinquished the opportunity to develop a relationship with the child, and his or her only link to the child is biological, the Constitution does not require a State to allow parental participation.") (citing *Lehr*, 463 U.S. at 261–265; *Quilloin*, 434 U.S. at 254–256).

62. *Quilloin*, 434 U.S. at 251.

63. The mother had claimed that *Quilloin*'s visits had "unhealthy effects" on both of her children, but there was no further elaboration. *See Quilloin*, 434 U.S. at 251 n.10.

64. *Id.* at 247.

65. *Id.* at 251 n.10 ("In addition to Darrell, appellees' family included a son born several years after appellees were married.").

66. *See id.* at 251.

67. *See id.* at 251 n.11.

68. *See id.* at 254 ("Appellees suggest that . . . any constitutionally protected interest appellant

on a few other factors. The Court pointed out that this was neither “a case in which the unwed father at any time had, or sought, actual or legal custody of his child,”<sup>69</sup> nor “a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived.”<sup>70</sup> Rather, the Court reasoned, “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 appellant.”<sup>71</sup>

The *Quilloin* Court implied that Quilloin had not earned the right to veto the adoption because he had “never exercised actual or legal custody over his child, and thus . . . never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child.”<sup>72</sup> Indeed, the Court implicitly took Quilloin to task for not wanting to wrest away custody of the child,<sup>73</sup> distinguishing Quilloin from a divorced father because the latter would have had legal custody of the child during the marriage.<sup>74</sup>

Yet, a few points might be made about the Court’s analysis. First, legal custody of the child need not involve significant responsibility regarding the daily supervision, education, or care of a child. In a home composed of one parent working outside the home and another solely working within the home, it may be that only the latter parent has significant responsibility for day-to-day childcare matters. Thus, while it still may be true that Quilloin and a divorced father were distinguishable, the Court may well have been inaccurate when imputing significant day-to-day childcare responsibility to some marital fathers.

The *Quilloin* Court implied that it was a failing on Leon Quilloin’s part not to have wanted to take custody of Darrell.<sup>75</sup> Yet, it might also be that Quilloin recognized that his son was better off living with his mother. One parent saying that a child is better off living with the other parent should hardly be construed as somehow admitting that the non-custodial parent does not also have a role to play in the child’s life. Indeed, as the North Dakota Supreme Court explained, “[v]isitation between a child and the noncustodial parent is presumed to be in the best

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might have had was lost by his failure to petition for legitimation during the 11 years prior to filing of Randall Walcott’s adoption petition. We would hesitate to rest decision on this ground, in light of the evidence in the record that appellant was not aware of the legitimation procedure until after the adoption petition was filed.”).

69. *Id.* at 255.

70. *Id.*

71. *Id.*

72. *Id.* at 256.

73. *Id.*

74. *Id.* (“In contrast, legal custody of children is, of course, a central aspect of the marital relationship, and even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage.”).

75. Cf. Oren, *supra* note 1, at 126 (“[I]n order to qualify to withhold consent to an adoption, [the putative father] must demonstrate a timely willingness to assume full responsibility for raising his child himself.”).

interest of the child.”<sup>76</sup> Thus, a much different take on *Quilloin*’s case, also compatible with the facts as described by the Court, is that Leon Quilloin recognized both that he had a real and important role in his son’s life and that Darrell was nonetheless better off living with his mother.

*Quilloin* provided some guidance as to the conditions under which an unwed father would be entitled to the rights recognized in *Stanley*. However, precisely because the underlying facts in those two cases differed in several important respects, the jurisprudence still required clarification. For example, in *Stanley*, the biological father had lived with his children all of their lives, while in *Quilloin* the biological father had never lived with his child. In the next important case in this area, the biological father had lived with his children during a portion of their lives.

### 3. *Caban v. Mohammed*

A year after the Court decided *Quilloin*, it considered another case, *Caban v. Mohammed*, in which a mother and her spouse sought to adopt her children without the consent of the children’s non-marital father.<sup>77</sup> In this case, however, the father and his wife also sought to adopt the children.

Abdiel Caban and Maria Mohammed lived together for five years during which time they had two children.<sup>78</sup> During this period, both Abdiel and Maria contributed to the support of the family.<sup>79</sup> Although Abdiel and Maria held themselves out as married, they were not.<sup>80</sup> Indeed, during the entire time that they were together, Abdiel was married to someone else.<sup>81</sup>

When Maria left Abdiel, she took the children and went to live with Kazim Mohammed, whom she subsequently married.<sup>82</sup> For the first several months following her marriage, the children were taken each weekend to the home of Maria’s mother, Delores Gonzalez, who lived one floor above Abdiel.<sup>83</sup> Because of Abdiel’s relationship with Delores,

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76. *Montgomery v. Montgomery*, 667 N.W.2d 611, 616 (N.D. 2003).

77. 441 U.S. 380, 381–82 (1979) (“The appellant, Abdiel Caban, challenges the constitutionality of § 111 of the *New York Domestic Relations Law* (McKinney 1977), under which two of his natural children were adopted by their natural mother and stepfather without his consent.”).

78. See *id.* at 382.

79. *Id.*

80. *Id.*

81. *Id.* (“Abdiel Caban and appellee Maria Mohammed lived together in New York City from September 1968 until the end of 1973. . . . [U]ntil 1974 Caban was married to another woman, from whom he was separated.”).

82. *Id.*

83. *Id.*

he was able to see the children when they visited their grandmother.<sup>84</sup>

Delores then decided to return to Puerto Rico.<sup>85</sup> At her daughter's request, she took her grandchildren with her.<sup>86</sup> Maria communicated with her children by mail, whereas Abdiel communicated with them through his parents, who were also in Puerto Rico.<sup>87</sup>

A little more than a year after the children had been in Puerto Rico, Abdiel went to visit them.<sup>88</sup> Delores willingly let him have the children for a few days.<sup>89</sup> However, rather than return the children to their grandmother as had been agreed, he returned with them to New York.<sup>90</sup> When Maria Mohammed learned what had happened, she tried to retrieve them from Abdiel.<sup>91</sup> When she was unable to do so, she instituted custody proceedings.<sup>92</sup> Maria and her husband were awarded custody, while Abdiel and his wife were awarded visitation.<sup>93</sup>

A few months later, the Mohammeds sought to adopt the children.<sup>94</sup> The Cabans were permitted to present evidence at the adoption hearing, but only with respect to the suitability of the Mohammeds as parents.<sup>95</sup> At that time, even if the non-marital father's relationship with his children was "substantial,"<sup>96</sup> New York law prevented the termination of an unwed father's parental rights only upon a "showing that the best interests of the child would not permit the child's adoption by the petitioning couple."<sup>97</sup> In contrast, absent a showing of abandonment or unfitness, the mother of children born out of wedlock could not have her parental rights terminated without her consent.<sup>98</sup>

The *Caban* Court explained that "an unwed father may have a relationship with his children fully comparable to that of the mother,"<sup>99</sup>

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84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 382-83.

88. *Id.* at 383.

89. *Id.*

90. *Id.* ("Caban, however, returned to New York with the children.").

91. *Id.*

92. *Id.*

93. *Id.*

94. See *id.* at 383 n.1 ("Section 110 of the N.Y. Dom. Rel. Law (McKinney 1977) provides in part: 'An adult or minor husband and his adult or minor wife together may adopt a child of either of them born in or out of wedlock and an adult or minor husband or an adult or minor wife may adopt such a child of the other spouse.' Although a natural mother in New York has many parental rights without adopting her child, New York courts have held that § 110 provides for the adoption of an illegitimate child by his mother." (citing *In re Anonymous Adoption*, 31 N.Y.S.2d 595 (Sur. Ct. 1941)).

95. See *id.* at 384.

96. *Id.* at 387.

97. *Id.*

98. *Id.* at 388 ("Adoption by Abdiel was held to be impermissible in the absence of Maria's consent, whereas adoption by Maria could be prevented by Abdiel only if he could show that the Mohammeds' adoption of the children would not be in the children's best interests.").

99. *Id.* at 389.

noting that Abdiel and Maria had lived with the children “as a natural family for several years”<sup>100</sup> and that “both mother and father [had] participated in the care and support of their children.”<sup>101</sup> The Court saw “no reason to believe that the Caban children—aged 4 and 6 at the time of the adoption proceedings—had a relationship with their mother unrivaled by the affection and concern of their father,”<sup>102</sup> and struck down New York’s law permitting unwed mothers but not unwed fathers to block the adoption of their children.<sup>103</sup>

By affording to some unwed fathers the parental rights already possessed by unwed mothers, the *Caban* Court understood that some children would not be placed in two-parent homes, since “some unwed fathers [will] prevent the adoption of their illegitimate children.”<sup>104</sup> However, the Court suggested that this refusal to permit an adoption would usually not be out of selfishness or stubbornness but instead “the result of a natural parental interest.”<sup>105</sup> Indeed, the Court seemed to reject that there was a “profound difference between the affection and concern of mothers and fathers for their children.”<sup>106</sup>

In his dissent, Justice Stewart noted that “[p]arental rights do not spring full-blown from the biological connection between parent and child,”<sup>107</sup> but instead “require relationships more enduring.”<sup>108</sup> Justice Stewart then compared the ways that fathers and mothers can establish the requisite connectedness. Noting that the “mother carries and bears the child,”<sup>109</sup> he explained that “in this sense her parental relationship is clear.”<sup>110</sup> However, he continued, the “validity of the father’s parental claims must be gauged by other measures,”<sup>111</sup> for example, “the legitimate familial relationship he creates with the child by marriage with the mother.”<sup>112</sup>

This analysis is somewhat surprising. Bracketing the complications posed by surrogacy arrangements, the mother’s biological relationship with the child is clear, given that she carries and bears the child. However, the fact that the mother has this biological relationship with her child does not guarantee that she will also have an emotional

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100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 391 (“We find that the distinction in § 111 between unmarried mothers and unmarried fathers . . . does not bear a substantial relation to the State’s interest in providing adoptive homes for its illegitimate children.”).

104. *Id.* at 391.

105. *Id.* at 391–92.

106. *Id.* at 392.

107. *Id.* at 397 (Stewart, J., dissenting).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

relationship with her child.<sup>113</sup> Further, if the non-marital father is present for the birth<sup>114</sup> and, perhaps, living with the child, he might also develop a deep and abiding relationship with the child, lack of marriage to the mother notwithstanding.<sup>115</sup>

Justice Stewart recognized that in “some circumstances the actual relationship between father and child may suffice to create in the unwed father parental interests comparable to those of the married father.”<sup>116</sup> Here, Justice Stewart had the facts of *Stanley* in mind.<sup>117</sup> However, he considered the facts of *Caban* and *Stanley* relevantly dissimilar, because in the former but not the latter case the father’s “wishes and those of the mother are in conflict, and the child’s best interests are served by a resolution in favor of the mother.”<sup>118</sup>

Yet, the wishes of the parents might be in conflict, even when a father has a deep and abiding relationship with his child. Thus, on Justice Stewart’s view, it is not merely biology plus a relationship with the child that yields parental rights for an unwed father. For Justice Stewart, the important difference between *Stanley* and *Caban* was that there was no evidence that Joan Stanley disapproved of and wished to terminate the relationship between her children and their biological father, whereas there was evidence that Maria Mohammed disapproved of and wished to terminate the relationship between her children and their biological father.<sup>119</sup>

Justice Stewart’s view bears close examination for yet another reason. In *Caban*, the lower court held that it was in the best interests of David and Denise to be adopted by Kazim Mohammed. But the court’s focus was solely on whether Mohammed would be a fit parent.<sup>120</sup> If so,

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113. See *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 86 (2001) (O’Connor, J., dissenting) (“A mother may not have an opportunity for a relationship if the child is removed from his or her mother on account of alleged abuse or neglect, or if the child and mother are separated by tragedy, such as disaster or war.”). The Court sometimes implies that *all* mothers love their children. See *Gonzales v. Carhart*, 127 S. Ct. 1610, 1634 (2007) (“Respect for human life finds an ultimate expression in the bond of love the mother has for her child.”); *but see Forman, supra* note 39, at 985 (“[T]he nature, existence, and extent of bonding that actually takes place between mother and child has been called into question. Studies challenge the notion that ‘the prenatal bond is a universal concomitant of pregnancy’ or ‘an immutable biological imperative.’”).

114. See *Nguyen*, 533 U.S. at 87 (O’Connor, J., dissenting) (“There is no reason, other than stereotype, to say that fathers who are present at birth lack an opportunity for a relationship on similar terms.”).

115. See *id.* at 85 (“After his parents’ relationship had ended, petitioner Nguyen lived with the family of his father’s new girlfriend. In 1975, before his sixth birthday, Nguyen came to the United States, where he was reared by his father.”).

116. *Caban*, 441 U.S. at 397 (Stewart, J., dissenting) (citing *Stanley* 405 U.S. 645).

117. *See id.*

118. *Id.*

119. Cf. Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL’Y 1, 34–35 (2004) (“When the biological father’s relationship with the mother is strong enough, and, more particularly, when the mother manifests her intent and desire for the biological father to assume the role of father, he receives constitutional protection for his paternal rights.”).

120. See *Caban*, 441 U.S. at 384.

it would be in the interests of the children to be adopted; if not, then it would not be in their interest to be adopted by him. The trial court which terminated Abdiel Caban's parental rights was not even considering whether the children would benefit from continued contact with him. Thus, when Justice Stewart noted that the trial court had found that it would be in the best interests of the children to be adopted, he failed to explain that the court had *not* found that continued contact with their biological father would not be in their interest, but merely that Maria Mohammed's husband would be a fit father. Yet, Kazim Mohammed's fitness as a father would not establish that it would be in the interest of Maria's children not to have continued contact with their biological father, Abdiel Caban.

Justice Stewart made clear that in his mind a key factor in determining whether the mother's wishes had to be respected was whether the mother and father had married—"the absence of a legal tie with the mother may in such circumstances appropriately place a limit on whatever substantive constitutional claims might otherwise exist by virtue of the father's actual relationship with the children."<sup>121</sup> Yet, this means that in many cases the alleged focus—the relationship between the father and his children—is not really the relationship of concern.<sup>122</sup> Rather, the relationship of concern is that between the parents, even though in a particular instance a non-marital father might have a deeper and more abiding relationship with his child than a marital father might have with his child.<sup>123</sup> Indeed, a marital father might spend very little

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121. *Id.* at 397 (Stewart, J., dissenting).

122. It is thus misleading to focus on the possibly deep relationship between the noncustodial parent and the child. See Elizabeth Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson*, 45 OHIO ST. L.J. 313, 339 (1984) ("Parental interests in children are . . . protected . . . because parents provide for the material and emotional needs of children and because the emotional attachments that are created by the parents' care are inherently valuable and worthy of protection."); Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 73 (1995) (describing the "rule of thumb" that "an unwed biological father who had established a substantial relationship with his child had a constitutionally protected interest in maintaining the relationship"); E. Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-Parenting of Her Child*, 48 ARIZ. L. REV. 97, 102 (2006) ("[T]he *Stanley* through *Lehr* line of cases distill to the principle that biological paternity alone does not give rise to a constitutional claim for protection, but biological paternity coupled with some 'developed parent-child relationship' does merit some degree of constitutional protection."). *Quilloin* implies that even a deep relationship might be overridden if the non-marital father had never had nor sought custody of his child.

123. Cf. *Michael H. v. Gerald D.*, 491 U.S. 110, 147 n.5 (1989) (Brennan, J., dissenting) ("One need only look as far as *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978), to understand why an unwed father might lose for reasons having nothing to do with his own relationship with the child: there, we approved the use of a 'best interest' standard, rather than an 'unfitness' standard, for an unwed father who objected to the adoption of his child by another man."). A different reading is that there are several foci. See Forman, *supra* note 39, at 977–78 ("To qualify as a father, the man must also establish a social relationship with the child. Second, the satisfaction of the biology plus formula is necessary but not sufficient to establish fatherhood. Whether a man will be recognized as a father will depend to a great extent on the nature of the relationship he has maintained with the mother and whether his recognition would disrupt any existing formal family units.").

time acting as a parent and nonetheless have constitutional rights protecting his relationship with his child.<sup>124</sup>

Justice Stevens also dissented in *Caban*. He noted that the case “concerns the validity of rules affecting the status of the thousands of children who are born out of wedlock every day,”<sup>125</sup> suggesting that “[a]ll of these children have an interest in acquiring the status of legitimacy; a great many of them have an interest in being adopted by parents who can give them opportunities that would otherwise be denied; for some, the basic necessities of life are at stake.”<sup>126</sup> Indeed, Justice Stevens suggested that the “state interest in facilitating adoption in appropriate cases is strong—perhaps even ‘compelling.’”<sup>127</sup>

Justice Stevens expressed a number of concerns in his *Caban* dissent. He recognized that affording both parents the right to block an adoption would complicate and delay that process<sup>128</sup> and that “such a rule would remove the mother’s freedom of choice in her own and the child’s behalf without also relieving her of the unshakable responsibility for the care of the child.”<sup>129</sup> He also made clear that his focus was not solely on step-parent adoptions, which had been at issue in *Quilloin* and *Caban*, but also on adoptions where the mother is considering surrendering her own parental rights. Justice Stevens suggested that the Constitution would not preclude a “rule that gives the mother of the newborn infant the exclusive right to consent to its adoption,”<sup>130</sup> which would give “the loving father an incentive to marry the mother,”<sup>131</sup> and would also “facilitate[] the interests of the adoptive parents, the child, and the public at large by streamlining the often traumatic adoption process and allowing the prompt, complete, and reliable integration of the child into a satisfactory new home at as young an age as is feasible.”<sup>132</sup>

Reasonable individuals might disagree about whether Justice Stevens’s approach is wise as a matter of public policy. Certainly, there might be cases in which the father needs an extra little push to marry the mother and everyone will be happy ever after, although there might also

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124. It is for this reason among others that a theory of “parental labor” does not seem to capture the relevant jurisprudence. For such a theory, see Spitzko, *supra* note 122, at 104 (“My theory of the constitutional significance of biological paternity starts with the premise that constitutional protection for an individual’s parental relationship with a child does not arise until the individual has performed sufficient parental labor with respect to the child.”).

125. *Caban*, 441 U.S. at 402 (Stevens, J., dissenting).

126. *Id.*

127. *Id.*

128. *Id.* at 408 (“If the State were to require the consent of both parents, or some kind of hearing to explain why either’s consent is unnecessary or unobtainable, it would unquestionably complicate and delay the adoption process.”).

129. *Id.*

130. *Id.* at 407.

131. *Id.*

132. *Id.* at 407–08.

be cases in which such a push would be to the detriment of all concerned. So, too, while there might well be cases in which a child would be better off living with adoptive parents, there might well be other cases in which the child would have been better off living with her biological father and, perhaps, his marital or non-marital partner.

Bracketing the cost-benefit analysis of Justice Stevens's approach, a separate point is that it does not seem to give adequate weight to the parental interests at stake. Part of what having parental rights involves is that, in most cases, the state should not even be tempted to consider whether, for example, it would be better for the child to be living elsewhere. The *Quilloin* Court had "little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'"<sup>133</sup> Yet, it is not at all clear that parental rights should only be robust if the parents have married.

Justice Stevens foresaw that recognizing the parental rights of unwed fathers could raise "questions relating to the adequacy of notice to absent fathers [which] could invade the mother's privacy, cause the adopting parents to doubt the reliability of the new relationship, and add to the expense and time required to conclude what is now usually a simple and certain process."<sup>134</sup> He also anticipated some of the practical consequences of affording the non-marital father parental rights, since "[i]n 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."<sup>135</sup> His point that these difficulties might arise is well-taken, which is one of the reasons that state putative father registries have been created and that some call for the creation of a national registry.<sup>136</sup> However, it is not at all clear that these concerns justify precluding an unwed biological father from having his relationship with his child afforded more protection.

*Stanley*, *Quilloin*, and *Caban* all involved whether an existing relationship between an unwed father and his child or children was constitutionally protected. At issue in the next important case in this

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133. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (quoting *Smith v. Org. of Foster Families*, 431 U.S. 816, 862–63 (Stewart, J., concurring in the judgment)).

134. *Caban*, 441 U.S. at 408–09 (Stevens, J., dissenting).

135. *Id.* at 404–05. *See also* Baker, *supra* note 119, at 46 ("For biological parents who are not living together, it is the woman who decides whether the biological father knows about the pregnancy, how participatory the biological father (or any other potential 'father') can be during the pregnancy, and, at least when the child is young, how much contact the father can have.").

136. *See, e.g.*, Mary Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y 1031, 1038 (2002) ("Congress should enact a national putative father registry database to address the interstate effect of adoptions. This system would have the dual purposes of facilitating notice of adoptive proceedings to unmarried birth fathers in interstate adoptive situations and of promoting secure adoptive placements.").

area was the degree to which an unwed father’s relationship with his child was protected when he had never supported and rarely seen her during her two years of life.<sup>137</sup>

#### 4. *Lehr v. Robertson*

The facts in *Lehr v. Robertson*<sup>138</sup> are contested.<sup>139</sup> Lehr offered the following account: he and Lorraine Robertson had known each other for about three years before they began living together, during which time they had a child.<sup>140</sup> She told him that she had reported his paternity of their child to the New York State Department of Social Services.<sup>141</sup> When Lorraine was released from the hospital after giving birth, she and the child disappeared. He kept looking for them and had sporadic success in locating them.<sup>142</sup> When he did locate them, he would visit with them to the extent that Lorraine permitted him to do so.<sup>143</sup> Then she disappeared.<sup>144</sup> When he finally located them again with the help of a private detective, she had already married Richard Robertson.<sup>145</sup> At this point, Lehr offered to provide financial assistance for Jessica, which Lorraine refused.<sup>146</sup> Lorraine threatened to have him arrested if he did not stay away from them.<sup>147</sup> He then retained counsel, who wrote to Lorraine requesting that Lehr be permitted to see his daughter and threatening legal action should that permission not be granted.<sup>148</sup> Shortly thereafter, perhaps in response to the letter from Lehr’s attorney, Lorraine and her husband sought to adopt Jessica.<sup>149</sup> About a month after Lorraine and Richard Robertson had initiated adoption proceedings, Lehr initiated a visitation and paternity petition.<sup>150</sup>

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137. *Lehr v. Robertson*, 463 U.S. 248, 249–50 (1983).

138. 463 U.S. 248 (1983).

139. See Alexandra R. Dapolito, *The Failure to Notify Putative Fathers of Adoption Proceedings: Balancing the Adoption Equation*, 42 CATH. U. L. REV. 979, 992 n. 78 (suggesting that the facts of *Lehr* are contested) (citing EVA R. RUBIN, THE SUPREME COURT AND THE AMERICAN FAMILY 46 (1986)).

140. *Lehr*, 463 U.S. 248 at 268–69 (White, J., dissenting) (“According to Lehr, he and Jessica’s mother met in 1971 and began living together in 1974. The couple cohabited for approximately 2 years, until Jessica’s birth in 1976.”).

141. *Id.* at 269 (“Lorraine acknowledged to friends and relatives that Lehr was Jessica’s father; Lorraine told Lehr that she had reported to the New York State Department of Social Services that he was the father.”).

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 252 (majority opinion).

The Court described the implicated parent-child relationship as “an unmarried father’s inchoate relationship with a child whom he has never supported and rarely seen in the two years since her birth.”<sup>151</sup> Pointing out that New York maintains a putative father registry,<sup>152</sup> and that Lehr “had not entered his name in the registry,”<sup>153</sup> the Court characterized the issue before it as whether Lehr had “an absolute right to notice and an opportunity to be heard before the child may be adopted.”<sup>154</sup>

By discussing whether Lehr had an “absolute” right to notice, the Court engaged in a bit of misdirection. If Lehr had such a right, he could have asserted it regardless of what he had done in the past. Thus, even had he not been continually searching for Lorraine and Jessica once they had disappeared from the hospital; even had he not hired a private detective to find them; even had he not offered support for Jessica or filed a petition to (1) establish his paternity, (2) become legally responsible to support her, and (3) have a visitation schedule set up;<sup>155</sup> he still would have had a right to notice if that right were “absolute.”<sup>156</sup> Basically, because Lehr did not fit into one of the recognized exceptions included within the New York law,<sup>157</sup> he had to perform a relatively simple task to be entitled to notice regarding a proceeding to adopt his daughter, namely, mail a postcard to the putative father registry.<sup>158</sup> His course of action, hiring an attorney and filing a paternity petition, was both more complicated and more expensive, and yet did not afford the protection to which the simple mailing would have entitled him.<sup>159</sup>

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151. *Id.* at 249–50.

152. *Id.* at 250.

153. *Id.* at 251.

154. *Id.* at 250.

155. *Id.* at 252 (“On January 30, 1979, one month after the adoption proceeding was commenced in Ulster County, appellant filed a ‘visitation and paternity petition’ in the Westchester County Family Court. In that petition, he asked for a determination of paternity, an order of support, and reasonable visitation privileges with Jessica.”).

156. *See Troxel v. Granville*, 530 U.S. 57, 88 (2000) (“A parent’s rights with respect to her child have thus never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family.”); *cf. Crawford v. Washington*, 541 U.S. 36, 73–74 (2004) (suggesting that a right is absolute where there are no exceptions to it).

157. *Lehr*, 463 U.S. at 251–52 (“In addition to the persons whose names are listed on the putative father registry, New York law requires that notice of an adoption proceeding be given to several other classes of possible fathers of children born out of wedlock—those who have been adjudicated to be the father, those who have been identified as the father on the child’s birth certificate, those who live openly with the child and the child’s mother and who hold themselves out to be the father, those who have been identified as the father by the mother in a sworn written statement, and those who were married to the child’s mother before the child was six months old. Appellant admittedly was not a member of any of those classes.”).

158. *Id.* at 264 (“By mailing a postcard to the putative father registry, he could have guaranteed that he would receive notice of any proceedings to adopt Jessica.”).

159. *See id.* at 275 (White, J., dissenting) (“The State is quite willing to give notice and a hearing to putative fathers who have made themselves known by resorting to the putative fathers’ register. It makes little sense to me to deny notice and hearing to a father who has not placed his name in the register but who has unmistakably identified himself by filing suit to establish his paternity and has notified the adoption court of his action and his interest. I thus need not question the statutory

In *Quilloin*, the Court did not rely on the biological father’s failure to legitimate his son before the adoption petition had been filed as a justification for denying *Quilloin* the right to block the adoption, perhaps because he had not been aware of the need to do so.<sup>160</sup> In *Lehr*, however, the Court relied on the biological father’s failure to file with the registry as a justification for denying his right to notice,<sup>161</sup> notwithstanding that (1) *Lehr* did not know about the registry, (2) he had filed a petition for a declaration of paternity and an imposition of visitation rights and financial obligations, and (3) he believed that the State was already on notice that he was the father of the child.<sup>162</sup> Indeed, the *Lehr* Court’s willingness to rely on the failure to file with the registry is even more surprising, given that (1) the judge granting the adoption had allegedly been aware of the filing of the paternity petition even before the adoption had been approved,<sup>163</sup> and (2) the only issue in *Lehr* was the right to notice to be heard, not the right to block the adoption.<sup>164</sup> Even if *Lehr* had the right to be heard, a separate issue would be whether he could have prevented the adoption.<sup>165</sup>

The *Lehr* Court made clear that some parent-child relationships are afforded constitutional protection. “The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases.”<sup>166</sup> The question at hand, however, was whether constitutional guarantees would be extended to the relationship before the Court.<sup>167</sup>

When explaining why the Constitution did not protect *Lehr*’s right to notice, the Court wrote that the “difference between the developed parent-child relationship that was implicated in *Stanley* and *Caban*, and

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scheme on its face. Even assuming that *Lehr* would have been foreclosed if his failure to utilize the register had somehow disadvantaged the State, he effectively made himself known by other means, and it is the sheerest formalism to deny him a hearing because he informed the State in the wrong manner.”).

160. See *Quilloin v. Walcott*, 434 U.S. 246, 254 (1978).

161. *Lehr*, 463 U.S. at 264 (“The possibility that he may have failed to do so because of his ignorance of the law cannot be a sufficient reason for criticizing the law itself.”).

162. See *supra* note 141 and accompanying text (noting that *Lehr* had claimed that Lorraine Robertson had informed the State that *Lehr* was Jessica’s father).

163. *Lehr*, 463 U.S. at 253 (“According to appellant’s attorney, the judge stated that he was aware of the pending paternity petition but did not believe he was required to give notice to appellant prior to the entry of the order of adoption.”).

164. Cf. *id.* at 272 n.4 (White, J., dissenting) (“The majority’s citation of *Quilloin* and *Caban* as examples that the Constitution does not require the same procedural protections for the interests of all unwed fathers is disingenuous. Neither case involved notice and opportunity to be heard. In both, the unwed fathers were notified and participated as parties in the adoption proceedings.”).

165. See *supra* notes 95–98 and accompanying text (noting that *Caban* was heard at the adoption proceeding).

166. *Lehr*, 463 U.S. at 256.

167. *Id.* (“In deciding whether this is such a case [meriting protection], however, we must consider the broad framework that has traditionally been used to resolve the legal problems arising from the parent-child relationship.”).

the potential relationship involved in *Quilloin* and this case, is both clear and significant.”<sup>168</sup> The Court added:

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 toward his children.” But the mere existence of a biological link does not merit equivalent constitutional protection.<sup>169</sup>

Here, the *Lehr* Court distinguishes between potential and actual parent-child relationships. The biological relationship affords the father a unique opportunity to establish a relationship with his child. If he avails himself of that opportunity, then the United States Constitution will offer protection for the relationship that has been created. However, if he fails to avail himself of the opportunity, then the Constitution does not require that he be afforded the same rights as fathers with existing relationships with their children.

In an often-cited passage, the Court suggests that biological parents who have relationships with their children will be afforded constitutional protection:

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child’s future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child’s development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child’s best interests lie.<sup>170</sup>

Yet, a brief consideration of the “potential relationship” cases cited by the Court suggests that the Court is not being entirely honest. First, insofar as the relevant issue is whether the father has established a relationship with his child, then *Quilloin* is an example of an actual rather than a potential relationship. *Quilloin* paid support, bought gifts for his son, and had enough of a relationship with his son that, even were the adoption petition by the mother and her new husband granted, his son

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168. *Id.* at 261.

169. *Lehr*, 463 U.S. at 261 (citing *Caban v. Mohammed*, 441 U.S. 380, 389 n.7, 392 (1979)).

170. *Id.* at 262.

wanted the relationship with Quilloin to continue.<sup>171</sup> Neither of these potential relationship cases involved someone claiming parental rights based purely on his biological relationship with his child. If the focus is not on the depth of the relationship between parent and child, but on whether the parent had accepted legal responsibility for the child, then Lehr's filing for a declaration of paternity and the court's imposition of financial obligations as well as visitation rights would seem sufficient to establish that Lehr was accepting "some measure of responsibility for the child's future."

The *Lehr* Court noted that Lehr "never had any significant custodial, personal, or financial relationship with Jessica, and he did not seek to establish a legal tie until after she was two years old."<sup>172</sup> Yet, if one accepts Lehr's account of what had transpired, it would have been extremely difficult for him to have had any kind of relationship with Jessica, given Lorraine's actions. Even if the Court did not credit his claims, the posture of the case required that Lehr's claims be accepted as true.<sup>173</sup>

The *Lehr* Court distinguished the parents in this case from the parents contesting custody in *Caban*.<sup>174</sup> In *Caban*, both parents supported and had custody of the children.<sup>175</sup> The same could not be said in *Lehr*:

Whereas appellee had a continuous custodial responsibility for Jessica, appellant never established any custodial, personal, or financial relationship with her. If one parent has an established custodial relationship with the child and the other parent has either abandoned or *never established* a relationship, the Equal Protection Clause does not prevent a state from according the two parents different legal rights.<sup>176</sup>

Yet, the *Lehr* Court's focus shifted from what the father did—whether he attempted to grasp the opportunity allegedly afforded by fathering a child—to whether he was successful in establishing a relationship with the child. By suggesting that the father's failure to

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171. See Jeffrey A. Parness, *Abortions of the Parental Prerogatives of Unwed Natural Fathers: Deterring Lost Paternity*, 53 OKLA. L. REV. 345, 354 (2000) ("Further, the existence of a social relationship between the child and the unwed natural father was also by itself deemed insufficient to prompt the 'substantial protection' of due process. Not only did Leon Quilloin visit the child often, but also he was never deemed 'an unfit parent' and his child had expressed a desire to continue the parent-child relationship.").

172. *Lehr*, 463 U.S. at 262.

173. *See id.* at 271 (White, J., dissenting) ("This case requires us to assume that Lehr's allegations are true—that but for the actions of the child's mother there would have been the kind of significant relationship that the majority concedes is entitled to the full panoply of procedural due process protections.").

174. *Id.* at 267 (majority opinion).

175. *See supra* notes 82–84 and accompanying text.

176. *Lehr*, 463 U.S. at 267–68 (emphasis added).

establish a relationship with the child, despite his great efforts to do so, put him in the position of having inferior or perhaps nonexistent rights, the Court seems to suggest that the relevant test is not what the father tried to do, but whether the father was in fact successful. Where the father has an established, substantial relationship with his child, his rights will be protected.<sup>177</sup> If he does not, then his relationship is merely inchoate and not entitled to constitutional protection.

*Lehr* is complicated, at least in part, because a variety of issues are implicated. The Family Court was aware of Lehr's filiation proceeding.<sup>178</sup> However, according to New York law, the only question before the court was whether it would be in the best interests of the child to be adopted by Lorraine Robertson's husband.<sup>179</sup> While implying that Lorraine may have been mentally and emotionally unstable, the court nonetheless suggested that she would remain the custodial parent whether or not it approved the adoption petition by her husband.<sup>180</sup> Given that suggestion, the only relevant issue was whether Lehr would have had anything to say about the parental fitness of Richard Robertson. The court had no reason to believe that Lehr had anything to contribute on that issue.<sup>181</sup>

It may be useful to compare *Lehr* with *Armstrong v. Manzo*.<sup>182</sup> At issue in *Armstrong* was an attempt by Salvatore Manzo to adopt the child of his wife, Alice.<sup>183</sup> The Manzos had not given Armstrong notice that Salvatore was trying to adopt Armstrong's daughter.<sup>184</sup> The Manzos claimed that they did not need to give notice because Texas law permitted an adoption without the consent of the father if he had not contributed substantially to the support of his child for a period of two years.<sup>185</sup>

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177. See *Michael H. v. Gerald D.*, 491 U.S. 110, 142–43 (1989) (Brennan, J., dissenting) ("[A]lthough an unwed father's biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with that child, such a link combined with a substantial parent-child relationship will do so."). A separate issue is how to define "substantial," e.g., whether it implies "custodial." See *infra* note 207.

178. *In re Adoption of Martz*, 423 N.Y.S.2d 378, 381 (N.Y. Fam. Ct. 1979) ("Monday, February 26, counsel for Mrs. Robertson informed the court of the pendency of the Westchester County Family Court filiation proceeding.").

179. *Id.* at 386 ("It is with the character and fitness of the adoptive parent that the court is primarily concerned.").

180. *Id.*

181. *Id.* (suggesting that the information to which the court did not have access by virtue of Lehr's lack of notice would not "in any way be significant or even relevant to the court's decision as to whether or not the stepfather's application for the adoption of this child should have been approved or disapproved").

182. *Armstrong v. Manzo*, 380 U.S. 545 (1965).

183. See *In re Adoption of Armstrong*, 371 S.W.2d 407, 408 (Tex. Civ. App.—El Paso 1963, writ ref'd n.r.e.).

184. *Armstrong*, 380 U.S. at 548 ("During this entire period the petitioner was not given, and did not have, the slightest inkling of the pendency of these adoption proceedings.").

185. *Id.* at 546–547 ("Texas law provides that an adoption such as this one shall not be permitted without the written consent of the child's natural father, except in certain specified circumstances. One such exceptional circumstance is if the father 'shall have not contributed substantially to the

Armstrong did not contest the constitutionality of the statute,<sup>186</sup> but instead challenged the suggestion that he had failed to support his daughter as required.<sup>187</sup> The Court held that “his motion to set aside the decree and consider the case anew” should have been granted,<sup>188</sup> suggesting that the “failure to give the petitioner notice of the pending adoption proceedings violated the most rudimentary demands of due process of law.”<sup>189</sup> However, it should be noted, not only did Armstrong have established rights to a relationship to his daughter, but he had information which would have been relevant to the proceeding, namely, whether in fact he had failed to support his daughter as required. If in fact he had supported her, his consent would have been required before his parental rights could have been terminated. In contrast, even if Lehr had been informed about the proceeding, he would not have been able to offer any information which would have established his legal rights or would have been helpful in assessing Richard Robertson’s fitness.

In *Schroeder v. City of New York*, the Court reaffirmed that “the requirement that parties be notified of proceedings affecting their legally protected interests is obviously a vital corollary to one of the most fundamental requisites of due process—the right to be heard.”<sup>190</sup> The *Schroeder* Court explained that “notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question.”<sup>191</sup> A point bearing emphasis, however, is that *Schroeder* only affords procedural due process protections to individuals whose “legally protected interests” are at stake.<sup>192</sup> Insofar as Lehr had only inchoate interests that were not yet legally protected, *Schroeder* does not stand for the proposition that he has a right to publication notice, much less actual notice.

##### 5. *Michael H. v. Gerald D.*

The *Stanley-Lehr* line of cases seemed to establish that a biological father who has a substantial relationship with his child has

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support of such child during a period of two years commensurate with his financial ability.’ In that event, the written consent of the judge of the juvenile court of the county of the child’s residence may be accepted by the adoption court in lieu of the father’s consent.”).

186. *Id.* at 547 n.2.

187. *Id.* at 549 (“[T]he petitioner introduced evidence, through witnesses and by depositions, in an effort to show that he had not failed to contribute to his daughter’s support ‘commensurate with his financial ability.’”).

188. *Id.* at 552.

189. *Id.* at 550.

190. 371 U.S. 208, 212 (1962).

191. *Id.* at 212–13.

192. *Id.* at 212.

constitutionally protected rights to the continuation of that parent-child relationship.<sup>193</sup> Yet, even that reading of the jurisprudence was put into doubt by *Michael H. v. Gerald D.*<sup>194</sup>

At issue in *Michael H.* was whether the parent-child relationship between Michael H. and Victoria D. was constitutionally protected. Michael had an adulterous affair with Carole, Victoria's mother.<sup>195</sup> Although Gerald, Carole's husband, was listed on the birth certificate as Victoria's father,<sup>196</sup> there was reason to believe that Michael rather than Gerald had fathered Victoria.<sup>197</sup> During the first three years of her life, Victoria sometimes lived with Michael and sometimes lived with Gerald.<sup>198</sup> When Victoria was three years old, Carole and Gerald reconciled and settled down with Victoria to live in New York.<sup>199</sup>

Michael claimed that he had a protected liberty interest in a continuing relationship with Victoria.<sup>200</sup> He argued that *Stanley*, *Quilloin*, *Caban*, and *Lehr* established that "a liberty interest is created by biological fatherhood plus an established parental relationship—factors that exist in the present case as well."<sup>201</sup> The *Michael H.* plurality disagreed, suggesting instead that those cases "rest not upon such 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."<sup>202</sup> The plurality reasoned that the legal issue before it was "whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection."<sup>203</sup>

Yet, the relationship between Peter Stanley and his children had not been treated as a protected family unit under the historic practices of our society, and thus one would infer from the *Michael H.* plurality that Stanley's parental rights should not have been protected. Indeed, the same point might have been made about the relationship between Abdiel Caban and his children. It would seem that the *Michael H.* plurality was

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193. See Buchanan, *supra* note 122, at 333 ("[U]nwed fathers who are presently exercising or have in the past exercised custodial responsibilities for their children have a constitutional interest in retaining the relationship established by their exercise of custody, and this interest is equivalent to the interests of other parents in their children.").

194. 491 U.S. 110 (1989).

195. *Id.* at 113.

196. *Id.*

197. *Id.* at 114 ("Carole and Michael had blood tests of themselves and Victoria, which showed a 98.07% probability that Michael was Victoria's father.").

198. See *id.* at 114–115.

199. *Id.* at 113–115.

200. *Michael H.*, 491 U.S. at 121 ("Michael contends as a matter of substantive due process that, because he has established a parental relationship with Victoria, protection of Gerald's and Carole's marital union is an insufficient state interest to support termination of that relationship.").

201. *Id.* at 123.

202. *Id.*

203. *Id.* at 124.

not really trying to account for the jurisprudence but instead trying to rewrite it.<sup>204</sup>

Perhaps *Michael H.* is best understood as only applying to the special facts of the case. The plurality suggested that where “the child is born into an extant marital family, the natural father’s unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter.”<sup>205</sup> According to this view, the relevant issue was not merely that Victoria was a product of an adulterous relationship,<sup>206</sup> since the *Caban* children were also the product of an adulterous relationship,<sup>207</sup> but that the mother had been legally married to the same individual throughout the period.

If the important point was that Carole had been married to Gerald the entire time, then it was at best misdirection to ask whether Michael and Victoria had been treated as a protected family unit under the historic practices of our society. Even if the relationship between the non-marital father and child had not been protected historically, it might nonetheless have been protected post-*Caban* if Carole had: (1) divorced Gerald, (2) married someone else after Victoria’s birth,<sup>208</sup> and (3) attempted to adopt Victoria with her new husband. In that event, Michael’s position would have been analogous to Abdiel Caban’s because: (1) the woman with whom he had a child would then have met and married someone else, and (2) she and her new spouse would have attempted to adopt the child whom he had fathered and helped to raise.<sup>209</sup>

In his concurrence, Justice Stevens suggested that “a natural father

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204. See *id.* at 144–45 (Brennan, J., dissenting) (“[T]he very premise of *Stanley* and the cases following it is that marriage is not decisive in answering the question whether the Constitution protects the parental relationship under consideration. These cases are, after all, important precisely because they involve the rights of *unwed* fathers. It is important to remember, moreover, that in *Quilloin*, *Caban*, and *Lehr*, the putative father’s demands would have disrupted a ‘unitary family’ as the plurality defines it; in each case, the husband of the child’s mother sought to adopt the child over the objections of the natural father. Significantly, our decisions in those cases in no way relied on the need to protect the marital family. Hence the plurality’s claim that *Stanley*, *Quilloin*, *Caban*, and *Lehr* were about the ‘unitary family,’ as that family is defined by today’s plurality, is surprising indeed.”).

205. *Id.* at 129 (plurality opinion).

206. But see *id.* at 144 (Brennan, J., dissenting) (“The plurality, indeed, expressly recognizes that marriage is the critical fact in denying Michael a constitutionally protected stake in his relationship with Victoria: no fewer than six times, the plurality refers to Michael as the ‘adulterous natural father’ (emphasis added) or the like.”).

207. See *supra* notes 79–81 and accompanying text (noting that Caban had been married to someone else during the entire time that he had lived with Mohammed and had had two children with her).

208. See *Michael H.*, 491 U.S. at 114. After Victoria’s birth, Carole lived with someone named Scott K. for awhile.

209. Arguably, what made *Michael H.* different was not merely that the children had been conceived while Carole and Gerald were married, see *Oren*, *supra* note 1, at 66 (“*Michael H.*, however, involved a unique factor: that Victoria’s mother was married to another man at the time that the child was conceived”), but that Gerald was seeking recognition of his parental rights to the child both born into and conceived during his marriage to Carole.

might . . . have a constitutionally protected interest in his relationship with a child whose mother was married to, and cohabiting with, another man at the time of the child's conception and birth.”<sup>210</sup> Indeed, Justice Stevens suggested that *Stanley* and *Caban* “demonstrate that enduring ‘family’ relationships may develop in unconventional settings.”<sup>211</sup> However, Justice Stevens concluded that there was “nothing fundamentally unfair about the exercise of a judge’s discretion that, in the end, allows the mother to decide whether her child’s best interests would be served by allowing the natural father visitation privileges.”<sup>212</sup> Yet, this means that the father’s constitutionally protected interest may be overridden if the mother decides that the child’s best interests would be better served by precluding the father from visiting.

Arguably, the *Michael H.* plurality decision can be limited to the less frequent case where a husband wishes to adopt a child born as a result of an adulterous union during his own marriage. However, Justice Stevens’s *Michael H.* concurrence has the potential to cover a more wide-ranging set of cases, since he seems to be suggesting that a mother can preclude a non-marital father from establishing a relationship with their child if she believes that the child’s interests would thereby be promoted. Both the *Michael H.* plurality and the *Michael H.* concurrence have implications for the relationships between non-marital fathers and their children. Indeed, especially when one considers the *Lehr* dissent’s characterization of Lehr’s great efforts to establish a relationship with his daughter, the *Stanley-Michael H.* line of cases suggests that the United States Constitution does not protect a non-marital father’s right to establish a relationship with his child, even if he is not at all blameworthy for the failure to establish that relationship. While *Stanley* and *Caban* offer some protection for a non-marital father who has established a relationship with and had custody of his children, the jurisprudence is much less robust than the language in this line of cases might lead one to believe.

## II. STATE PROTECTIONS OF UNWED FATHERS’ RIGHTS

The United States Supreme Court has never expressly delineated the rights of unwed fathers, either with respect to the conditions which must be met for an unwed father to have rights or with respect to the conditions under which such rights may be overridden. That reticence has left state courts in an unenviable position—they have been confronted by a dizzying array of cases involving non-marital fathers

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210. *Michael H.*, 491 U.S. at 133 (Stevens, J., concurring in the judgment).

211. *Id.*

212. *Id.* at 136.

seeking to establish or preserve parental rights and have no clear jurisprudence specifying the proper approach to be taken. It is no surprise that courts analyzing these cases have taken a variety of approaches, some affording protection only if the non-marital fathers established relationships with their children and others protecting the opportunity to establish a parental relationship absent some culpable act or failure on the biological father’s part.

#### *A. Cases More Protective of Non-marital Fathers’ Rights*

In *In re Raquel Marie X.*, the New York Court of Appeals discussed the conditions under which an unwed father could assert parental rights during adoption proceedings.<sup>213</sup> At issue were the parental rights of the biological fathers of Baby Girl S. and Raquel Marie X.<sup>214</sup> In each case, the biological parents had not lived together for a sustained period before the placement of the child with the would-be adoptive couple, but had reconciled after the placement.<sup>215</sup>

The parents of Raquel Marie—Miguel and Louise—married a few months after the child was placed.<sup>216</sup> However, it was unclear whether Miguel had done all that was necessary to afford him parental rights. The trial court found that the couple met the “living together” requirement of the statute, and that Miguel had contributed to pregnancy and birth expenses as well as having held himself out as Raquel Marie’s father.<sup>217</sup> However, the appellate court reversed, finding that the “living together” component had not been satisfied and suggesting that there was little evidence of compliance with the remaining factors.<sup>218</sup> The high court of the state struck down the “living together” component, reasoning that such a criterion wrongly focused on the relationship between the parents rather than on the relationship between the father and child.<sup>219</sup> The court then remanded to the appellate court to determine whether Miguel had manifested sufficient parental responsibility to justify his veto power over his daughter’s adoption.<sup>220</sup> The New York Court of Appeals did not discuss how much weight, if any, should have been given to Miguel’s assaulting Louise several times during the six months

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213. 559 N.E.2d 418 (N.Y. 1990).

214. *See id.* at 419–20.

215. *Id.* at 420 (“[A]fter the initial estrangement during which each unwed mother sought adoption for the child—thus implicating the lives of hopeful adoptive parents—the biological parents reunited and the mother thereafter supported the father’s efforts to gain custody of the child.”).

216. *Id.*

217. *Id.*

218. *Id.* at 428.

219. *Id.* at 426.

220. *Id.* at 428.

preceding the child's placement.<sup>221</sup>

The other couple—Regina and Gustavo—had a somewhat different story.<sup>222</sup> From the time that Gustavo had learned of the pregnancy, he did all that he could to establish his parental responsibility.<sup>223</sup> Further, the would-be adoptive parents had engaged in fraud during the proceedings.<sup>224</sup> None of the courts had any difficulty in finding that Gustavo could block the adoption.<sup>225</sup>

*Raquel Marie* is interesting for several reasons. It was issued shortly after the United States Supreme Court had issued *Michael H.*,<sup>226</sup> and nonetheless treats the New York Legislature's inclusion of a "living together" component as irrational, because it mistakenly emphasized the relationship between the parents rather than the relationship between the father and child. While the New York court's focus may well have been more sensible given that the issue at hand involved the quality of the relationship between the father and child, the New York Legislature seemed merely to have followed the United States Supreme Court's "irrational" lead, treating the relationship between the parents as a kind of proxy for the relationship between the parent and child. The outcome of *Michael H.* was predicated on the relationship between Carole and Gerald;<sup>227</sup> and Justice Stewart had expressly suggested in *Caban* that "the absence of a legal tie with the mother may . . . appropriately place a limit on whatever substantive constitutional claims might otherwise exist by virtue of the father's actual relationship with the children."<sup>228</sup> Thus, Justice Stewart had already suggested that the Constitution permits a legislature to consider the parents' relationship when determining the father's parental rights, the claim to the contrary by the New York Court of Appeals notwithstanding.

The New York high court had occasion to refine its *Raquel Marie*

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221. *See id.* at 420.

222. *See id.*

223. *Id.* at 428.

224. *Id.* at 420 ("[T]he affirmed findings of the Surrogate established a course of conduct over several months that prevented Gustavo from even knowing of the pregnancy or his paternity, thus rendering literal compliance with the statute impossible. The Surrogate, unanimously affirmed by the Appellate Division, concluded that the adoption should fail both because of fraud of the adoptive parents during the proceeding and because—reading a 'savings clause' into the statute for prevention by others—Gustavo did as much as possible to fulfill the statutory requirements and therefore was entitled to veto the adoption.").

225. *Id.* at 428 (affirming "the Appellate Division order in *Baby Girl S.*, where there are extensive affirmed findings supported by the record to sustain the unanimous conclusion reached by the courts that Gustavo, the biological father himself seeking full custodial responsibility virtually from the time he learned of Regina's pregnancy, did everything possible to manifest and establish his parental responsibility").

226. *See id.* at 423.

227. *See Michael H.*, 491 U.S. at 144 (Brennan, J., dissenting) ("The plurality, indeed, expressly recognizes that marriage is the critical fact in denying Michael a constitutionally protected stake in his relationship with Victoria.").

228. *Caban*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting).

analysis in *Robert O. v. Russell K.*<sup>229</sup> *Robert O.* concerned a couple—Robert and Carol—who were engaged and living together.<sup>230</sup> However, they broke up and Robert moved out. Carol did not tell Robert that she was pregnant, but instead contacted some friends whom she thought might be interested in adopting the child.<sup>231</sup>

Between March 1988 and January 1990, Robert did not contact Carol.<sup>232</sup> They then reconciled and subsequently married.<sup>233</sup> In March 1990, she told him about the pregnancy, at which point he reimbursed her for medical expenses, filed with the putative father registry, and sought to vacate the adoption.<sup>234</sup> The *Robert O.* court explained the relevant jurisprudence:

The guiding principle has been that the biological connection between father and child is not sufficient, in and of itself, to create a protected interest for the father. Only if the unwed father “grasps the opportunity” to form a relationship with his child will the inchoate right created by biology blossom into a protected liberty interest under the Constitution.<sup>235</sup>

While Robert O., the biological father, had “grasped the opportunity” ten months after the adoption had been finalized,<sup>236</sup> he had done so promptly after having been apprised that he was a father. The New York court explained that promptness is to be measured by the child’s life rather than when the father learned that he was a father.<sup>237</sup> Either to justify that it was not imposing an undue burden on the father or to distinguish the facts before it from the facts involved in *Baby Girl S.*,<sup>238</sup> the court noted that the father had neither been deceived nor

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229. 604 N.E.2d 99 (N.Y. 1992).

230. *Id.* at 100.

231. *Id.* (“Carol was pregnant but she did not tell petitioner, apparently because she believed he would feel she was trying to coerce him into marriage. Over the next few weeks, Carol approached her friends, respondents Russell K. and his wife Joanne K., and obtained their agreement to adopt her child.”).

232. *Id.* at 101 (“Between the time Carol and petitioner separated in March 1988 and January 1990, petitioner made no attempt to contact Carol although she continued to live in the same house and, as the courts below found, did nothing to conceal her whereabouts or her pregnancy.”).

233. *Id.*

234. *Id.* (“In a belated effort to meet the statutory requirements for notice and consent, petitioner reimbursed Carol for her medical expenses, filed with the Putative Father Registry, and commenced this proceeding to vacate the adoption.”).

235. *Id.* at 102.

236. *Id.* at 101 (“In March 1990—nearly 18 months after the birth and 10 months after the completed adoption—Carol informed petitioner that the child had been born.”).

237. *Id.* at 103. *See also* Buchanan, *supra* note 122, at 364 (“The main significance of *Lehr*, then, is its indication that the opportunity interest of every biological father in establishing a constitutionally protected parent-child relationship is of constitutional significance for only a limited time. Nevertheless, what constitutes a limited time depends on the circumstances under which the state is acting.”).

238. *See supra* note 224 and accompanying text (suggesting that the would-be adoptive parents had engaged in fraudulent behavior).

prevented from learning that Carol was pregnant.<sup>239</sup> After all, she had neither moved nor done anything to hide her pregnancy.<sup>240</sup>

In his concurring opinion, Justice Titone worried about the implications of the court's *Robert O.* opinion. He suggested that the majority was imposing an unrealistic burden on the great many men who have sexual relations with non-marital partners.<sup>241</sup> In those kinds of cases, it may often be true that the woman, but not the man, knows of any resulting pregnancy, and she will be in the position of deciding whether to inform him of the pregnancy.<sup>242</sup> Justice Titone implied that the majority was imposing an obligation on such men to remain in regular contact even after the relationships had ended so that they would know whether a pregnancy had resulted or, at least, to pursue alternative sources of information until they were sure that no child had been born of the relationship.<sup>243</sup> Such continuing attention might be quite uncomfortable for both parties and, further, might provide a justification for what might otherwise be viewed as stalking behavior.

These worries notwithstanding, however, Justice Titone agreed that the adoption should not be voided. He reasoned:

In my view, the adoption should be left undisturbed despite petitioner's competing interest in the child not because petitioner is blameworthy, but rather because the strong

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239. *Robert O.*, 604 N.E.2d at 104 ("No one, however, let alone any State actor, prevented petitioner from finding out about Carol's pregnancy. His inaction, however regrettable and with whatever unfortunate consequences, was solely attributable to him.").

240. *Id.* at 101. *See also In re Appeal in Maricopa County, Juvenile Action No. JS-8490*, 876 P.2d 1137, 1141 (Ariz. 1994) ("[S]ome states have interpreted *Lehr* to say that it is a father's burden to discover the existence of his child, even if he had no notice of pregnancy or birth."); *but see In re Termination of Parental Rights of Biological Parents of Baby Boy W.*, 988 P.2d 1270, 1274 (Okla. 1999) ("Natural Father did everything he could reasonably have done under the circumstances. His conduct was sufficient considering that Natural Mother failed to provide any information to him concerning her pregnancy. After Natural Mother ended the relationship with Natural Father in January, 1997, she knew how to make contact with him, but she never informed him that he was a father. She compounded her attempt to withhold knowledge of the child at the August 22, 1997, hearing at which she relinquished her parental rights. There, she testified that Natural Father was just someone she had met at a party and that she did not know his identity or where he could be found. Natural Mother's actions constitute specific denial of knowledge of the child and offer a complete defense to the termination of Natural Father's parental rights. The actions of Natural Mother and those of the Agency deprived Natural Father of the chance to grasp his parental opportunity interest. Under the Due Process Clause, Natural Father had a right to notice of the fact that Natural Mother was pregnant and had given birth to his child. The duty to inform him rested initially with Natural Mother and later with the Agency. Both failed to inform him despite the relative ease with which this could have been accomplished. In this regard, the Agency was no less to blame than Natural Mother in denying Natural Father notice of the child's existence."). It may well be that part of the reason that the *Baby Boy W.* Court decided the case this way was that the father was unlikely to father another child. *See Baby Boy W.*, 988 P.2d at 1271 ("Natural Father claims to have discussed his desire to parent a child should Natural Mother become pregnant by him. He also claims to have told her that treatment for cancer, involving the removal of a testicle and post-operative chemotherapy, had left his chances of producing offspring at 'slim to none.'").

241. *Robert O.*, 604 N.E.2d at 106 (Titone, J., concurring).

242. *Id.*

243. *Id.*

public policies favoring the finality of adoptions outweigh the interest of a biological father who, through no fault of his own, has been deprived of the opportunity to “manifest and establish his parental responsibility” toward the child.<sup>244</sup>

Justice Titone’s concurrence echoes some of the points made by Justice Stevens in his *Caban* dissent. Justice Stevens noted that 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.”<sup>245</sup> Further, both Justice Titone and Justice Stevens seem to suggest that the better view in some of these cases is that the rights of the biological father can be overridden, not that the biological father simply does not have protected rights.<sup>246</sup>

Other state supreme courts have offered analyses similar to New York’s with respect to how to construe the ability of an unwed father to grasp the opportunity of parenthood. In *In re Baby Girl Eason*, the Georgia Supreme Court addressed the conditions under which unwed fathers had parental rights.<sup>247</sup> The court suggested that relationships between children and their non-marital fathers may be placed on a continuum with corresponding degrees of protection.<sup>248</sup> At the high end are those relationships where the father had or has custody, whereas at the low end are those where the father has no relationship and his only connection to the child is biological.<sup>249</sup>

The Georgia court suggested that an unwed father’s biological connection to his child affords him an opportunity interest to develop a relationship with his child.<sup>250</sup> That interest is constitutionally protected, although it can be lost or abandoned.<sup>251</sup> Absent abandonment, however, “a state may not deny a biological father a reasonable opportunity to establish a relationship with his child.”<sup>252</sup> A separate issue involves whether in fact Scharlach, the father in *Baby Girl Eason*, had abandoned this interest.<sup>253</sup> For example, it was a matter of dispute as to whether he had consistently wanted custody of the child or wanted to have her put up for adoption.<sup>254</sup> It was also disputed whether he had offered financial

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244. *Id.* at 105–06 (citing *Raquel Marie X*, 559 N.E.2d at 428); *cf. In re M.N.M.* 605 A.2d 921, 931 (D.C. 1992) (Gallagher, Sr. J., dissenting) (“[S]o far as it appears, the child is situated in a happy adopted home environment where she has been since she was about two weeks old and she is now nearing five years of age. Reopening of the adoption proceeding would seriously affect the child and the adoptive parents.”).

245. *Caban*, 441 U.S. 380, 404–05 (1979) (Stevens, J., dissenting).

246. *See supra* notes 125–32 and accompanying text (discussing Stevens’s *Caban* dissent).

247. 358 S.E.2d 459 (Ga. 1987).

248. *Id.* at 461.

249. *Id.* at 461–62.

250. *Id.* at 462.

251. *Id.*

252. *Id.*

253. *Id.* at 459.

254. *See id.* at 460.

support to the mother.<sup>255</sup> Even the fact that he left Georgia for a job in California was subject to different interpretations, since the mother had pointed out that he left no forwarding address or telephone number, while he had suggested that she knew how to get in touch with him through his friends.<sup>256</sup> On remand, the court was to determine whether Scharlach had abandoned his opportunity interest.<sup>257</sup>

It should be noted, however, that *Lehr* and *Quilloin* suggest a toggle switch rather than a continuum approach. If the father had the requisite connectedness, then his rights will be protected. If he does not have the requisite connectedness, his rights will be inchoate rather than actual.

The California Supreme Court addressed the protections of unwed fathers afforded by the United States Constitution in *Adoption of Kelsey S.*<sup>258</sup> The court held that as a matter of federal constitutional law a fit father who has been promptly and diligently attempting to gain custody of his child must be allowed to withhold his consent to the child's adoption.<sup>259</sup> *Kelsey S.* involved two individuals who were not married to each other, Rickie M. and Kari S., who had a child together, Kelsey.<sup>260</sup> At the time of the birth, Rickie M. was separated from and in the process of divorcing someone else.<sup>261</sup> Kari planned to place their child for adoption, but Rickie wanted to raise the child himself.<sup>262</sup> Two days after the child's birth, Rickie filed an action in court to establish his paternity and to obtain custody.<sup>263</sup> He was awarded temporary custody and the would-be adoptive couple was precluded from having contact with the child.<sup>264</sup> However, that order was subsequently modified, giving the biological mother temporary custody.<sup>265</sup>

Although Rickie had held out the child as his own, he never physically had the child in his home: "[h]e was prevented from doing so by the mother, the court, and the would-be adoptive parents."<sup>266</sup> The California Supreme Court recognized that there were significant

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255. *See id.*

256. *See id.*

257. *Id.* at 463.

258. 823 P.2d 1216 (Cal. 1992).

259. *Id.* at 1217 ("The primary question in this case is whether the father of a child born out of wedlock may properly be denied the right to withhold his consent to his child's adoption by third parties despite his diligent and legal attempts to obtain custody of his child and to rear it himself, and absent any showing of the father's unfitness as a parent. We conclude that, under these circumstances, the federal constitutional guarantees of equal protection and due process require that the father be allowed to withhold his consent to his child's adoption and therefore that his parental rights cannot be terminated absent a showing of his unfitness.").

260. *Id.*

261. *Id.*

262. *See id.*

263. *Id.* at 1217-18.

264. *Id.* at 1218.

265. *Id.*

266. *Id.* at 1220.

similarities between the case before it and *Lehr*, and offered its own interpretation of that Supreme Court decision: “*Lehr* can fairly be read to mean that a father need only make a reasonable and meaningful attempt to establish a relationship, not that he must be successful against all obstacles.”<sup>267</sup> Thus, like many commentators, the California court implicitly suggested that *Lehr*’s continuous search for his daughter and ex-partner, even to the point of hiring a private detective, somehow fell short of what would constitute a reasonable and meaningful attempt to establish a relationship.<sup>268</sup> Yet, such a reading imposes a super-reasonableness standard, which would seem extremely difficult to meet.

When seeking to establish the federal constitutional protections afforded to unwed fathers, the California court considered the analyses offered by the *Baby Eason* and *Raquel Marie* courts,<sup>269</sup> reading both courts as finding it “improper to make the father’s rights contingent on the mother’s wishes.”<sup>270</sup> Indeed, the California court seemed especially worried that in certain cases the state’s statutory scheme had placed the unwed father’s rights almost entirely in the hands of the mother.<sup>271</sup> The *Kelsey S.* litigants, like those in *Baby Eason*,<sup>272</sup> contested the degree to which the father had supported the mother during the pregnancy.<sup>273</sup> While the case proceeded through the courts for three years, the child

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267. *Id.* at 1228.

268. See, e.g., Scott B. Rae, *Parental Rights and the Definition of Motherhood in Surrogate Motherhood*, 3 S. CAL. REV. L. & WOMEN’S STUD. 219, 232 n.47 (1994) (“In *Lehr*, the Court ruled that an unwed father who has made no attempt to have a relationship with his child and who is not seeking custody or visitation at the time of the adoption proceedings cannot block a step-parent adoption of the child.”); D. Marianne Brower Blair, *Lifting the Genealogical Veil: A Blueprint for Legislative Reform of the Disclosure of Health-Related Information in Adoption*, 70 N.C. L. REV. 681, 747 n.350 (1992) (“[T]he *Lehr* Court determined that a father who has never had any significant custodial, personal, or financial relationship with a child (and in fact failed to attempt to establish paternity until the child was over two) was not entitled to notice of adoption proceedings.”); Alison S. Pally, *Father by Newspaper Ad: The Impact of In Re The Adoption of a Minor Child on the Definition of Fatherhood*, 13 COLUM. J. GENDER & L. 169, 193 (2004) (“Many adopted the Supreme Court’s ‘biology plus’ definition of unwed fatherhood, which requires demonstrating a commitment to parenting as a prerequisite for gaining the right to be notified of an adoption proceeding.”); but see Irma S. Russell, *Within the Best Interests of the Child: The Factor of Parental Status in Custody Disputes Arising from Surrogacy Contracts*, 27 J. FAM. L. 585, 651 (1988-89) (“*Lehr* does not stand for the proposition that a man’s genetic parentage plus sincere attempts to establish a parental relationship with one’s offspring creates constitutionally protected parental status.”).

269. *Kelsey S.*, 823 P.2d at 1229.

270. *Id.*

271. *Id.* at 1235 (“Under the statute, the father has basically two ways in which to achieve that status: he can either marry the mother, or he can receive the child into his home and hold it out as his natural child. Of course, the first alternative is entirely within the mother’s control. She cannot be forced to marry the father. The second alternative is, for the most part, also within her control. She can deny the father the right to come into her home. She can also deny him the right to take the child into his home. Faced with the mother’s denial, the father has only one recourse aside from illegal self-help. He must seek a court order granting him custody so that he can take the child into his home and thereby gain presumed father status. As in this case, however, the trial court may deny him custody based on its view that the child is better served by remaining with the mother or third parties, e.g., prospective adoptive parents.”).

272. See *supra* note 254 and accompanying text.

273. *Kelsey S.*, 823 P.2d at 1225 (“The parties disagree as to the amount of care and support that petitioner provided to the child and its mother.”).

lived with the would-be adoptive parents pursuant to the mother's wishes.<sup>274</sup> But this meant that the only parents the child had known for the first three years of life were those wishing to adopt him. Were the best interests of the child the relevant test for determining who should be the child's parent, the biological father would be at a significant if not overwhelming disadvantage as a result of the mother's decision to place the child with another family. As the California court recognized, such a statutory scheme made the father's rights precarious, although Justice Stevens seems to believe that a state can make such a policy choice without thereby violating federal constitutional guarantees.<sup>275</sup>

As a separate matter, the California Supreme Court was unwilling to assume that adoption is necessarily in a child's best interest.<sup>276</sup> The court pointed out that if the benefits afforded by adoption into a two-parent home were deemed sufficient to justify termination of parental rights, then an unwed *mother's* parental rights might also be at risk on such a best-interests analysis.<sup>277</sup> The court struck down the California statutory scheme as a violation of federal constitutional protections.<sup>278</sup>

The *Kelsey S.* holding has certain implications for what an unmarried mother should do if she wishes to place her child with an adoptive family. For example, a mother might only be willing to give up her rights if she were confident that the father would not be given custody of the child. She might believe that the child would be best off with an adoptive family, but better off with her than with the child's biological father.<sup>279</sup> Because the biological father's rights are protected, the mother might only be willing to give contingent consent to the

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274. *Id.* ("Of course, we recognize that as a result of the lower courts' decisions the child has now been living with the prospective adoptive parents for more than three years.").

275. *See supra* note 212 and accompanying text.

276. *Kelsey S.*, 823 P.2d at 1234.

277. *Id.*

278. *Id.* at 1236 ("In summary, we hold that section 7004, subdivision (a) and the related statutory scheme violates the federal constitutional guarantees of equal protection and due process for unwed fathers *to the extent that* the statutes allow a mother unilaterally to preclude her child's biological father from becoming a presumed father and thereby allowing the state to terminate his parental rights on nothing more than a showing of the child's best interest. If an unwed father promptly comes forward and demonstrates a full commitment to his parental responsibilities—emotional, financial, and otherwise—his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent. Absent such a showing, the child's well-being is presumptively best served by continuation of the father's parental relationship. Similarly, when the father has come forward to grasp his parental responsibilities, his parental rights are entitled to equal protection as those of the mother.").

279. *See* S.D. County Dep't of Soc. Servs. v. Edward M. (*In re Baby Girl M.*), 688 P.2d 918, 926 (Cal. 1984) (Mosk, J., dissenting) ("The practical result of the holding of the majority is that in the future an unwed mother who elects to place her child for adoption in a stable environment with a two-parent family will refuse to relinquish custody whenever, as is commonly the case, she does not desire custody to be placed with the man who became a father as the result of a casual liaison and who has not formed any relationship with the child."). Cf. Cecily L. Helms & Phyllis C. Spence, *Take Notice Unwed Fathers: An Unwed Mother's Right to Privacy in Adoption Proceedings*, 20 WIS. WOMEN'S L.J. 1, 36–37 (2005) ("A mother may decide to parent a child when she is not situated for the job rather than risk the possibility that the father would learn of the adoption and challenge it.").

adoption, e.g., say that she is willing to surrender her parental rights only if the biological father also surrenders or does not assert his parental rights.<sup>280</sup> If local law does not permit contingent consents to adoption, she might instead decide that it would be better to give birth in a jurisdiction that is less hospitable to the father’s rights.

The New York, Georgia, and California courts issued rulings that were relatively protective of fathers’ rights. A father can lose his parental rights if he fails to assert them in a timely manner, and timeliness may be measured by the child’s life rather than by when the father learned of his paternity. Nonetheless, he has substantially more protection than is offered in some other states where there is more of an emphasis on securing early and secure adoption placements.

#### *B. Courts Less Protective of Non-marital Fathers’ Rights*

The high courts of California, New York, and Georgia were concerned that a mother might prevent a willing and fit father from establishing a relationship with the child that he had helped create. For example, a woman might hide her intent to place the child for adoption<sup>281</sup> or that she has already placed the child for adoption. Several cases have involved women who decided to give birth in another state so that they might more easily surrender their children for adoption. Sometimes, biological fathers have been precluded from blocking the adoption of their children, even if they could not reasonably have known where their ex girlfriends had given birth. The current patchwork of protective and non-protective systems is intolerable, leading to protracted litigation and the disappointment of reasonable expectations.

*In re Steve B.D.*<sup>282</sup> involved an attempt by a biological father to undo an adoption. Swan and DeBernardi had a child together.<sup>283</sup> They had lived together intermittently prior to the birth.<sup>284</sup> DeBernardi gave

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280. *Baby Girl M.*, 688 P.2d at 926 (Mosk, J., dissenting) (“The mother signed the relinquishment only on condition that custody be transferred to the two-parent family chosen as adoptive parents. The social welfare department implied that it would permit her to withdraw her consent if this condition is not fulfilled.”).

281. See, e.g., *In re Kirchner*, 649 N.E.2d 324, 327 (Ill. 1995) (“Otto returned to Chicago prior to Daniella’s due date, whereupon he discovered that Daniella had left him. He learned through friends that she had gone to a women’s shelter. He and Daniella then went through a period of reconciliation, during which time she did not inform him that she had arranged to place their child for adoption.”).

282. 730 P.2d 942 (Idaho 1986).

283. *Id.* at 943.

284. *Id.* (“Swan and DeBernardi lived together from October, 1982, to June, 1983. They were not married at the time. In June of that year, DeBernardi learned she was pregnant. Swan moved out in late June, then returned in late July and remained until the middle of September. Swan and DeBernardi did not live together again until after the birth of the child.”).

birth on March 5, 1984.<sup>285</sup> Swan visited DeBernardi and the child in the hospital twice following the birth.<sup>286</sup> Unbeknownst to him, DeBernardi surrendered custody of the child on March 6, and consented to the adoption on March 7.<sup>287</sup> When consenting to the adoption, she claimed that she did not know the identity of the father.<sup>288</sup>

When Swan wanted DeBernardi to bring the child to his residence, she offered various excuses as to why she could not, such as inclement weather or illness of the child. Swan did not want to go to DeBernardi's home because DeBernardi's mother was living there and Swan felt uncomfortable around her.<sup>289</sup> DeBernardi promised to bring the child to Swan's home for Easter, but then claimed that the child had measles.<sup>290</sup>

When Swan finally learned what had happened, he sought to establish his parental rights.<sup>291</sup> However, the magistrate eventually held that Swan's consent to the adoption was unnecessary, a decision which was affirmed on appeal.<sup>292</sup> The Idaho Supreme Court reasoned that "because of a child's urgent need for permanence and stability, the unwed father must act quickly to take responsibilities and establish ties."<sup>293</sup> The court understood that DeBernardi had played a role in Swan's not asserting his rights more quickly. However, the court reasoned, the "fleeting opportunity may pass ungrasped through no fault of the unwed father or perhaps due to the interference of some private third party; nevertheless, once passed the unwed father is left without an interest cognizable under the Fourteenth Amendment."<sup>294</sup> The court suggested that where a father has not established a relationship with his child during the relevant period, and the responsibility for that failure cannot be attributed to the state, the father's consent will not be necessary in order for the adoption to proceed.<sup>295</sup>

Perhaps the court did not believe Swan was entirely without fault. The court noted that "during the time between his initial visits to the hospital and the day DeBernardi informed him of her surrendering the child, a period of some fifty-one days, Swan made no attempt to interact with the child."<sup>296</sup> Had he insisted on seeing the child, he would have

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285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.* at 944.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.* at 945.

294. *Id.*

295. *Id.* ("In sum, where the unwed father has not developed a substantial relationship with the child, and has not been denied the opportunity by the state, he has no interest protected by the Fourteenth Amendment, and the state is not required to obtain the father's consent to the child's adoption.").

296. *Id.* at 946.

learned what had happened before and could have established his paternity earlier.<sup>297</sup> That DeBernardi concealed the adoption proceedings and lied about the child was held not to provide a sufficient justification for Swan’s failure to establish his relationship with the child.<sup>298</sup>

In *Swan*, the putative father waited several weeks before asserting his paternity. The issue in *Shoecraft v. Catholic Social Services Bureau, Inc.*<sup>299</sup> was whether a father who had filed a notice acknowledging paternity nine days after the birth could block the adoption of the child that he had fathered. The Nebraska Supreme Court upheld the statutory scheme requiring “the father of a child born out of wedlock to declare himself as such within 5 days after the birth of the child and to assume the financial obligations of that status.”<sup>300</sup> This scheme applied to Shoecraft, who had been notified of the birth on the day his child was delivered, and had made no financial contributions during the pregnancy.<sup>301</sup>

The Nebraska Supreme Court revisited the application of the 5-day post-birth requirement the following year in *S.R.S. v. M.C.C.*<sup>302</sup> The issue in *S.R.S.* was whether the biological father of a child could block an adoption even though he had not filed to establish his paternity until 2 ½ years had passed.<sup>303</sup> In this case, the unwed father had lived with the mother and child for 19 months, supporting them both.<sup>304</sup> The couple then broke up, with the mother taking the child and going elsewhere to live.<sup>305</sup> The mother eventually moved in with her new boyfriend, but no one would tell the father where his son and his son’s mother were living.<sup>306</sup> Nonetheless, the father was able to see the child intermittently.<sup>307</sup> The mother eventually decided that she did not want the father to have any more contact with their son and put their son up for adoption.<sup>308</sup>

The *S.R.S.* court held that consent of the father was necessary in this case, notwithstanding the 5-day rule, because the father had established strong ties with the child.<sup>309</sup> The court also found that the father had not abandoned the child,<sup>310</sup> so the adoption could not proceed

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297. *Id.*

298. *Id.*

299. 385 N.W.2d 448 (Neb. 1986).

300. *Id.* at 451.

301. *Id.* at 450–51.

302. 408 N.W.2d 272 (Neb. 1987).

303. *See id.* at 273, 277.

304. *Id.* at 277.

305. *Id.* at 274.

306. *Id.*

307. *Id.*

308. *Id.* at 275.

309. *See id.* at 278.

310. *See id.* at 277.

without the father's consent.<sup>311</sup> The court reached this holding even though the child had adjusted well to the would-be adoptive family in which he had been placed.<sup>312</sup>

In *Friehe v. Schaad*, the Nebraska court again addressed the applicability of the 5-day filing requirement, when the biological father filed an intent to claim paternity on July 10 for a child born on June 15.<sup>313</sup> He had been notified that his ex-girlfriend had given birth on the day following the birth,<sup>314</sup> which was the first time he had any inkling that she had been pregnant.<sup>315</sup> The mother herself claimed that she did not know that she was pregnant until the day of the birth when she had consulted a doctor complaining of flu-like symptoms.<sup>316</sup>

*Friehe* and *Schaad* were undecided about what to do with the baby—she was inclined to put the child up for adoption, whereas he was inclined to raise the child himself. On June 18, they decided to postpone the decision for at least a week and to put the child in temporary foster care in the meantime.<sup>317</sup> On June 21, *Schaad* contacted an attorney, who told him about the five-day filing deadline. Rather than file one day late, *Schaad* decided to try to work things out with *Friehe*.<sup>318</sup> On September 14, *Friehe* filed a petition for a declaratory judgment seeking to determine the rights of the parties.<sup>319</sup> *Schaad* asserted that the statute was unconstitutional as applied to him because he had orally expressed an interest in raising the child and had offered to pay *Friehe*'s medical expenses.<sup>320</sup>

The court rejected *Schaad*'s claims, suggesting that requiring the unwed father to file a notice of paternity within 5 days of birth was substantially related to protecting the best interests of children.<sup>321</sup> This was because it "is in the best interests of the child to allow the transfer to a loving adoptive family as soon as possible after birth."<sup>322</sup> Interestingly, in *Schaad* there was no mention of any couple that had formed an attachment with the child and, indeed, the court suggested that the child remained in temporary foster care.<sup>323</sup> Thus, it could not even have been claimed in *Schaad* that by recognizing the father's rights the child would have been removed from a loving home where he had already become settled and secure.

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311. *Id.* at 279.

312. *Id.* at 275.

313. 545 N.W.2d 740, 743 (Neb. 1996).

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* at 743–44.

321. *Id.* at 747.

322. *Id.*

323. *Id.* at 743.

Perhaps the Nebraska Supreme Court was not concerned about protecting existing bonds in this case but instead was thinking of future cases. Thus, the court might have been thinking the reason the child was still in temporary foster care was that would-be adoptive parents were hesitant to commit to a child whose father was still seeking to assert parental rights.<sup>324</sup> Yet, were that the court's goal, the court's analysis undermined its own goals of early placement and permanency for the child. The *Schaad* court held "that the means of the state employed in this case, that of requiring a putative father to file a notice of claim of paternity within 5 days of birth in order to assert rights, is substantially related to protecting the best interests of children *on the facts of this case.*"<sup>325</sup>

The *Schaad* court failed to make clear which facts were considered dispositive or even weighty. Was it that the father waited weeks to file after being informed by his attorney that he had missed the deadline by one day? Perhaps someone who was late but filed immediately after being informed that he was a father would be treated differently. Was it because he, as a father of a newborn, was apparently willing to leave his child in foster care rather than take custody himself? Perhaps someone who seemed more seriously committed to raising his child would have been successful.

These are all legitimate considerations and would be appropriately weighed by a court insofar as the court is interested in assessing the depth of the individual's commitment to fatherhood. However, the difficulty is that such a fact-specific determination invites litigation, which might make would-be adoptive couples more reluctant to commit, and early placement and permanency would be less likely to be achieved. The jurisprudence which, at least implicitly, is extremely dependent upon a variety of likely contested facts, would be very unlikely to yield speedy and certain placements.

The Nebraska approach might be contrasted with that of Utah. The issue in *Wells v. Children's Aid Society of Utah*<sup>326</sup> was whether an unwed father could block the adoption of his child. Wells had signed the form acknowledging paternity on September 18 but had not mailed it until September 23, the day the child was born.<sup>327</sup> Apparently he thought that if the child were born much later he might not have been the father,

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324. *See id.* at 747 ("Some finality for the transfer of children to adoptive parents must be achieved. The 5-day period employed in §§ 43-104.02 and 43-104.04 was selected as a legitimate amount of time in which a child would be in the hospital with the mother and in which the father could determine his intentions to the child. . . . In this way, the mother, father, and, most importantly, the child, are not left in limbo during an extensive period. It is in the best interests of the child to allow the transfer to a loving adoptive family as soon as possible after birth.").

325. *Id.* (emphasis added).

326. 681 P.2d 199 (Utah 1984).

327. *Id.* at 202 ("The baby was born on September 23, and Mrs. Wells and Dennis learned of the birth that same day. Although Dennis had signed the form on September 18, he did not mail it until September 23, the day before K.B. relinquished custody to Children's Aid.").

since his former girlfriend had started dating someone else a month after their relationship had ended.<sup>328</sup> The acknowledgement arrived a week after the birth.<sup>329</sup> However, his girlfriend had placed the child with an adoption agency the day after the child was born.<sup>330</sup> Local law provides that notice of paternity must be registered before an illegitimate child is placed with a licensed adoption service agency.<sup>331</sup>

The father had mailed the paternity acknowledgment the day of the child's birth, and the child had been in the would-be adoptive parents' home a mere five days before the agency knew about the father's paternity acknowledgment.<sup>332</sup> Nevertheless, the court upheld the adoption and the lack of need for the father's consent.<sup>333</sup> The Utah court suggested that the

state has a strong interest in speedily identifying those persons who will assume the parental role over such children, not just to assure immediate and continued physical care but also to facilitate early and uninterrupted bonding of a child to its parents. The state must therefore have legal means to ascertain within a very short time of birth whether the biological parents (or either of them) are going to assert their constitutional rights and fulfill their corresponding responsibilities, or whether adoptive parents must be substituted.<sup>334</sup>

There is a narrow impossibility exception to the Utah law, where it

328. *Id.*

329. *Id.* at 201 ("On September 30, the Department of Health notified the Children's Aid Society that they had received an acknowledgment of paternity form signed by Dennis E. Wells, Jr., the plaintiff in this case. The form arrived by mail at the Department's office in Salt Lake City on September 30 in an envelope post-marked Moab, Utah, September 23.").

330. *Id.* ("On September 24, K.B. signed the consent and release that placed the child in the custody of Children's Aid.").

331. *Id.* at 204 ("Subsection (b) provides that the notice 'may be registered prior to the birth of the child but *must be registered prior to the date the illegitimate child is relinquished or placed with an agency licensed to provide adoption services . . .*' (Emphasis added.) Subsection (c) then provides as follows: Any father of such child who fails to file and register his notice of claim to paternity and his agreement to support the child *shall be barred from thereafter bringing or maintaining any action to establish his paternity of the child.* Such failure shall further constitute an abandonment of said child and a waiver and surrender of any right to notice of or to a hearing in any judicial proceeding for the adoption of said child, and *the consent of such father to the adoption of such child shall not be required.*"') (emphasis in original).

332. *Id.* at 201 ("On September 25, Children's Aid placed the child, Infant B., in the home of intervenors John and Mary Doe for purposes of adoption. . . . On September 30, the Department of Health notified the Children's Aid Society that they had received an acknowledgment of paternity form signed by Dennis E. Wells, Jr., the plaintiff in this case.").

333. *Id.* at 208 ("We agree with the reasoning in *Lehr v. Robertson*, and we therefore hold that the agency correctly applied § 78-30-4(3) on the facts of this case and did not violate federal or state due process rights.").

334. *Id.* at 203. *See also* Nolan, *supra* note 29, at 296 ("Placement should occur as early as possible so that the child and the adoptive parents may bond, especially if the child is a newborn. Thus, minimum delay in the adoption process and finality of adoption fosters the child's sense of well-being and adjustment.").

is impossible for the father to meet the deadline through no fault of his own.<sup>335</sup> Otherwise, in the interest of prompt and permanent placement, the statute will be enforced against putative fathers.<sup>336</sup>

In *Wells*, the father's rights were terminated, at least in part, because it took a full week for the mail to be delivered. The *Wells* court suggested that it is the father's responsibility to assure that the forms arrive in the right place in a timely manner, and he would not have any excuse if they did not arrive.

The same approach was taken by a Minneapolis appellate court in *In re Gaus*, where the biological father had filled out the relevant forms and given them to the mother, his non-marital partner, to file.<sup>337</sup> He did not try to confirm that the forms had been filed until five months later, after she had died.<sup>338</sup> Apparently, she had not filed the forms, and he was not permitted to vacate the adoption of his child.<sup>339</sup> Here, he had

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335. *Wells*, 681 P.2d at 208. See *In re Adoption of Baby Boy Doe*, 717 P.2d 686, 691 (Utah 1986) ("Under the circumstances of this case, however, including the clearly articulated intent of the father to keep and rear the child, the full knowledge of that intent on the part of all involved, the representations made by the mother, the actions of her family, the premature birth, and the non-residency of the father coupled with his absence at the time of birth, we cannot say that this was either a usual case or that notice may be implied. We therefore conclude that appellant has successfully shown 'that the termination of his parental rights was contrary to basic notions of due process, and that he came forward within a reasonable time after the baby's birth, [such that] he should be deemed to have complied with the statute.'") (citation omitted)). Some states have impossibility provisions included within the relevant statutes. See *In re K.J.R.*, 687 N.E.2d 113, 120 (Ill. App. 1997) ("The Adoption Act explicitly states that, if it was impossible for the putative father to register before the expiration of 30 days following the birth of the child, he must register within ten days after it becomes possible for him to do so.") (citing 50/12.1(g)(3) (West 1994)).

336. See *In re Adoption of B.B.D.*, 984 P.2d 967, 971 (Utah 1999) ("C.F. failed to meet any of the requirements of notice and consent under section 78-30-4.13 and -4.14. He knew K.D. was pregnant, that she had moved to Utah to have the baby, and that she was going to place the baby for adoption. Nonetheless, he failed to take any action to establish paternity according to our statutory scheme; thus, he waived any right to notice and consent."). See also *In re Baby Girl P.*, 802 A.2d 1192, 1197 (N.H. 2002) ("Consistent with this purpose, the legislature has articulated a time period during which a putative father has the opportunity to establish his parental rights. If, before the mother's consent is given, the father's identity is not known by the courts, the adoptive parents or their attorney or he fails to come forward, he is thereafter barred from bringing any action to establish paternity. That the natural mother knows of his identity is irrelevant to the statutory analysis. Indeed, under the statute, a natural mother is not required to identify anyone as the father. If she does name someone and, prior to her consenting, his identity becomes known by the court—either through a filed affidavit or otherwise—or to the adoptive parents or their attorney, then he is entitled to notice of the adoption proceedings. This statutory scheme protects a putative father's rights by giving him several avenues by which he can preserve his parental interests while, at the same time, protecting the privacy of unwed mothers and allowing adoptions to take place soon after birth. By specifying the time period in which an alleged father must either be known or have acted in some way, the statute promotes safe and secure placements. Our interpretation of the statute does not allow the mother to unilaterally divest a father of his paternal interests. As previously stated, a biological father has an opportunity to come forward. However, in order to protect the interests of the child, the legislature has provided that the unwed father's opportunity to preserve his right is decidedly limited in duration. Choosing the point at which the natural mother consents to the adoption ensures that the placement is effectuated in an expedient manner.").

337. 578 N.W.2d 405, 407 (Minn. App. 1998).

338. *Id.*

339. *Id.* at 408 ("The district court lawfully denied Beard's motion to vacate the adoption. Beard did not substantially comply with statutory requirements to entitle him to notice of adoption proceedings, and the lack of notice did not offend his due process rights.").

completed the necessary forms and had relied on someone else to deliver those forms in a timely manner. Had she filed the forms, what he had done would have sufficed to protect his interests. Because she had not, however, he ended up being a legal stranger to the child he helped produce.

*Burns v. Crenshaw* involved a child born to an unmarried couple.<sup>340</sup> The couple had been dating for several months in the state of Washington when Scott Burns enlisted in the Air Force.<sup>341</sup> The following month, he received a call from his ex-girlfriend stating that she was pregnant and that he was the father.<sup>342</sup> Allegedly, Burns rejected the claim that he was the father and stated that he would not take responsibility for the child.<sup>343</sup>

Several months later, Burns filed filiation proceedings in Washington.<sup>344</sup> However, he did not file a notice of that proceeding with the Oregon Department of Human Resources, despite his suspicion that his ex-girlfriend might move to Oregon.<sup>345</sup> The *Burns* court noted,

Although plaintiff had initiated a filiation proceeding in Washington, and although he had reason to believe that the mother might move to Oregon, he did not file the notice required by ORS 109.096(4). Thus, under Oregon law, the Washington filiation proceeding was not sufficient by itself to entitle him to notice, and he did not qualify for notice under any other Oregon statute.<sup>346</sup>

Here, the issue was not whether the father had accepted responsibility for his child, since he had done so in the state in which the child had been conceived. Rather, the question was whether the state where the child had been born had been put on notice by the father that he was asserting his rights. The fact that he had not been told where his ex-girlfriend had gone, and only had a suspicion of where she might have gone, did not afford him an excuse for not having informed Oregon earlier of his acceptance of his parental responsibilities.

*Hylland v. Doe* involved another case in which a woman moved to Oregon and gave birth to a child whom she gave up for adoption.<sup>347</sup> This time though, the father had no reason to suspect that she had gone to Oregon. He filed a filiation proceeding in California to establish paternity and obtain custody.<sup>348</sup> By the time he had sent a letter to the

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340. 733 P.2d 922 (Or. App. 1987).

341. *Id.* at 922.

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.* at 924.

347. 867 P.2d 551 (Or. App. 1994).

348. *Id.* at 553.

Oregon Department of Vital Statistics that he had filed filiation proceedings, the adoption had already been granted.<sup>349</sup> The court rejected his claim that his due process rights had been violated, citing *Burns*.<sup>350</sup> The court failed to note that in *Burns*, but not in *Hylland*, the father had suspected that his ex-girlfriend had gone to Oregon and thus arguably had been placed on notice that he should notify Oregon about the filiation proceedings in another state.

In many of these cases, the father manifested his intent to take responsibility for his child. The courts seemed less concerned about whether the father had grasped the relevant opportunity and more concerned about assuring early and permanent adoptive placement, either because the child had already been placed, or because the court believed that future placements would be easier to achieve were the biological father foreclosed from preventing or undoing the adoption. Further, a theme running through many of these decisions is that an adoption will not be undone merely because the father manifested his intention to take full responsibility for the child in a timely way—the state must have made an error. In *Burns*, for example, the state did not know of the father’s filiation procedure in California and thus saw no reason to undo the adoption. Even if the father had been deceived by the mother as in *Friehe* or in *Steve B.D.*, that deception could not be attributed to the state and was not seen as a reason to undo an adoption or recognize the biological father’s parental rights. In these cases, the question was not whether the father acted in a way worthy of protection, but only whether the state had somehow done something wrong for which it had to make amends.<sup>351</sup>

The implicit, if not explicit, view of the federal constitutional rights of non-marital fathers offered by the supreme courts of New York, Georgia, and California is very different from the view offered by the supreme courts of Idaho, Nebraska, Utah, and Oregon. Basically, the former courts suggest that a non-marital, biological father has the right to establish a relationship with his child unless he does something to lose that right, whereas the latter courts suggest that a non-marital, biological father has no protected parental rights until he develops a relationship with his child. Ironically, both views seem to have support in the Supreme Court’s jurisprudence, although the latter likely more accurately reflects the Court’s current view.

### C. *Re-examining the Supreme Court’s Jurisprudence*

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349. *Id.*

350. *Id.* at 557.

351. Cf. David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless*

When explaining the relevant federal jurisprudence, the Illinois Supreme Court in *In re Kirchner*<sup>352</sup> pointed out that while the Court has denied that biology alone will vest in the father the same rights that are possessed by the mother, “if the unwed father grasps the opportunity that this biological link provides, accepts responsibility for the child, and develops a relationship with the child, the father enjoys the same constitutional due process rights afforded married fathers and birth mothers.”<sup>353</sup> While noting that none of the Court’s decisions discuss the rights of a deceived, unwed father whose child was placed for adoption at birth,<sup>354</sup> the Illinois court reasoned that

the rationale underlying the Court’s opinions dealing with the rights of unwed fathers thus far suggests that fathers such as Otto, whose parental rights are not properly terminated and who, through deceit, are kept from assuming responsibility for and developing a relationship with their children, are entitled to the same due process rights as fathers who actually are given an opportunity and do develop this relationship.<sup>355</sup>

Any other holding would provide an incentive for deceit.<sup>356</sup>

While the Illinois Supreme Court is correct that, all else being equal, deceit would be encouraged by failing to accord rights to the biological father in such circumstances, that alone does not establish that the biological father has such rights. After all, deceit may be discouraged and punished in ways which do not involve the recognition of constitutional rights. For example, a state may permit a father who has done all that he can to protect his relationship with his child<sup>357</sup> to bring a tort action against those who prevented him from establishing that relationship.<sup>358</sup> Or, states might try to limit the effect of deceit, e.g.,

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*Father*, 41 ARIZ. L. REV. 753, 764 (1999).

352. 649 N.E.2d 324 (Ill. 1995).

353. *Id.* at 333.

354. *Id.*

355. *Id.*

356. *Id.* The court also based its decision on state law. (“Moreover, without regard to Federal constitutional jurisprudence, Illinois law requires that Otto be granted the care, custody and control of his son.”). *Id.*

357. See *Smith v. Malouf*, 722 So. 2d 490, 497 (Miss. 1998) (“While they were moving from state to state and country to country, Joey—like the father in *Baby Girl S*—was ‘grasping every opportunity’ to manifest and establish a relationship with his child. He filed a declaration of paternity, obtained a permanent injunction against Natalie and all others working with her to prohibit an adoption of the child, hired private investigators to locate Natalie and mailed the permanent injunction to every Vital Statistics office in Mississippi as well as other states. In sum, he did all he could have done under the circumstances.”).

358. See *id.* at 498 (“[T]his Court concludes that Joey has presented a viable claim for intentional infliction of emotional distress.”). See also *Kessel v. Leavitt*, 511 S.E.2d 720, 756 (W.Va. 1998) (“[W]here a person has knowledge of information concerning a newborn child’s birth or physical location, or indicating where and in whose care the child may be found, and the child’s parent inquires of such person regarding his/her child’s birth or physical location, and/or where and in whose care his/her child may be found, such person may be held liable for fraudulently concealing

by making it clear that individuals will not be able to rely on the statements of others as an excuse for having failed to meet the statutory requirements to protect one's parental rights.<sup>359</sup> That way, fathers might take the necessary precautions to do all that the law requires, even after having been assured that taking those steps is not necessary.

While the United States Supreme Court has never expressly addressed the non-marital father's rights in the context of a newborn child,<sup>360</sup> the Illinois court seems to have read the jurisprudence in an overly protective way. *Lehr* implies that if a mother precludes a non-marital father from establishing a relationship with the child that they created together, the father will not have a right protected by the Federal Constitution to prevent that child from being adopted, even if the father is entirely blameless.<sup>361</sup> Thus, while the Court *talks* about the father's grasping the opportunity to establish a relationship with the child, it is difficult to believe that this is the *actual* criterion, given all that *Lehr*

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information if he/she affirmatively, intentionally, and willfully fails to provide such information to the child's parent pursuant to his/her request for such information and such concealment unduly hinders or otherwise irreparably harms the parent's ability to establish a parent-child relationship with his/her child. Additionally, we hold that any person or persons who plot, plan, scheme, or otherwise conspire to affirmatively, intentionally, and willfully conceal information regarding a newborn child's birth or physical location, or indicating where and in whose care the child may be found, in response to inquiries by the child's parent for such information, may be held liable for his/her or their participation in such civil conspiracy.").

359. See, e.g., *In re Paternity of M.G.S.*, 756 N.E.2d 990, 995 (Ind. App. 2001) (citations omitted) ("The Notice informed Wachowski that Soltysik intended to put the baby up for adoption. It also advised Wachowski that in order to contest the adoption, he must file a paternity action to establish a relationship with the unborn child within thirty days after receiving this Notice, or his consent to the adoption would be irrevocably implied. Consequently, he would lose 'the right to contest the adoption, the validity of his implied consent to the adoption, the termination of the parent-child relationship, and the validity of his implied consent to the termination of the parent-child relationship.' Below the attorney's signature at the base of the Notice, was a clause stating: 'I further acknowledge that nothing that the mother of the child or anyone else may tell me about her intentions regarding a possible adoption of the child can relieve me of the obligations imposed upon me having received this notice.' This language regarding any representations by the mother and other persons was repeated in the acknowledgement of receipt clause at the bottom of the Notice. Wachowski kept the Notice and did not execute an acknowledgement of receipt."). See also Nolan, *supra* note 29, at 311 ("A father may also have registered too late because the mother committed fraud by concealing information that he was the father, or he did not know of the pregnancy or the birth of the child. These are not defenses in most states."); Beck, *supra* note 136, at 1062 ("Where fathers have requested impossibility exceptions due to lack of knowledge of the pregnancy, courts have denied them if the father made no attempt to investigate the possibility of pregnancy.").

360. Robbin Pott Gonzalez, *The Rights of Putative Fathers to Their Infant Children in Contested Adoptions: Strengthening State Laws that Currently Deny Adequate Protection*, 13 MICH. J. GENDER & L. 39, 46 (2006) ("The Supreme Court has never addressed an unwed father's parental rights to his infant, a situation in which it is difficult for him to establish a substantial relationship with his child.").

361. See Buchanan, *supra* note 122, at 363 ("Lehr's interest in his child required no special treatment by the state because it was no longer of any constitutional significance. Lehr's interest was never transformed from the opportunity that is the right of every biological father into a developed parent-child relationship that is identified by commitment to and responsibility for the child. For more than two years, he had tried and consistently failed to grasp his opportunity to play an important part in his child's life. Consideration of the constitutional values served by the opportunity right leads to a conclusion that timeliness is required of parents who would grasp the opportunity, regardless of the blamelessness of the parent who, like Lehr, just does not grasp it in time.").

allegedly did to establish the requisite relationship.<sup>362</sup>

Much of the wide disparity in interpreting the Court's current jurisprudence is likely due to some courts focusing on the Court's "grasping-the-opportunity" language and other courts focusing on the holdings in the line of cases starting with *Stanley* and ending with *Michael H.* In these cases, a necessary but not sufficient condition for a non-marital father having parental rights was that the father had both *custody* of and a relationship with the child. In *Stanley* and *Caban*, the father previously had custody. *Michael H.* established that custody may not be a sufficient condition for protecting parental rights. In *Lehr* and *Quilloin*, neither father ever had custody. Yet, if this interpretation of the jurisprudence is accurate, then any protections to be afforded to non-marital fathers who have not yet established relationships with their children will have to come from laws or state constitutions,<sup>363</sup> contrary views of certain state supreme courts notwithstanding.

Laws can be passed which will mitigate some of the effects of a mother's making it impossible for her former partner to establish a parent-child relationship with the child they produced, e.g., by refusing to have anything to do with him, accept any financial assistance from him,<sup>364</sup> or even disclose his name. Putative father registries help protect the rights of non-marital fathers in that a putative father who registers will be more likely to receive notice should there be an attempt to place his child in an adoptive home. Yet, putative father registries have their limitations. For example, the father may have to file in the correct state to protect his rights, which might be quite difficult if the father does not know where the mother went to deliver the child.

Commentators are correct to point out that the creation of a national registry may prove helpful when the father does not know where the mother is giving birth.<sup>365</sup> Yet, even a national registry would not resolve all of the relevant difficulties. First of all, the right to notice is

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362. Some commentators seem to look at the Court's language without considering what *Lehr* allegedly did. See, e.g., Lynn Kirsch, *Unwed Fathers and Their Newborn Children Placed for Adoption: Protecting the Rights of Both in Custody Disputes*, 36 ARIZ. L. REV. 1011, 1016 (1994) ("Thus, the Court maintained its stance of requiring some form of relationship between the biological father and the child before the father's rights will be constitutionally protected, although its definition of 'relationship' was expanded by the recognition that a father has an opportunity to develop a relationship with his biological child that should be protected. After *Lehr*, the Supreme Court recognizes not only existing relationships, but also the opportunity to develop such relationships.").

363. Cf. Parness, *supra* note 171, at 360 ("The state courts and legislatures have been left to determine which and how these men may seek to establish parental rights under law."); Jeanette Mills, *Unwed Birthfathers and Infant Adoption: Balancing a Father's Rights with the States' Need for a Timely Surrender Process*, 62 LA. L. REV. 615, 623-24 (2002) ("Louisiana Constitution affords greater protection to birthfathers than does the United States Constitution.").

364. See Gonzalez, *supra* note 360, at 47 ("A mother may refuse help from the father and bar him from her life during this time. She may hide the pregnancy from him or tell him that the child is not his.").

365. For a discussion of a national registry, see generally Beck, *supra* note 136.

not equivalent to the right to block an adoption.<sup>366</sup> Even if the father can establish his own parental fitness,<sup>367</sup> a separate question is whether he should be treated any differently from any other fit adult who might be interested in having a parent-child relationship with that child. If the putative father must have established a relationship with the child before he has substantive rights which are accorded constitutional protection, then the registry will have afforded him notice but may not have helped him to preserve the opportunity to establish a relationship with the child whom he has helped to create. That is true even if he is entirely blameless for not having that relationship. For example, if the mother has moved to another state without telling him where she is, he may have been unable to establish a relationship with the child so that his parental rights could vest. In that event, absent protective local law, he may not be afforded the opportunity to establish a relationship with his child, even if he is afforded notice of the adoption proceedings.

The point here is not to depict a mother who goes to another state to give birth and surrender her child for adoption as a villain. She may have good reasons for not wanting the biological father to raise the child that she has carried to term.<sup>368</sup> Yet, the mother in a marital relationship cannot surrender her own *and* her husband's parental rights, even if she sincerely believes that doing so would be best for the child, and it is not at all clear why the relationship between the parents should determine whether the mother is permitted to waive the father's rights.

Some of the difficulties pointed to here can be prevented by statute. For example, the Uniform Adoption Act provides some protection for putative fathers who, through no fault of their own, have been denied the opportunity to have relationships with their children.<sup>369</sup>

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366. Mills, *supra* note 363, at 616–17 (“There is an important distinction between a right to consent to an adoption and the right to notice of an adoption. The right to consent is a much broader concept than the right to notice. Those entitled to the right to consent will also be entitled to notice. An individual who has the right to consent has the power to veto or approve of an adoption. In contrast, a party with the limited right to notice has no right to veto an adoption. A party with a right to notice is typically entitled to an opportunity to provide information as to whether the impending adoption is in the best interest of the child.”).

367. See Gonzalez, *supra* note 360, at 56 (“Imagine a father who properly registers for his state’s PFR and gains legal standing to assert his parental rights to his infant child in an adoption proceeding where the mother gave consent. That father has only so far acquired the right to argue what he thinks is in the best interest of his child. If the father wants custody of his child, he must prove he is fit to parent her. This is especially true if the father was denied the opportunity to support the mother during pregnancy and birth.”).

368. See Shanley, *supra* note 122, at 82 (“A woman’s decision to place her biological child for adoption also does not mean that she is indifferent as to who raises the child. . . . [I]f the mother has known the father over a considerable period of time, her unwillingness to make him the custodial parent should be examined to see why she feels as she does.”).

369. Erin Green, Note, *Unwed Fathers’ Rights in Adoption: The Virginia Code vs. the Uniform Adoption Act*, 11 WM. & MARY J. WOMEN & L. 267, 273 (2005) (“The UAA also distinguishes between fathers who willfully abandon their children and those whose attempts at fatherhood have been thwarted. The thwarted father has somehow been prevented from meeting his parental responsibilities, because the mother either never informed him of her pregnancy or the child’s birth, lied to him about her plans for the child, disappeared with the child, named another man as the birth

A state adopting that Act would provide some protection for a non-marital biological father who, through no fault of his own, has been unable to establish a relationship with his child.<sup>370</sup>

By the same token, however, some of the difficulties pointed to here might be exacerbated by statute. For example, a Safe Haven statute, which makes it possible for a custodial parent to remain anonymous when dropping off a newborn, might reduce the protective nature of a putative father registry.<sup>371</sup> Even if a putative father knows the identity of the woman with whom he has had relations<sup>372</sup> and can specify the dates of intercourse so that it would be clear that he might be the father of a particular child, this would not provide any assurance that he would be notified if the child he helped produce had been *anonymously* placed in a safe haven. Because there would be no way to know that the rights of a registered father had been triggered, there would be no way to know who should be given notice about a proposed adoption.

Safe Haven laws may be inconsistent with existing federal constitutional jurisprudence,<sup>373</sup> although only in certain circumstances. For example, suppose that a married mother makes use of a safe haven, thereby attempting to nullify the parental rights of her spouse.<sup>374</sup> Or, suppose that a mother drops her child off at a safe haven site after her non-marital partner had already grasped the opportunity of parenting by sharing custodial and financial responsibility for the child. In these cases, the Safe Haven law would seem to facilitate the violation of

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father, or was married to another man in a state that presumes the legitimacy of a child born to a married woman. According to the UAA, the unmarried father in these circumstances has not willfully abandoned his child but has instead been externally prevented from carrying out his parental responsibilities. Thwarted fathers can assert parental rights during the pendency of adoption proceedings, but they must prove a compelling reason for not having performed their parental duties. The thwarted father must also defend against other parties who try to prove that termination of his rights is necessary to avoid ‘detriment or a risk of substantial harm to the child.’”). *See also*, UNIF. ADOPTION ACT § 2-401 cmt. at 38 (1994) (“A thwarted father may be able to assert parental rights during the pendency of the adoption proceeding or in response to a petition to terminate his parental relationship to a minor. A thwarted father may succeed in blocking an adoption if he not only can prove a ‘compelling reason’ for not having performed parental duties but successfully defends against an effort by the prospective adoptive parents, the birth mother, or an agency to prove that termination of a thwarted father’s rights is necessary to avoid detriment or a risk of substantial harm to the child. A person may not challenge an adoption decree more than six months after it is issued, even if the person was thwarted in his ability to assume parenting responsibilities.”) (citations omitted).

370. Vermont has adopted the Act. 15A Vt. STAT. ANN. §§ 1-101 to 7-105 (1997).

371. *See* Karin Dwelle, *Adoption without Consent: How Idaho Is Treading on the Constitutional Rights of Unwed Fathers*, 39 IDAHO L. REV. 207, 232–33 (2002).

372. Beck, *supra* note 136, at 1039 (“Putative father registries typically operate by providing any registrant with notice of any adoption petition for a child of the woman named in his filing.”).

373. *See* Laura Oren, *Thwarted Fathers or Pop-Up Pops?: How to Determine When Putative Fathers Can Block the Adoption of Their Newborn Children*, 40 FAM. L.Q. 153, 187 (2006) (suggesting that safe haven acts “seem inconsistent with the advanced *Lehr* line-drawing indicia” proposed in the article).

374. *See* Dwelle, *supra* note 371, at 232–33 (noting that the “Idaho Safe Haven Act . . . applies to a custodial parent who is married to the infant’s other biological parent,” and then suggesting that this aspect of the Act is constitutionally suspect).

constitutional guarantees, precisely because one parent cannot waive or surrender another parent’s rights.

Yet, it is not at all clear that a mother who drops off her child at a Safe Haven site *before* the father has established a relationship with the child would be violating the father’s constitutional rights. Precisely because the child is so young and the father’s rights would still be inchoate, it is not at all clear that such a father would have been deprived of a legally protected interest.<sup>375</sup> Absent a protective local law, the non-marital father would have no legal basis upon which to rely to assure that his inchoate parental rights could become actualized.

It should be no surprise that Safe Haven laws have not been subject to many constitutional challenges,<sup>376</sup> if only because a limited class of individuals would have standing to make such a challenge.<sup>377</sup> Certainly, one can imagine circumstances in which a mother would have standing to challenge such a law, e.g., if her husband or non-marital partner dropped off a newborn at a safe haven site. So, too, a husband or non-marital father who had already met the requirements for grasping the opportunity for parentage might have standing to challenge such a law. However, the father with only inchoate rights would not be protected similarly and, further, might not even know what had happened to the child. Yet, it is precisely this type of parent-child relationship that would seem most likely to be at risk when safe havens are used.

### III. CONCLUSION

The *Stanley-Michael H.* line of cases seems to offer great protection for non-marital fathers who wish to grasp the opportunity to be a parent. However, much of that protection is illusory. Dicta to the contrary notwithstanding, the current jurisprudence offers very little protection to fathers who have not yet established custodial relationships with their children.

State courts have reached very different conclusions about the federal constitutional protections afforded to non-marital fathers because the Supreme Court has used misleading language in the key cases. The Court has suggested that it is using a “biology plus” standard, implying

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375. *Smith v. Hayes*, 2005 WL 1394779, \*1 (Ohio App. June 14, 2005) (“In general, the DCA sets forth provisions for the voluntary surrender of a newborn, 72 hours or younger, to a ‘safe haven,’ allowing the surrendering parent of an unharmed newborn anonymity and protection from criminal prosecution.”).

376. Dayna R. Cooper, *Fathers Are Parents Too: Challenging Safe Haven Laws with Procedural Due Process*, 31 HOFSTRA L. REV. 877, 878 n.11 (2003) (“To date no father has challenged the constitutionality of the Safe Haven Laws.”).

377. Cf. *Smith*, 2005 WL 1394779, at \*3 (“Accordingly, because appellant cannot avail himself of this exception to traditional standing requirements, the trial court did not err in granting appellee’s motions to dismiss.”).

that the “plus” involves whether the father has established a significant relationship with his child. But when one examines these decisions more closely, one sees that the Court has something else in mind—the plus factor involves either the relationship with the mother or custody of the child. A substantial, non-custodial relationship does not seem to meet the Court’s “biology plus” criterion.

The Court sometimes implies that fathers who do not meet this “plus” standard have shirked their parental responsibilities. Yet, this is misleading because the Court has never stated that fathers are afforded constitutional protection in their attempts to establish relationships with the children that they have fathered. Further, the Court has suggested that the contrary is true: there is no protection even for fathers who are blameless for their failure to establish relationships with their children. Some state courts have rightly suggested that this jurisprudence creates bad incentives and can have unfair and unjust results. Those implications notwithstanding, however, the Court’s interpretation of the implicated federal constitutional guarantees does not preclude a state from passing and enforcing laws that place a premium on early and permanent adoptions.

Both individuals and society as a whole benefit when children who otherwise would not be cared for are placed in loving, adoptive homes. Yet, that does not justify offering no protection to non-marital fathers who, through no fault of their own, are prevented from establishing relationships with their children. States, and perhaps Congress, should fill the void in the current jurisprudence by creating safeguards so that fathers who act in a timely fashion to establish their parental rights and responsibilities will not be prevented from doing so.

Laws might be passed to offer increased protections. Creation of a national registry would help solve some problems in instances in which a father does not know where the mother is giving birth. However, such a registry will not resolve all of the associated difficulties. If the mother identifies neither the father nor herself—through use of a safe haven for instance—then the notice provision will not be triggered. One possibility would be to have a DNA databank associated with the registry, assuming that appropriate privacy protections could be maintained, including a provision requiring the destruction of the information at some point.<sup>378</sup> By utilizing such a databank, the biological father might be afforded notice of an adoption of his child even if the child had been surrendered anonymously.

Yet, notice alone will not provide adequate protection. Substantive interests of the biological father must also be recognized so that he will

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378. Tracey Maclin, *Is Obtaining an Arrestee’s DNA a Valid Special Needs Search under the Fourth Amendment? What Should (and Will) the Supreme Court Do?*, 34 J.L. MED. & ETHICS 165, 169 (2006) (suggesting that “privacy interests [are] implicated in the storage of DNA in databanks for an infinite period of time”).

be able to establish a relationship with his child in appropriate cases.<sup>379</sup> In *Little*, the Court recognized the possible importance to each of the parties in establishing and maintaining the relationship between father and child, and merely affording notice without also affording substantive protection will not suffice if these interests are to be advanced in appropriate cases.

It may well be that in some cases a child would be better off with an adoptive family than with her biological parent or parents. Yet, that is true whether or not the biological parents are married and whether or not the single parent is the child's mother or father. No justification has been offered for affording non-marital fathers so little constitutional protection with respect to their relationships with their biological children.

A woman deciding to give up her son or daughter for adoption may well have carefully considered how the child would have fared if raised by his or her father, having only the best interests of the child in mind when seeking to prevent the father from establishing a relationship with the child. Yet a mother cannot in effect waive a father's rights in other contexts, even when doing so for the best of reasons, and she should not be allowed to do so here.

The current non-marital father's rights jurisprudence is regrettable both because of its lack of clarity and because the Court seems almost to have purposely misled lower courts by saying one thing and doing another. The Court has refused to recognize that the rights of non-marital fathers should be protected, even if those fathers have not yet had the opportunity to establish meaningful relationships with their children. At the same time, the Court has implied that all such fathers have somehow shirked their responsibilities, thereby adding insult to injury in those instances in which the fathers have done everything to take on those responsibilities that could reasonably have been asked of them.

It seems unlikely that the Court will modify the current jurisprudence anytime soon, which means that legislatures and state courts may need to step into the breach to correct this error. While adoption should be promoted and children in need of placement should be put in loving homes as soon as is practicable, these worthwhile goals must not be achieved at the expense of non-marital fathers who, through no fault of their own, have been denied the opportunity to establish relationships with their children. If parental rights mean anything at all, they must mean, at the very least, that non-marital fathers cannot be precluded from establishing relationships with their children so readily.

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379. See *supra* note 369 (discussing the Uniform Adoption Act provision protecting thwarted fathers).