10-1982

Lehr v. Robertson

Lewis F. Powell Jr.

Discuss — Grant of G/R on Caban, indicating it does apply retroactively

Decision of N.Y.C/Appeals probably conflicts with Caban v. Mohammed (1979) as pursuant to father here was given no notice of adoption proceedings of his child.

Pet'r unsuccessfully attacked validity of N.Y. statute that does not require notice.

N.Y.Ct/Appeals declined to apply Caban retroactively on ground that we did not so hold explicitly

may moter do not adequately present issues here

PRELIMINARY MEMORANDUM

May 18, 1982 Conference
List 1, Sheet 1

No. 81-1756

LEHR (putative father)

v.

ROBERTSON, et al (mother and adoptive father) OK

Appeal from N.Y. Ct App (Jasen, Gabrielli, Meyer, Jones; Cooke, Wachtler, Fuchsberg, diss.)

State/Civil Timely (w/ext)

SUMMARY: Appt, the putative father of a child adopted by appes, challenges the validity of the adoption order on the ground that he was not given notice or an opportunity to participate in the adoption proceedings. He also maintains that, under Caban v. Mohammed, 441 U.S. 380 (1979), the adoption could not properly take place without his consent.

This case is too "close" to Caban to Dismiss, yet arguably distinguishable on its facts, so that summary reversal might be unappealing. Either a GVR or a Note. RC

FACTS: Appt and appe Lorraine Robertson lived together for two years prior to the birth of Lorraine's daughter Jessica on Nov. 9, 1976. Both during her pregnancy and after Jessica's birth, Lorraine acknowledged that appt was the father of the child. After the birth, appt visited Lorraine regularly in the hospital, but after leaving the hospital Lorraine withheld her whereabouts from appt. In Aug. 1977, Lorraine married appe Richard Robertson.

Appt located Lorraine in August 1978, and, in Dec. 1978, appt's attorney wrote to appes requesting that they make arrangements for appt to visit Jessica. On Dec. 21, 1978, appes instituted a proceeding in the Ulster County Family Court seeking to have Richard adopt Jessica; appt was not given any notice of this proceeding at that time. On Jan. 15, the Family Court requested the customary investigation by the Social Services Dept., which, on Feb. 26, 1979, returned a favorable report.

Meanwhile, appt, having not received a response from appes concerning his visitation request, filed a petition in the Westchester County Family Court to establish paternity and obtain visitation rights; the petition was filed on Jan. 30, 1979, and appes were served with the summons on Feb. 22, 1979. At the Feb. 26 hearing on the Robertsons' adoption application, appes' counsel informed the court about the pending paternity action. At counsel's request, the court signed an "order to show cause" returnable March 12, 1979 (the return date in the paternity proceeding) bringing on appes' application to change the venue of the paternity action from Westchester to Ulster County. Appt was served with the order to show cause on March 3, 1979, and then learned for the first time about the adoption proceeding.

court was informed

On March 7, 1979, at the request of appes' counsel, the Ulster County Family Court signed a final order of adoption. Later that same day, appt's attorney telephoned the Family Court Judge to request a stay of the adoption proceedings; however, the attorney was informed that his request came too late because the adoption was already final.

On June 13, 1979, appt petitioned to vacate the order of adoption and reopen the adoption proceedings. Appt contended that he had been denied due process and equal protection of the laws because, although he was Jessica's putative father, he was not given notice of the adoption proceedings, nor was his consent to the adoption required. Appt's petition was denied by the Ulster County Family Court, and the App. Div affirmed with one judge dissenting.

HOLDING BELOW: The N.Y. Ct App affirmed, 4 to 3. The court acknowledged that Caban v. Mohammed, 441 U.S. 380 (1979), held unconstitutional § 111 of the N.Y. Domestic Relations Law on the ground that it required the consent of the mother, but not the father, as a prerequisite to adoption of a child born out of wedlock. However, the court held that it had "no occasion to reach or resolve the substantive aspects" of appt's constitutional arguments, because Caban was decided 7 weeks after the final order of adoption was entered in this case--"unless the Supreme Court itself accords full retroactive effect to its holding, the decision and the rationale of Caban should be applied only to actions and proceedings that were still in the judicial process at the time the decision was announced."[1]

Footnote(s) 1 will appear on following pages.

The Ct App also held that it was not "an abuse of discretion" for the Family Court to sign the final order of adoption on Mar. 7, 1979, because all the necessary consents had been obtained and all the statutory prerequisites to adoption had been met at that time. Section 111-a(4) of the Domestic Relations Law required that notice of adoption proceedings be given to the person listed as father on the child's birth certificate, but appt was not so listed. Nor had appt filed a formal "notice of intention to claim paternity" pursuant to § 372c of the Family Services Law, which apparently would have assured him the right to participate in the adoption proceeding. It would be contrary to the N.Y. legislature's intent to require that notice generally be given to putative fathers "known to" the mother or the Family Court who do not fall within the statutorily-enumerated categories. Moreover, even if appt had been notified he would have been restricted to presenting evidence concerning the "best interests of the child," and there was showing that appt possessed such evidence.

Similarly, it was not an abuse of discretion to refuse to reopen the adoption proceedings in June 1979, particularly since the consequences of such a reopening "would have been to render Caban applicable and thereby to accord [appt] not only a right to notice but a power of veto over any adoption, beyond the reach of

[1]Appt also contended that § 111-a of the Domestic Relations Law--which as interpreted by the Ct App did not require that appt be given notice of the adoption proceedings--was unconstitutional under the Due Process Clause. This section of the N.Y. statute was not at issue in Caban, and the Ct App did not explain why its decision concerning Caban's retroactivity had any bearing on this challenge.

the court's [sic] to supervise or to dispense with, whatever the dictates of Jessica's best interests."

Judge Cooke wrote a strong dissent, concluding that the procedure used by the Family Court was "acceptable [neither] in law or justice." Although the dissenters agreed that Caban should not be given retroactive effect, they maintained that even under pre-Caban law "it was recognized that a putative father is entitled at least to notice and an opportunity to be heard concerning whether adoption would be in his child's best interests." See Quilloin v. Walcott, 434 U.S. 246 (1978). The dissenters viewed as critical the fact that the Family Court had actual knowledge, prior to signing the adoption order, that appt was claiming paternity and seeking visitation rights. Appt had no reason to file a "notice of intention to claim paternity" since he did not know that an adoption proceeding was under way. Under the circumstances of this case, "simple justice" requires that appt be given his day in court.

CONTENTIONS: Appt contends first that the Ct App ignored his due process claims, which were not predicated on Caban. In Stanley v. Illinois, 405 U.S. 645 (1972), and Quilloin v. Walcott, supra, the Court recognized that a father of an illegitimate child is entitled to a hearing concerning his interest in the child before his parental rights may be terminated. In both cases, the Court assumed that reasonable notice of, and an opportunity to be heard in, the adoption proceedings was required. See 405 U.S., at 657 n.9, 658; 434 U.S., at 253-254. See also Caban, 441 U.S., at 385 n. 3 ("As the appellant was given due notice and was permitted to participate as a party in the adoption proceeding, he does not contend that

contend that he was denied the procedural due process held to be requisite in Stanley v. Illinois ...").

In addition, appt contends that § 111 of the Domestic Relations Law violates the Equal Protection Clause because it requires consent for adoption only from the mother of an illegitimate child. Caban, which so held, was not a case of first impression and did not overrule past precedent, but rather was clearly foreshadowed by cases such as Stanley, Quilloin, and Craig v. Boren, 429 U.S. 190 (1976). It therefore should be retroactively applied. See In re Riggs, 612 S.W. 2d 461 (Tenn Ct App 1980), cert denied, 450 U.S. 921 (1981). Furthermore, because appt was not given notice of the adoption proceedings, those proceedings were constitutionally defective and never became final; thus, Caban should be applied regardless of the resolution of the retroactivity issue.

Appes maintain that this is not a proper appeal. Relying on Caban, appt argued below that § 111 of the N.Y. Domestic Relations Law was unconstitutional. However, the N.Y. Ct App did not "uphold the validity" of the statute, but simply held that Caban should not be applied retroactively. Moreover, the Ct App "refused to address" appt's constitutional challenges based on cases other than Caban. Absent an express finding by the Ct App that the N.Y. statute was valid, this Court lacks jurisdiction under 28 U.S.C. § 1257(2). In the alternative, the question of Caban's retroactivity is so insubstantial as to warrant dismissal of the appeal.

DISCUSSION: Caban held unconstitutional the N.Y. adoption law challenged here, permitting an adoption to take place without the consent of the putative father, at least as applied to "unwed

fathers [whose] identity is known and [who] have manifested a significant parental interest in the child." 441 U.S., at 391. Although there are some significant differences between this case and Caban--for example, the facts that appt has never lived with the child, and is not officially recorded as the father on the child's birth certificate, cf. Quilloin v. Walcott, supra--there is nonetheless a substantial argument that appt falls within the class of fathers whose consent to adoption is required by Caban. The Caban dissenters maintained that the decision should not be applied retroactively, id., at 401, 415-416; however, the majority did not address the issue, and it is one which the Court might now wish to consider.

Appt also raises substantial due process claims, not dependent upon Caban, and not adequately addressed by the Ct App. Both Stanley and Quilloin, supra, suggest that appt--who was not only known to be the putative father, but who was actually before the Family Court in a related paternity proceeding--was entitled to notice and an opportunity to contest the adoption. It is particularly disturbing that the Family Court rushed to issue a final adoption order for no other apparent reason than to prevent appt from being heard. If appt were to prevail on his due process claims, and thereby become entitled to reopen the adoption proceedings, then I doubt that the retroactivity of Caban would be an issue in the case. Even the Ct App majority acknowledged that Caban would apply on a prospective basis in the event the adoption proceedings had not properly been concluded.

I think this probably is a proper appeal. 28 U.S.C. § 1257(2) creates a right of appeal from state decisions

May 13, 1982

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 81-1756

LEHR

vs.

ROBERTSON

HAB & CV would reverse summarily

Postpone

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	MERITS AFF	MOTION G	MOTION D	AGREE	DISAGREE
Burger, Ch. J.				✓							
Brennan, J.						✓		after discussion			
White, J.				✓							
Marshall, J.						✓					
Blackmun, J.				✓							
Powell, J.				✓							
Rehnquist, J.						✓					
Stevens, J.					✓						
O'Connor, J.					✓						

drk 12/06/82

Reviewed 12/8 - will need one more careful review by 12/10

I could reverse if we address merits of N.Y. law as applied in these cases where ~~[illegible]~~ identity + ~~[illegible]~~ whereabouts of putative father were known.

N.Y. law is valid facially.

BENCH MEMORANDUM

To: Mr. Justice Powell December 6, 1982

From: Rives

No. 81-1756, Lehr v. Robertson, et al.

Questions Presented

1. Whether the New York Family Court's failure to notify a putative father of pending adoption proceedings violated the Due Process and Equal Protection Clauses.

2. Whether Caban v. Mohammed, 441 U.S. 380 (1979), should be applied retroactively.

I. Background

This case involves the propriety of an adoption proceeding for a child named Jessica. Because the case arose on the trial court's dismissal of appt's motion to reopen Jessica's adoption proceedings, the facts are taken from appt's motion. The mother and appt had lived together for two years prior to Jessica's birth on November 9, 1976. After the mother's release from the hospital, she disappeared for approximately 20 months. In August 1977, the mother married her present husband. During these 20 months, appt sporadically would discover where the mother was living and attempt to visit Jessica. When the mother allowed appt to visit Jessica, appt offered the mother financial assistance which she refused.

In August 1978, appt learned that the mother and her present husband, appees here, had settled in Milton, New York. When he sought to visit Jessica, he was told that if he did not stay away he would be arrested. In December 1978, appt sought legal advice. His attorney wrote appees on December 12, requesting that arrangements be made for appt to visit Jessica. Appees did not answer the letter, and on January 8, 1979, a second letter was sent, which was refused. On December 21, 1978, after appees received appt's first letter, they filed a petition for adoption in the Ulster County Family Court. A

hearing was held on the adoption proceedings on January 15 without notice to appt.

On January 30, appt filed a paternity petition in Westchester County Family Court, requesting that he be declared Jessica's natural father, that payments for her support be fixed and that he receive visitation rights. On February 22, 1979, appees were served with notice of the paternity petition. On February 26, appees' attorneys sought an order to show cause why the paternity suit should not be moved to the same forum as the adoption proceedings. The return date on the show cause order was March 12, 1979.

Appt received the show cause order on Saturday, March 3, and realized for the first time that adoption proceedings were pending. On March 6, appt's attorney telephoned the Ulster County Family Court Judge to advise him that he had prepared a motion to stay the adoption proceedings pending the outcome of the paternity proceeding. The judge, however, informed appt's attorney that he had signed the adoption order that morning.

The appt attempted to appeal the adoption proceeding, but never perfected the appeal. He then attacked the judgment collaterally by filing a show cause order to vacate the proceedings. Although appt raised a number of state law issues, only three federal questions were raised: whether the Family Court's failure to provide him with adequate notice of the adoption proceedings was a denial of due process or equal

protection and whether Caban, supra, should be applied retroactively.

The New York Court of Appeals noted appt's retroactivity and due process claims. It ruled, however, that Caban should be applied retroactively only to cases that were not on direct appeal. To do otherwise would wreak "cruel havoc." The Court of Appeals but did not address directly appt's claim that the failure to provide him with notice violated due process. The Court discussed, instead, the question of whether the family judge's failure to give appt notice complied with the state statutory requirements set out in N.Y. Domestic Relations Law §§111, 111-a. The majority's only response to appt's constitutional claim is its statement that these sections were enacted in response to Stanley v. Illinois, 405 U.S. 645 (1972), and designed to meet its minimum requirements.

Judge Cooke dissented. He agreed that Caban should not be applied retroactively but disagreed with the majority that appt should not have received notice under the statute. The intent of the legislature to provide putative fathers with notice and a right to be heard makes clear that when a judge has actual knowledge both of a putative father's existence and his acknowledgement of his paternity, notice should be provided.

B. Statutory Background

This appeal involves two sections of New York's Domestic Relations Law. At the time the adoption proceeding took place, section 111 provided that the consent of the mother, but not the father, of a child born out of wedlock was required before the adoption could take place. Subsection 111(3) provides that notice shall be given to any party whose consent is required but also specifies that the family court judge may give notice to "any other parent whose consent may not be required ...." Although this section could have provided a statutory basis for the family court judge to provide appt with notice, the state Court of Appeals found that the family judge did not abuse his discretion in deciding not to give appt notice of the adoption.

The other relevant section is section 111-a, which was enacted to conform to the requirements of Stanley v. Illinois. It provides that notice of adoption proceedings will be given to seven classes of putative fathers. Although it is undisputed that appt fits in none of these classes, §111-a(2)(c) provides a means for putative fathers to ensure that they will receive notice of any adoption proceedings. Putative fathers who file a notice of intent to claim paternity of the child with the putative father registry will receive notice of adoption proceedings. See N.Y. Social Services Law §372-c. Although appt did not file a notice with the putative father registry, he did file a petition to establish paternity, which does not entitle him to notice under §111-a.

II. Contentions

A. Appt's contentions

Appt argues that he has a protectible liberty interest in maintaining a relationship with his daughter, which New York may not sever without due process. See Stanley v. Illinois, 405 U.S. 645 (1972). Here, the Court failed to provide him with the process that was due since it did not give him adequate notice of the adoption proceedings. Appt also argues that the difference in the notice provisions violates equal protection since all unwed mothers, but only a limited class of unwed fathers, are entitled to notice prior to adoption proceedings. Finally, appt argues that Caban should be applied retroactively. First, Caban does not represent an abrupt break with past law. It was foreshadowed by both this Court's recognition that discrimination based on sex are subject to middle tier scrutiny and its application of such scrutiny to distinctions drawn by the states in the field of family relations. See Stanley, supra. Second, the purpose of Caban was to prevent unwed fathers from having their parental rights terminated solely on the basis of their sex. Retroactive application would further that goal. Finally, retroactive application would not upset the balance of the equities since there will be few putative fathers who have sought actively to assert their parental rights. Since most fathers will be deemed to have abandoned their children, they will be precluded from objecting to the adoption proceedings.

B. Appees' contentions

Appee New York State contends that this Court lacks jurisdiction since no substantial federal question is presented by this appeal. First, when appt sought to intervene at the time of Jessica's adoption, appt had not established a substantial relationship with his daughter. Moreover, the Family Court followed this Court's lead in Quilloin v. Walcott, 434 U.S. 246 (1978), in that it approved an adoption which formalized a family unit which was then in existence and in the best interest of the child. Nor is there a substantial question about notice. Appt had the option under New York law, even after the adoption order was entered, of intervening and appealing the Family Court's decision. This was sufficient to cure any deficiency in notice.

Alternatively, the State argues that the categories established in §111-a of putative fathers who require notice satisfies due process. In enacting §111-a, the New York legislature sought to establish a scheme that would meet the requirements of Stanley and made a considered judgment that some classes of unwed fathers would be too difficult to locate to require that they be given notice. The legislature instead established a putative father registry where putative fathers could register their intent to claim paternity, which would entitle them to receive notice of any adoption proceedings. The existence of separate categories for men and women does not deny unwed fathers equal protection since the difficulty in

proving paternity justifies different treatment on the basis of sex.

Section 111-a also provides all the process that is due. It provides a simple, easy procedure for putative fathers to make their interest in a child's welfare known. Although it is possible that the mother could identify the putative father, this would infringe on her right to privacy. Nor would giving notice to anyone who has filed a paternity petition be satisfactory. It would require the adopting parents to look through each county court system before instituting adoption proceedings.

With respect to applying Caban retroactively, the state essentially adopts Justice Stevens' position in his Caban dissent. Concentrating on the third factor noted in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), it notes the strong interest in finality for adoption proceedings. The proceeding is designed to foster an integral family unit. To upset the adoptive family's stability by making Caban retroactive would indeed wreak cruel havoc.

Finally, the state argues that if Caban does apply retroactively, that appt had never developed the substantial relationship with his daughter that Caban found to be a prerequisite for requiring the unwed father's consent.

III. Discussion

This case raises four issues: 1) whether the case is properly here on appeal; 2) whether the §111-a as applied to

this case violates due process in that no notice of the adoption was given to appt; 3) whether the distinguishing the classes to whom notice was to be given on the basis of sex violates the equal protection clause; and 4) whether Caban should be applied retroactively.

A. Whether this case is an appeal

The appees raise two relatively frivilous issues on this question. First, appee Robertson argues that this is not an appeal since the New York Court of Appeals did not decide whether the challenged statutes were unconstitutional as applied to appt. This claim lacks merit. Appt claimed that §111-a violated due process and equal protection. The Court of Appeals did not address his claims directly, but appeared to hold that because the legislature had enacted §111-a to comply with Stanley §111-a was constitutional. Even if the state court failed to address appt's constitutional claim, it is settled doctrine that the mere failure to decide a properly raised federal claim does not bar a litigant from taking an appeal to this Court. See New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928). With respect to appt's challenge that Caban should be applied retroactively to invalidate §111, the state court expressly addressed that challenge and upheld the application of the statute to appt.

Nor is appee New York State's jurisdictional challenge meritorious. New York argues that the Court lacks jurisdiction since this case does not raise a substantial

federal question. Both the retroactive application of Caban and whether notice is required are substantial questions.

B. Due Process

The state makes two threshold arguments with respect to due process. First, it claims that appt had notice since he learned on Saturday, March 3, 1979--when he received the order to show cause why the paternity proceeding should not be moved to Ulster County--that the appees had initiated adoption proceedings. Thus, he has no reason to complain about lack of notice. This argument lacks merit. Appt had no notice prior to the hearings themselves and the "notice" he received on March 3 was far from adequate. The notice was contained in an affidavit attached to the order to show cause. It did not specify when the adoption proceedings would be concluded but indicated only that the hearings had been completed and that all that was left to be done was the formal signing of the adoption order. See JA 91-92. Indeed, to the extent the show cause order sought to justify removal on the ground of efficiency it suggested that the adoption proceedings would not be concluded until the paternity proceeding had been settled.

The state also claims that appt could have moved to intervene after learning of the adoption order and then sought to appeal. It would seem, however, that if the appt was entitled to any notice, he was entitled to an opportunity to appear and present evidence on his rights and interests in the adoption proceedings. The ability to intervene and appeal the

Family Court's determination, into which appt had no input, would not seem to cure the initial defect in the notice. Thus, the question of whether the procedure provided by New York satisfied due process is squarely posed.

Mullane v. Central Hanover Bank, 339 U.S. 306 (1950), held that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action...." Because the notice due varies with the circumstances of the case, the Court found that personal notice would be required when the party seeking to conclude another party's rights knew the names and the addresses of the interested parties. When such information was lacking, notice by publication would be sufficient. Section 111-a is unusual in that it does not require notice to be provided to all putative fathers who may have an interest in the proceedings. It instead places the burden on the party entitled to receive notice to make himself known. It does not require, as Mullane would, the party who seeks to conclude the father's paternal rights to provide personal notice to claimants, where known, and notice by publication where the identity of the putative father is unknown.

The virtue of the Mullane approach is that every party who conceivably may be interested is given some sort of notice. By excluding some classes of putative fathers from those entitled to receive notice, the New York procedure

requires that the interest of that class of fathers be weighed against the interest of the state in excluding them from receiving notice. New York advances three interests in support of its statutory scheme: (1) fathers who have failed to establish proof of paternity have no protectible interest; (2) the difficulty in identifying putative fathers justifies excluding those who have not manifested some indication of paternity and (3) the interest in the mother's privacy justifies shifting the burden to fathers to manifest their paternity.

The Court has not previously considered the minimum protectible interest that a father has in this child. It has indicated, however, that the father's interest derives from two sources, the fact that he is the biological parent and the relationship that the unwed father develops with the child. In Stanley, the Court recognized that the "private interest, here, that of a man in the children he has sired and raised, undeniably warrants ..., absent a powerful countervailing interest, protection." Id., at 651 (emphasis added); ibid. (referring to the right to "conceive and raise one's children"). In Quilloin v. Walcott, 434 U.S. 246 (1978), the Court recognized that the strength of the interest, and the protection deserved, varies according to the duration and extent of the relationship. Thus, when the biological father had not had custody of the child and when the child had lived with his adopting parents prior to the adoption, the father's ability to appear and offer evidence as to the child's best

interest was sufficient, for due process purposes, to protect the father's interest. In Caban, the Court examined whether a statutory scheme that made an unwed mother's, but not an unwed father's consent a necessary condition to adoption violated equal protection. It noted that "where the father has never come forward to participate in the rearing of the child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child." 441 U.S. at 392.

This case does not require the court to determine what sort of protectible interest biological parentage creates since the question raised is whether putative fathers are entitled to notice and an opportunity to be heard. Even if it is ultimately determined that a particular father has no interest other than biological, that does not mean that the state may deny notice to a class of putative fathers. It is precisely because the strength of the father's interest is not known that putative fathers deserve notice and an opportunity to establish their paternity and strength of their interests. The facts of this case illustrate this point. According to appt, he was a concerned father who sought to establish a relationship with his child but was prevented from doing so by the machinations of the mother. According to the mother, appt has known her whereabouts ever since Jessica's birth but has not bothered to establish a relationship with the child prior to the adoption proceedings. Although it may develop that appt's interest did not extend much further than the moment of

conception, he certainly has an interest in being able to establish the strength of his claim.

Second, the Court of Appeals found that the reason that the state had established the putative father registry because of the difficulty in identifying putative fathers. While a legitimate state interest, the scheme established by the state does not further its interests effectively. First, even though the mother may know both the identity of the father and his location, the state does not require that she provide the father with notice. See 111-a(2)(f) (requiring that notice be given only to fathers whom the mother has identified in a written, sworn statement); In the Matter of Jessica "XX", App. to Jur. Stat. A9 (mother had no obligation to disclose the existence of the biological father). While other considerations, such as the mother's privacy may counsel against requiring the mother to provide notice to known fathers, the state's difficulty in locating fathers does not explain the scheme adopted by New York State. To the extent that there are multiple claimants to the title of father, there seems to be no reason, with respect to the logistics of identifying claimants, to treat this problem any differently than one would where one party seeks to establish title to a piece of property. If the party seeking to establish title knows of people who have colorable interests in the property, then personal notice would seem to be required. Otherwise, notice by publication would suffice. Admittedly, a child is not a piece of land and the considerations that guide the way

in which notice is given will of course differ. With respect to the difficulty of identifying and notifying putative fathers, however, the problem raised is no different than in any situation in which one party seeks to establish rights in rem.

The state's real interest in this situation appears to be protecting the privacy of the mother. The commentators generally have recognized the strength of this interest. See Comment, The "Strange Boundaries" of Stanley: Providing Notice of Adoption to the Unknown Putative Father, 59 Va. L. Rev. 517, 524 (1973). The strength of the interest, however, would seem to vary with the situation. When the mother possesses enough information to provide for personal notice, there is not the problem, as there would be with notice by publication, of embarrasing public disclosure. There would seem, however, to be two potential concerns in this situation: the mothere should not be forced to "confess" the identity of the father and a mother has an interest in keeping her past from being revealed to her present family and friends. Although there is a valid concern about a mother's reluctance to name the father, it is questionable whether a mother's reluctance to admit the father's identity should be allowed to prevent the father from receiving notice that his interest in his child is in danger of being cut off. It does not seem that requiring the mother to state that a particular person may be the father of her child is particularly intrusive when the information will be divulged except in the personal notice sent to the putative father.

what about interest in child?

With respect to a mother's desire not to surprise her present family with an embarrassing disclosure, the interest seems minimal. Under New York's present scheme, a father who registers with the putative father registry can defeat this interest by bringing a paternity suit against the mother. Once the paternity suit is filed the cat is out of the bag.

When the identity of the father or his whereabouts are unknown, there is, however, a strong interest in avoiding notice by publication. Since the father in such situations may be unaware of the name or existence of the child, the notice typically will disclose the mother's name. Making such information public knowledge would not only be demean the mother's reputation but it also might endanger the successful adoption of the child. Many states regard keeping the identity of the natural parents secret from the child as essential to fostering a healthy relationship with the adopted parents. Assurances of secrecy also are important in encouraging some mothers to rely on regulated adoption agencies rather than seeking to place the child privately. If the mother were required to reveal her identity through publication as a condition for surrendering the child for adoption, these interests would be undercut.

Although the state's interest in protecting the privacy of the mother would appear to be less pressing when she possesses enough information to provide for personal notice, the interest in avoiding notice by publication is quite strong. All told, the state seems justified in relieving the mother of

the burden of identifying the father and in adopting a alternative system for providing notice to the father.

The question then becomes whether the system the state has adopted is sufficient to comply with due process. Although the state system provides a simple way for putative fathers to receive notice, there would seem to be two alternative procedures that would increase the accuracy of the notice given. The state could cross-reference petitions filed to determine paternity with the putative father registry. Second, it could require that mothers who have been served with notice of a paternity proceeding give notice of any adoption to the person seeking to establish his paternity. Both procedures would enhance the accuracy of the notice given since it would include the class of putative fathers who may not have filed with the putative father registry but who are seeking to establish their paternity. The first procedure would impose some burden on the state treasury since it would increase the paperwork for county courts that receive putative father petitions. The second would impose less of a financial burden since notice would be dealt with by the individual litigants. Such a requirement would not burden the mother's privacy interests since she is already a party to the pending paternity petition, and the class of people whom she would have to notify would be easily identifiable.

Although these measures would increase the accuracy of the notice given, I doubt whether due process should be used as a means of scrutinizing too closely a state's procedures.

It is perhaps always possible to find that a particular change would enhance a state procedure's accuracy incrementally. In this regard, Matthews v. Eldridge, 424 U.S. 319, 344 (1976), recognized that "procedural due process rules are shaped by the risk of error inherent in the truth finding process as applied to the generality of cases, not the rare exceptions." Although the result in this case does not seem just, the use of the putative father registry is a generally a fair procedure, given the state's concern for protecting the mother's privacy. If this procedure is struck down as violating due process, then every putative father who fails to avail file with the putative father registry but whose case happens to justify receiving notice would be able to bring a due process claim against the state. I would recommend that the use of the putative father registry be upheld on the ground that although more accurate procedures could have been developed, the due process clause only demands that the states develop fair procedures.

Although I recommend upholding the procedure, I think this is a close question and would suggest, if you disagree with my recommendation, that it be struck down on the ground that a mother who has received notice of a pending paternity action should be required to give notice to the putative father who filed the suit.

C. Whether §111-a violates the Equal Protection Clause

Appt argues that the statute discriminates on the basis of sex since it provides that notice should be given to

all unwed mothers but not to all unwed fathers. The initial question is the level of scrutiny that should be applied. On this point, Parham v. Hughes, 441 U.S. 347 (1979), provides some guidance.

Parham involved an equal protection challenge to a Georgia statute whereby all mothers were entitled to bring a wrongful death action for the loss of their illegitimate child, but only those unwed fathers who previously had legitimated their children could do so. Justice Stewart's plurality opinion determined that the right of unwed fathers to establish their paternity and thus their right to sue for wrongful death does not reflect any overbroad generalizations about men as a class. Thus he reasoned that "the statutory classification does not discriminate against fathers as a class but instead distinguishes between fathers who have legitimated their children and those who have not." Id., at 356. The plurality accordingly only applied mere rationality scrutiny and found that the state's system satisfied that minimal standard. See id., at 357-58.

Your concurring opinion determined that the scheme drew lines on the basis of sex and thus was subject to middle tier scrutiny. You determined, however, that the Georgia statute was substantially related to the state's goal of avoiding difficult problems of proving paternity after the death of the illegitimate child. Your concurrence appears to have relied primarily on the proposition that, under the Georgia statute, "[i]t lies entirely within a father's power to

remove himself from the disability that only he will suffer." See id., at 359-60. Finally, the dissent agreed with you that the Georgia classifications were drawn on the basis of sex, but found that the statute was not substantially related to the state's asserted goals.

The New York statutory scheme is similar to the one in Parham in that it provides notice to all mothers but distinguishes among classes of fathers. Although I find the reasoning in Justice Stewart's plurality appealing, it does seem that the distinction is not gender neutral--a point on which Parham suggests five Justices (you and the dissent) would agree. Thus, the statute must "serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976).

The state's interests in providing notice to only those fathers who are readily identifiable and in protecting the privacy of the mother are important state objectives. As your concurring opinion in Parham indicates, the ability of a putative father to remove himself from the statutory burden--as he could in this case by registering with the putative father registry--is sufficient to say that the means adopted by the statute are substantially related to the state's goals.

D. The Retroactivity of Caban

Chevron Oil Co. v. Huson, 404 U.S. 97 (197) established three factors to be considered in determining whether a decision should be applied retroactively: whether

the decision announced a new principle of law, whether retroactive application of the rule announced in the decision will further its purpose and whether retroactive application will result in hardship or injustice.

Although Caban was foreshadowed by Stanley, Caban stated that it was addressed to a question that had been left open in Quillon. Thus, while Caban was not completely unexpected, it was a ground breaking opinion in an area that had just begun to experience change. Prior to Caban and Stanley, the unwed father's rights uniformly were ignored.

With respect to the second Chevron factor, it would further the application of Caban to apply it retroactively. The purpose of Caban was to give unwed fathers who had a substantial relationship with their children the same rights that an unwed mother would have had.

The primary concern in this case, however, is raised by the hardship that would result from retroactive application of Caban. Although both parents have rights not to be separated from their children, the primary concern in adoption proceedings is the welfare of the child. Once adoption proceedings have been completed and the child is settled and adjusting to its adopted parents, it would result in extreme hardship to allow a biological father to upset the relationship and remove the child from its new family. Even though the actual number of fathers who would have had a substantial enough relationship to obtain veto power over the child's adoption may be small, the potential disruption entailed in

litigation by even unsuccessful fathers is sufficient to counsel against retroactive application of Caban.

Conclusion

1. The state's primary interest in departing from the type of notice given in a normal in rem proceeding is its interest in protecting the mother's privacy. This interest is sufficient to justify establishing an alternative procedure, so long as it is fair and provides putative fathers with a simple means of establishing their right to notice. New York's procedure does that. Although it might be improved by requiring notice for a person such as appt, due process does not guarantee the best procedure but one that is fair.

2. Petr's equal protection challenge fails under the analysis in Parham. Although the state's classification is not gender neutral, the state's goals in providing a reliable way to identify putative fathers and in protecting the mother's privacy are important. The scheme is substantially related to those goals since it provides a clear way of identifying putative fathers without requiring the mother to resort to notice by publication.

3. The primary interest in not applying Caban retroactively is that the ensuing litigation poses the danger of upsetting successful adoptions. The danger of hardship, combined with

the relative newness of Caban, support making Caban prospective only. I would recommend affirming.

Rev

81-1756 LEHR v. ROBERTSON

Argued 12/7/82

N.Y. adoption case - W/P Q

Freeman (Appnt)

Argues D/P - biological relationship creates ~~an inherent~~ liberty interest that requires notice. A D/P case.

(Overt-argued her case - here all counsel knew identity of father & that he claimed ~~his~~ interest in child)

The court here ~~knew~~ knew about Lehr,

~~[illegible]~~ Lehr was asking ~~[illegible]~~ that he be granted ~~[illegible]~~ visitation rights.* Also he claimed right to contest adoption by step-father.

→ | Anytime mother knows identity of father, he should be notified

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* Visiting rights were predicated on paternal relationship

Samoff (appellee)
(Not helpful)

There is a separate case from the order of adoption on March 3rd, 79.

Appellant could have filed motion to intervene – no time limit in N.Y. statute.

Samoff retreated from his { If we decide D/P issue for appellant, we decide merits as to custody.

(I don't understand this. Counsel says Cuban upheld N.Y. ~~law~~ law allowing mother to veto an adoption provided father has same right. But there is not an absolute right. The veto must be subject to best int. of child)

? Cuban is an e/p case

Freeman (Reply)
The

● Affirm 7-2 ●

No. 81-1756 Lehr v. Robertson Conf. 12/10/82

The Chief Justice On recond vote: Affirm
No auth. to review a state court's exercise of discretion.
N.Y law as to notice is valid.
Unmarried father to doesn't have all rights a married father does.
N.Y C/Appls did not address the D/P issue. Could Remand for its consideration. Not at next Panel.

Justice Brennan On recond vote: Affirm
Under our appellate juris., we can decide D/P issue. The Q is different—
Unless fathers take affirmative rights to protect themselves, they do not have right to notice & be heard. N.Y.'s provision seem adequate & valid. The narrow Q in this case, Must one may require notice. There may be unique facts. Extremely close case. Not at next.

Justice White Rev.
D/P quest. was presented & discussion of C/Appls must be read as deciding it.
The judge was under Const. duty to have to give putative father notice. Not sure whether the mother's knowledge alone is enough to require notice & hearing. (I could go with this)

Justice Marshall Rev.

As everyone knew about the claim of appellant, he should have been given a hearing.

Justice Blackmun Rev.

Agree with BRW

Justice Powell Affirm

(I made basically argument of 9/05)

Justice Rehnquist Aff'm

Agree essentially with LFP.

Justice Stevens Aff'm

We have no subs. to review discretionary acts of state court.

Statute provides numerous & court. means.

No duty to give notice - when there is a duty - is on the parties, not on the judge. If we held otherwise a duty, havoc would result. How does a judge have any duty

Justice O'Connor Aff'm

Statutory scheme is valid & Appellant did not follow it.

L.F.P

Questions:
p 13 - when putative father "comes forward" (citing Caban) to participate in preserving child, he "acquires DPP rights" (Check what P wrote in Caban)
p 13,14 putative father must "grasp" opp. to create relationship.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: MAY 10 '83

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

p 17 U.S. Statutes protected Appellant's inchoate right - 17

No. 81-1261

JONATHAN LEHR, APPELLANT v. LORRAINE ROBERTSON, ET AL.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

[May , 1983]

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether an unmarried father who has not established any relationship with his child during the two years since her birth has a constitutional right to notice and an opportunity to be heard before she may be adopted. The appellant, Jonathan Lehr, claims that such a right is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment as interpreted in *Stanley v. Illinois*, 405 U. S. 645 (1972), and *Caban v. Mohammed*, 441 U. S. 380 (1979). We disagree.

Jessica M. was born out of wedlock on November 9, 1970. Her mother, Lorraine Robertson, married Richard Robertson eight months after Jessica's birth. On December 21, 1978, when Jessica was over two years old, the Robertsons filed an adoption petition in the Family Court of Ulster County, New York. The court heard their testimony and received a favorable report from the Ulster County Department of Social Services. On March 7, 1979, the court entered an order of adoption.[2] In this proceeding, appellant

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[1] Although both Lorraine and Richard Robertson are appellees in this proceeding, for ease of discussion the term "appellee" will hereafter be used to identify Lorraine Robertson.

[2] The order provided for the adoption of appellee's older daughter, Renee, as well as Jessica. Appellant does not challenge the adoption of Renee.

A mis-mark of an opinion. Can't believe JPS wrote it. There is no Part I, Part II begun on p. 15

contends that the adoption order is invalid because he, Jessica's putative father, was not given advance notice of the adoption proceeding.[1]

The State of New York maintains a putative father registry.[2] A man who files with that registry demonstrates his intent to claim paternity of a child born out of wedlock and is therefore entitled to receive notice of any proceeding to adopt that child. Before entering Jessica's adoption order, the Ulster County Family Court had the putative father registry examined. Although appellant claims to be Jessica's natural father, he had not entered his name in the registry.

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

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[1] Appellee has never conceded that appellant is Jessica's biological father, but for purposes of analysis in this opinion it will be assumed that he is.

[2] At the time Jessica's adoption order was entered, § 372-c of the New York Social Services Law provided:

"1. The department shall establish a putative father registry which shall record the names and addresses of . . . any person who has filed with the registry before or after the birth of a child out of wedlock, a notice of intent to claim paternity of the child . . . .

"2. A person filing a notice of intent to claim paternity of a child shall include therein his current address and shall notify the registry of any change of address pursuant to procedures prescribed by regulations of the department.

"3. A person who has filed a notice of intent to claim paternity may at any time revoke a notice of intent to claim paternity previously filed therewith and, upon receipt of such notification by the registry, the revoked notice of intent to claim paternity shall be deemed a nullity and of no force.

"4. An unrevoked notice of intent to claim paternity of a child may be introduced in evidence by any party other than the person who filed such notice, in any proceeding in which such fact may be relevant.

"5. The department shall, upon request, provide the names and addresses of persons listed with the registry to any court or authorized agency, and such information shall not be divulged to any other person, except upon order of a court for good cause shown."

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.[1] Appellant admittedly was not a member of any of those classes. He had lived with appellee prior to Jessica's birth and visited her in the hospital when Jessica was born, but his name does not appear on Jes-

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[1]At the time Jessica's adoption order was entered, subdivisions 2–4 of § 111-a of the New York Domestic Relations Law provided:

"2. Persons entitled to notice, pursuant to subdivision one of this section, shall include:

"(a) any person adjudicated by a court in this state to be the father of the child;

"(b) any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry, pursuant to section three hundred seventy-two of the social services law;

"(c) any person who has timely filed an unrevoked notice of intent to claim paternity of the child, pursuant to section three hundred seventy-two of the social services law;

"(d) any person who is recorded on the child's birth certificate as the child's father;

"(e) any person who is openly living with the child and the child's mother at the time the proceeding is initiated and who is holding himself out to be the child's father;

"(f) any person who has been identified as the child's father by the mother in written, sworn statement; and

"(g) any person who was married to the child's mother within six months subsequent to the birth of the child and prior to the execution of a surrender instrument or the initiation of a proceeding pursuant to section three hundred eighty-four-b of the social services law.

"3. The sole purpose of notice under this section shall be to enable the person served pursuant to subdivision two to present evidence to the court relevant to the best interests of the child."

sica's birth certificate. He did not live with appellee or Jessica after Jessica's birth, he has never provided them with any financial support, and he has never offered to marry appellee. Nevertheless, he contends that the following special circumstances gave him a constitutional right to notice and a hearing before Jessica was adopted.

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. Notice of that proceeding was served on appellee on February 22, 1979. Four days later appellee's attorney informed the Ulster County Court that appellant had commenced a paternity proceeding in Westchester County; the Ulster County judge then entered an order staying appellant's paternity proceeding until he could rule on a motion to change the venue of that proceeding to Ulster County. On March 3, 1979, appellant received notice of the change of venue motion and, for the first time, learned that an adoption proceeding was pending in Ulster County.

On March 7, 1979, appellant's attorney telephoned the Ulster County judge to inform him that he planned to seek a stay of the adoption proceeding pending the determination of the paternity petition. In that telephone conversation, the judge advised the lawyer that he had already signed the adoption order earlier that day. 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.

Thereafter, the Family Court in Westchester County granted appellee's motion to dismiss the paternity petition, holding that the putative father's right to seek paternity "... must be deemed severed so long as an order of adop-

tion exists." App. 228. Appellant did not appeal from that dismissal.[1] On June 22, 1979, appellant filed a petition to vacate the order of adoption on the ground that it was obtained by fraud and in violation of his constitutional rights. The Ulster County Family Court received written and oral argument on the question whether it had "dropped the ball" by approving the adoption without giving appellant advance notice. Tr. 53. After deliberating for several months, it denied the petition, explaining its decision in a thorough written opinion. *In the Matter of the Adoption by Lorraine and Richard Robertson of Jessica Marie*, 102 Misc. 2d 102 (1979).

The Appellate Division of the Supreme Court affirmed. *In the Matter of the Adoption of Jessica "XX"*, 77 App. Div. 2d 381 (1980). The majority held that appellant's commencement of a paternity action did not give him any right to receive notice of the adoption proceeding, that the notice provisions of the statute were constitutional, and that *Caban* v. *Mohammed*, 441 U. S. 380 (1979), was not retroactive.[2] Parenthetically, the majority observed that appellant "could have insured his right to notice by signing the putative father registry." *Id.*, at 383. One justice dissented on the ground that the filing of the paternity proceeding should have been viewed as the statutory equivalent of filing a notice of intent to claim paternity with the putative father registry.

The New York Court of Appeals also affirmed by a divided vote. *In the Matter of Jessica "XX"*, 54 N. Y. 2d 417 (1981). The majority first held that it did not need to consider

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[1] Without trying to intervene in the adoption proceeding, appellant had attempted to file an appeal from the adoption order. That appeal was dismissed.

[2] *Caban* was decided on April 24, 1979, about two months after the entry of the order of adoption. In *Caban*, a father who had lived with his two illegitimate children and their mother for several years successfully challenged the constitutionality of the New York statute providing that children could be adopted without the father's consent even though the mother's consent was required.

whether our decision in *Caban* affected appellant's claim that he had a right to notice, because *Caban* was not retroactive.[4] It then rejected the argument that the mother had been guilty of a fraud upon the court. Finally, it addressed what it described as the only contention of substance advanced by appellant: that it was an abuse of discretion to enter the adoption order without requiring that notice be given to appellant. The court observed that the primary purpose of the notice provision of § 111—a was to enable the person served to provide the court with evidence concerning the best interest of the child, and that appellant had made no tender indicating any ability to provide any particular or special information relevant to Jessica's best interest. Considering the record as a whole, and acknowledging that it might have been prudent to give notice, the court concluded that the family court had not abused its discretion either when it entered the order without notice or when it denied appellant's petition to reopen the proceedings. The dissenting judges concluded that the family court had abused its discretion, both when it entered the order without notice and when it refused to reopen the proceedings.

Appellant has now invoked our appellate jurisdiction.[5] He offers two alternative grounds for holding the New York statutory scheme unconstitutional. First, he contends that a putative father's actual or potential relationship with a child born out of wedlock is an interest in liberty which may not be destroyed without due process of law; he argues therefore

[4] Although the dissenters in *Caban* discussed the question of retroactivity, see 441 U. S., at 401, 415–416, that question was not addressed in the Court's opinion.

[5] We postponed consideration of our jurisdiction until after hearing argument on the merits. 456 U. S. 971 (1982). Our review of the record persuades us that appellant did in fact draw into question the validity of the New York statutory scheme on the ground of its being repugnant to the Federal Constitution, that the New York Court of Appeals upheld that scheme, and that we therefore have jurisdiction pursuant to 28 U. S. C. § 1257(2).

that he had a constitutional right to prior notice and an opportunity to be heard before he was deprived of that interest. Second, he contends that the gender-based classification in the statute, which both denied him the right to consent to Jessica's adoption and ~~thus~~ accorded him fewer procedural rights than her mother, violated the Equal Protection Clause.[1]

The Due Process Claim.

The Fourteenth Amendment provides that no State shall deprive any person of life, liberty, or property without due process of law. When that Clause is invoked in a novel context, it is our practice to begin the inquiry with a determination of the precise nature of the private interest that is threatened by the State. See, *e. g., Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895–896 (1961). Only after that interest has been identified, can we properly evaluate the adequacy of the State's process. See *Morrissey* v. *Brewer*, 408 U. S. 471, 482–483 (1972). We therefore first consider the nature of the interest in liberty for which appellant claims constitutional protection and then turn to a discussion of the adequacy of the procedure that New York has provided for its protection.

I

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[1] The question whether the Family Court abused its discretion in not requiring notice to appellant before the ex parte order was entered and in not reopening the proceeding is, of course, not before us. That issue was presented to and decided by the New York courts purely as a matter of state law. Whether we might have given such notice had we been sitting at the trial court, or whether we might have considered the failure to give such notice an abuse of discretion had we been sitting as state appellate judges, are questions on which we are not authorized to express an opinion. The only questions we have jurisdiction to decide are whether the New York statutes are unconstitutional because they inadequately protect the natural relationship between parent and child or because they draw an impermissible distinction between the rights of the mother and the rights of the father.

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. In deciding whether this is such a case, however, we must consider the broad framework that has traditionally been used to resolve the legal problems arising from the parent-child relationship.

In the vast majority of cases, state law determines the final outcome. Cf. *United States* v. *Yazell*, 382 U. S. 341, 351–353 (1966). Rules governing the inheritance of property, adoption, and child custody are generally specified in statutory enactments that vary from State to State.[5] Moreover, equally varied state laws governing marriage and divorce affect a multitude of parent-child relationships. The institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society.[6] In recognition of that role, and as part of their general overarching concern for serving the best interests of children, state laws almost universally express an appropriate preference for the formal family.[7]

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[5] At present, state legislatures appear inclined to retain the unique attributes of their respective bodies of family law. For example, as of the end of 1982, only eight states had adopted the Uniform Parentage Act. 9A U. L. A. 371 (1983 Supp.)

[6] See Hafen, Marriage, Kinship, and Sexual Privacy, 81 Mich. L. Rev. 463, 479–483 (1983) (hereinafter Hafen).

[7] See *Townsend* v. *Gordon*, 291 U. S. 782, 769 (1977) ("No one disputes the appropriateness of Illinois' concern with the family unit, perhaps the most fundamental social institution of our society"). A plurality of the Court noted the societal value of family bonds in *Moore* v. *City of East Cleveland*, 431 U. S. 494, 505 (1977) (Opinion of POWELL, J.):

"Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties

In some cases, however, this Court has held that the Federal Constitution supersedes state law and provides even greater protection for certain formal family relationships. In those cases, as in the state cases, the Court has emphasized the paramount interest in the welfare of children and has noted that the rights of the parents are a counterpart of the responsibilities they have assumed. Thus, the "liberty" of parents to control the education of their children that was vindicated in *Meyer v. Nebraska*, 262 U. S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U. S. 510 (1925), was described as a "right coupled with the high duty to recognize and prepare [the child] for additional obligations." *Id.*, at 535. The linkage between parental duty and parental right was stressed again in *Prince v. Massachusetts*, 321 U. S. 158, 166 (1944), when the Court declared it a cardinal principal "that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.*, at 166. In these cases the Court has found that the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional

love + duty in a "recognized family unit" (East Cleveland?)

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and the satisfactions of a common home. . . . Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life."

See also Hafen 475-476:

"Not all formal families are stable, nor do all necessarily provide wholesome continuity for their children, as the prevailing levels of child abuse and divorce amply demonstrate. But the commitments inherent in formal families do increase the likelihood of stability and continuity for children. These factors are so essential to child development that they alone may justify the legal incentives and preferences traditionally given to permanent kinship units based on marriage. The same factors can justify the denial of legal protection to unstable social patterns that threaten children's developmental environment."

protection. See also *Moore* v. *City of East Cleveland*, 431 U. S. 494 (1977) (plurality opinion). "[S]tate intervention to terminate [such a] relationship . . . must be accomplished by procedures meeting the requisites of the Due Process Clause." *Santosky* v. *Kramer*, 455 U. S. 745, 752 (1982).

There are also a few cases in which this Court has considered the extent to which the Constitution affords protection to the relationship between natural parents and children born out of wedlock. Because such children have no responsibility for their status, the Constitution protects them from punishment for the activities of their parents. *Trimble* v. *Gordon*, 430 U. S. 762, 770 (1977); *Jimenez* v. *Weinberger*, 417 U. S. 628, 632 (1974); *Weber* v. *Aetna Casualty*, 406 U. S. 164, 175–176 (1972). Of course, no punishment of the child is at issue in this case; rather, it is a parent who claims that the state has improperly deprived him of a protected interest in liberty. This Court has examined the extent to which a natural father's biological relationship with his illegitimate child receives protection under the Due Process Clause in precisely three cases: *Stanley* v. *Illinois*, 405 U. S. 645 (1972), *Quilloin* v. *Walcott*, 434 U. S. 246 (1978), and *Caban* v. *Mohammed*, 441 U. S. 380 (1979).

Stanley involved the constitutionality of an Illinois statute that conclusively presumed every father of a child born out of wedlock to be an unfit person to have custody of his children. The father in that case had lived with his children all their lives and had lived with their mother for eighteen years. There was nothing in the record to indicate that Stanley had been a neglectful father who had not cared for his children. *Id.*, at 655. Under the statute, however, the nature of the actual relationship between parent and child was completely irrelevant. Once the mother died, the children were automatically made wards of the state. Relying in part on a Michigan case[1] recognizing that the preservation of "a sub-

[1] *In re Mark T.*, 5 Mich. App. 122, 134 N. W. 2d 27 (1965).

sisting relationship with the child's father" may better serve the child's best interest than "uprooting him from the family which he knew from birth," *id.*, at 654–655, n. 7, the Court held that the Due Process Clause was violated by the automatic destruction of the custodial relationship without giving the father any opportunity to present evidence regarding his fitness as a parent."

Quilloin involved the constitutionality of a Georgia statute that authorized the adoption of a child born out of wedlock over the objection of the natural father. The father in that case had never legitimated the child. It was only after the mother had remarried and her new husband had filed an adoption petition that the natural father sought visitation rights and filed a petition for legitimation. The trial court found adoption by the new father to be in the child's best interests, and we unanimously held that action to be consistent with the Due Process Clause.

Caban involved the conflicting claims of two natural parents who had maintained joint custody of their children from the time of their birth until they were respectively two and four years old. The father challenged the validity of an order authorizing the mother's new husband to adopt the children; he relied on both the Equal Protection Clause and the Due Process Clause. Because this Court upheld his equal protection claim, the majority did not address his due process challenge. The comments on the latter claim by the four dissenting Justices are nevertheless instructive, because they identify the clear distinction between a mere biological relationship and an actual relationship of parental responsibility.

"Having "concluded that all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody," the Court also held: "that denying such a hearing to Stanley and those like him, while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause." 405 U. S., at 658.

Justice Stewart correctly observed:

> "Even if it be assumed that each married parent after divorce has some substantive due process right to maintain his or her parental relationship, cf. *Smith v. Organization of Foster Families*, 431 U. S. 816, 862–863 (opinion concurring in judgment), it by no means follows that each unwed parent has any such right. *Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.*" 441 U. S., at 397 (emphasis added).[1]

In a similar vein, the other three dissenters in *Caban* were prepared to "assume that, *if and when one develops*, the relationship between a father and his natural child is entitled to protection against arbitrary state action as a matter of due process." *Caban v. Mohammed*, 441 U. S. 380, 414 (emphasis added).

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[1] In the balance of that paragraph Justice Stewart noted that the relation between a father and his natural child may acquire constitutional protection if the father enters into a traditional marriage with the mother or if "the actual relationship between father and child" is sufficient.

"The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures. By tradition, the primary measure has been the legitimate familial relationship he creates with the child by marriage with the mother. By definition, the question before us can arise only when no such marriage has taken place. 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. Cf. *Stanley v. Illinois*, *supra*. But here we are concerned with the rights the unwed father may have when his 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. It seems to me that 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.

Ibid.

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. 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," *Caban*, 441 U. S., at 392, 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." *Id.*, at 389, n. 7. But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds; moreover, by themselves those bonds have little meaning for society. "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children as well as from the fact of blood relationship." *Smith v. Organization of Foster Families for Equality and Reform*, 431 U. S. 816, 844 (1977) (quoting *Wisconsin v. Yoder*, 406 U. S. 205, 231–233 (1972)).[1]

[1] Commentators have emphasized the constitutional importance of the distinction between an inchoate and a fully developed relationship. See Comment, 46 Brooklyn L. Rev. 95, 125–126 (1979) ("the unwed father's interest springs not from his biological tie with his illegitimate child, but rather, from the relationship he has established with and the responsibility he has shouldered for his child"); Note, 58 Neb. L. Rev. 910, 917 (1979) ("a putative father's failure to show a substantial interest in his child's welfare and to employ methods provided by state law for solidifying his parental rights . . . will remove from him the full constitutional protection afforded the parental rights of other classes of parents"); Note, 29 Emory L.J. 845, 854 (1980) ("an unwed father's rights in his child do not spring solely from the biological fact of his parentage, but rather from his willingness to admit his paternity and express some tangible interest in the child"). See also Posin, Illegitimacy and Family Privacy: A Note on Maternal Cooperation in Paternity Suits, 70 Nw. U. L. Rev. 910, 916–919 (1975) (hereinafter

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 seizes 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. See J. Goldstein, A. Freud, and A. Solnit, Beyond the Best Interests of the Child 16–17 (1979 ed.). 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.

In this case, we are not assessing the constitutional adequacy of New York's procedures for terminating a developed relationship. Appellant has 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.[*] We are concerned only with whether New York has adequately protected his opportunity to form such a

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Poulin; Developments in the Law, 93 Harv. L. Rev. 1156, 1275–1277 (1980); Note, 18 Duquesne L. Rev. 325, 363–364, n. 73 (1980); Note, 19 J. Family L. 510, 560 (1980); Note, 57 Denver L.J. 673, 680–684 (1980); Note, 1979 Wash. U. L. Q. 1029, 1035; Note, 12 U. C. D. L. Rev. 432, 450, n. 215 (1979).

[*] "This case happens to involve an adoption by the husband of the natural mother. But we do not believe the natural father has any greater right to object to such an adoption than to an adoption by two total strangers. If anything, the balance of equities tips the opposite way in a case such as this. In denying the putative father relief in *Quilloin*, we made an observation equally applicable here:

"'Nor is this 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. Rather, 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. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the 'best interests of the child.'" 434 U. S., at 255.

relationship.

II

The most effective protection of the putative father's opportunity to develop a relationship with his child is provided by the laws that authorize formal marriage and govern its consequences. But the availability of that protection is, of course, dependent on the will of both parents of the child. Thus, New York has adopted a special statutory scheme to protect the unmarried father's interest in assuming a responsible role in the future of his child.

N.Y. 's schemes

After this Court's decision in *Stanley*, the New York Legislature appointed a special commission to recommend legislation that would accommodate both the interests of biological fathers in their children and the children's interest in prompt and certain adoption procedures. The commission recommended, and the legislature enacted, a statutory adoption scheme that automatically provides notice to seven categories of putative fathers who are likely to have assumed some responsibility for the care of their natural children.[7] If

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[7] In a report explaining the purpose of the 1976 Amendments to § 111–a of the New York Domestic Relations Law, the temporary state commission on child welfare that was responsible for drafting the legislation stated, in part:

"The measure will dispel uncertainties by providing clear constitutional statutory guidelines for notice to fathers of out-of-wedlock children. It will establish a desired finality in adoption proceedings and will provide an expeditious method for child placement agencies of identifying those fathers who are entitled to notice through the creation of a registry of such fathers within the State Department of Social Services. Conversely, the bill will afford to concerned fathers of out-of-wedlock children a simple means of expressing their interest and protecting their rights to be notified and have an opportunity to be heard. It will also obviate an existing disparity of Appellate Division decisions by permitting such fathers to be petitioners in paternity proceedings.

"The measure is intended to codify the minimum protections for the putative father which *Stanley* would require. In so doing it reflects policy decisions to not codify constitutional requirements, to clearly establish as

this scheme were likely to omit many responsible fathers, and if qualification for notice were beyond the control of an interested putative father, it might be thought procedurally inadequate. Yet, as all of the New York courts that reviewed this matter observed, the right to receive notice was completely within appellant's control.[7] By mailing a postcard to the putative father registry, he could have guaranteed that he would receive notice of any proceedings to adopt Jessica. 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. The New York legislature concluded that a more open-ended notice requirement would merely complicate the adoption process, create the risk of unnecessary controversy, and impair the desired finality of adoption decrees. Regardless of whether we would have done likewise if we were legislators instead of judges, we surely cannot characterize the state's conclusion as arbitrary.[8]

Appellant argues, however, that even if the putative father's opportunity to establish a relationship with an illegitimate child is adequately protected by the New York statutory scheme in the normal case, he was nevertheless entitled to special notice because the court and the mother knew that

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early as possible in a child's life, the rights, interests and obligations of all parties; (c) facilitate prompt planning for the future of the child and permanence of his status; and (d) through the foregoing, promote the best interest of children." App. to Brief for Appellant C–13.

[8] Nor can we find unconstitutionally arbitrary the state courts' conclusion that appellant's absence did not distort its analysis of Jessica's best interests. The adoption does not affect Jessica's relationship with her mother. It gives legal permanence to her relationship with her adoptive father, a relationship they had maintained for 21 months at the time the adoption order was entered. Cf. J. Goldstein, A. Freud, and A. Solnit, Before the Best Interests of the Child 38–57 (1979). Appellant did not have any evidence to suggest that legal confirmation of the established relationship would be unwise; he did not even know the adoptive father.

he had filed an affiliation proceeding in another court. But the fact that he had elected to pursue an improper remedy can hardly be thought to have imposed any special duty on his adversaries.[7] A potential defendant who knows that the statute of limitations is about to run, or that a potential plaintiff is having difficulty in serving him with process, has no duty to give legal or factual advice to his adversary.[8] Nor, as a matter of constitutional law, is a judge under a duty to order that special notice be given to nonparties who are presumptively capable of asserting and protecting their own rights. Since the New York statutes adequately protected appellant's inchoate interest in establishing a relationship with Jessica, we find no merit in the claim that his constitutional rights were offended because the family court strictly complied with the notice provisions of the statute.[9]

N.H. Statute protected appellant's inchoate right

The Equal Protection Claim.

The concept of equal justice under law requires the State to govern impartially. *New York Transit Authority* v. *Beazer*, 440 U. S. 568, 587 (1979). The sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective. *Reed* v. *Reed*, 404 U. S. 71, 76 (1971).[10] Specifically, it

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[7] There is no suggestion in the record that appellee engaged in any fraudulent practices that caused appellant to fail to protect his rights.

[8] This general presumption about our adversary system receives mild support in this context by a general concern for protecting the mother's privacy. Cf. *Roe* v. *Norton*, 422 U. S. 614 (1975), vacating and remanding 385 F. Supp. 85 (D. Conn. 1973). See Poulin 982–983; Barron, Notice to the Unwed Father and Termination of Parental Rights, 9 Family L.Q. 527, 542 (1975).

[9] As we have explained above, this is not a case in which the appellant was deprived of any constitutionally vested interest. It is thus unlike *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306 (1950), in which the petitioner had been deprived of a protected property interest without adequate notice.

[10] In *Reed*, the Court considered an Idaho statute providing that in dis-

may not subject men and women to disparate treatment when there is no substantial relation between the disparity and the state's purposes. *Ibid*; *Craig* v. *Boren*, 429 U. S. 190, 197–199 (1976).

The legislation at issue in this case, sections 111 and 111a of the New York Domestic Relations Law, is intended to establish procedures for adoptions. Those procedures are designed to promote the best interests of the child, protect the rights of interested third parties, and ensure promptness and finality.[2] To serve those ends, the legislation guarantees to

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igning administrators of the estates of intestate decedents, "[i]f several persons claiming and equally entitled to administer, males must be preferred to females." The state had sought to justify the statute as a way to reduce the workload of probate courts by eliminating one class of contests. Writing for a unanimous Court, The Chief Justice observed that in using gender to promote that objective, the legislature had made "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause." 404 U. S., at 76. The state's articulated goal could have been completely served by requiring a coin flip. The decision instead to choose a rule that systematically harmed women could be explained only as the product of habit, rather than analysis or reflection. *cf. Califano* v. *Goldfarb*, 430 U. S. 199, 223 (1977) (STEVENS, J., concurring in the judgment), or as the product of an invidious and indefensible stereotype. *cf. id.*, at 218. Such legislative decisions are inimical to the norm of impartial government.

The mandate of impartiality also constrains those state actors who implement state laws. It requires them to apply the rules of law faithfully in all cases that the rules purport to control. And where they must interpret the rules in order to apply them, it requires their interpretations to satisfy the same standard of neutral justification that is imposed on the lawmaker. Thus, the Equal Protection Clause would have been violated in precisely the same manner if in *Reed* there had been no statute and the probate judge had simply announced that he chose Cecil Reed over Sally Reed "because I prefer males to females."

[2] Appellant does not contest the vital importance of those ends to the people of New York. It has long been accepted that illegitimate children whose parents never marry are "at risk" economically, medically, emotionally, and educationally. *See* E. Ooglin, M. Pringle, P. West, Born Illegitimate: Social and Educational Implications 96–112 (1971); *cf.* T. Lash, H. Sigal, D. Dudzinski, State of the Child: New York City 11, at 47 (1980).

certain people the right to veto an adoption and the right to prior notice of any adoption proceeding. The mother of an illegitimate child is always within that favored class, but only certain putative fathers are included. Appellant contends that the gender-based distinction is invidious.

As we noted above, the existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interests of the child. Before birth, the mother carries the child; it is she who has the constitutional right to decide whether to bear it or not. *See Planned Parenthood of Central Missouri v. Danforth*, 428 U. S. 52, 67–75 (1976). And from the moment the child is born, the mother always has a relationship of legal responsibility toward the child. Because the natural father of an illegitimate child can often be legally and practically anonymous if he chooses, responsibility does not devolve upon him in the same automatic fashion.[8] In *Quilloin v. Walcott*, *supra*, we noted that the putative father, like appellant, "ha[d] never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child. Appellant does not complain of his exemption from these responsibilities . . . ." 434 U. S., at 256. We therefore found that a Georgia statute that always required a mother's consent to the adoption of a child born out of wedlock, but required the father's consent only if he had legitimated the child, did not violate the Equal Protection Clause. For the same reasons, the New York statutes at issue in this case are not invalid in all cases.

[8] It is an unfortunate fact that the maxim "maternity is a matter of fact whereas paternity is a matter of opinion" still retains validity. H. Krause, Illegitimacy: Law and Social Policy 116 (1971). That fact has justified distinguishing between unwed mothers and unwed fathers in the context of wrongful death actions. *See Parham v. Hughes*, 441 U. S. 347, 355, n. 7 (1979); *Glona v. American Guarantee & Liability Ins. Co.*, 391 U. S. 73 (1968).

We have held that these statutes may not constitutionally be applied in that class of cases where the mother and father are in fact similarly situated with regard to their relationship with the child. In *Caban v. Mohammed*, 441 U. S. 380 (1979), the Court held that it violated the Equal Protection Clause to grant the mother a veto over the adoption of a four-year-old girl and a six-year-old boy, but not to grant a veto to their father, who had admitted paternity and had participated in the rearing of the children. The Court made it clear, however, that if the father had not "come forward to participate in the rearing of his child, nothing in the Equal Protection Clause [would] preclude[] the State from withholding from him the privilege of vetoing the adoption of that child." 441 U. S., at 392.

Jessica's parents are not like the parents involved in *Caban*. 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[7] or never established a relationship, the Equal Protection Clause does not prevent a state from according the two parents different legal rights.

The judgment of the New York Court of Appeals is

Affirmed

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[7] In *Caban*, the Court noted that an adoption "may proceed in the absence of consent when the parent whose consent otherwise would be required . . . has abandoned the child." 441 U. S., at 392.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 11, 1983

Re: 81-1756 - Lehr v. Robertson

Dear John,

In due course, I shall file a brief dissent.

Sincerely,

Justice Stevens

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 11, 1983

Re: No. 81-1756-Zehr v. Robertson

Dear John:

I await further writing.

Sincerely,

T.M.

Justice Stevens

cc: The Conference

Ask Rives: Does appellant claim a subst. D/Process right as well as a procedural one? If not, is any part of first section drk 05/12/83 of opn. necessary?

To: Mr. Justice Powell

I'll await other writings.

From: Rives JPS's opn. appears unsatisfactory.

Re: No. 81-1756, Lehr v. Robertson

I am troubled by several portions of Justice Stevens' opinion. The first section (pp. 7-14) reviews the Court's prior cases in the area and explains at length why this Court has accorded substantive due process protection to certain types of relationships. I am not sure that this discussion is completely necessary since the issue is whether Lehr has a sufficient liberty interest to require some form of procedural due process protection--i.e., whether any process is due a biological father before his parental rights are terminated. At the end of section I (p. 14-15), the opinion suggests, without any explanation, that biological fathers have such a protectible liberty interest.

If it is not.

The Q

The reason I find this lengthy discussion troubling is that the language Justice Stevens uses to summarize past cases could be said to be refocusing the constitutional inquiry. First the emphasis on "formal family and recognized family relationships" could be seen at odds with your opinion in Moore v. City of East Cleveland, which extended protection to non-formal familites. Justice Stevens does not define the term "formal family" and there is nothing to prevent it from including the extended family in

Moore. But the term could be misunderstood easily. Along this line, Justice Stevens appears to give only grudging approval to the Court's cases that recognize constitutional protection for non-traditional family relationships--illegitimates and fathers seeking to legitimate their children.

A second aspect of this first section that gives me pause is that the opinion seems to be saying that the Court will recognize only certain types of relationships and defines those relationships in terms of "love and duty." The opinion states: "[T]he Court has found that the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection." (pp. 14-15). Having entered this area, lines have to be drawn. But phrasing the inquiry in terms of "love and duty" suggests that the Court will be forced to assess the psychological benefit and worth of certain types of relationships. This simply strikes me as a questionable way of phrasing the inquiry.

My problems with this first section do not arise out of any specific statement, but result from the tone and the language with which the opinion describes the Court's prior decisions. This may not be an incorrect way of summarizing the past cases, but since it seems that consideration of these difficult questions is unnecessary to the resolution of this case. I don't understand why the opinion creates problems, at least in my mind, by gratuitously undertaking this inquiry.

My second problem derives in part from the first. The first section establishes that Lehr has no interest entitled to substantive due process protection. It suggests he has a protected

liberty interest that entitles him to some procedural protection before his parental rights are terminated, but it does not explain the nature of the interest that is relevant to this case. And it is not clear to me that the second section (pp. 15-17) analyzes the constitutionality of New York's law as if any process were due Lehr.

Footnote 23 states that "this is not a case in which the appellant was deprived of any constitutionally vested interest." It notes that this case is unlike one in which a party had a protected property interest that could not be terminated without adequate notice. Further, the text does not analyze the constitutionality of the process provided Lehr in the way that would be expected if he had a constitutionally protected liberty interest. In such cases, the three-part inquiry established in Matthews v. Eldridge normally would determine if the State had provided all the process that is due. The opinion in this case, however, does not engage in such analysis. Instead, it merely examines the New York statute to see if it is "arbitrary" (p. 16), just as it would any piece of legislation that was passed and challenged under a rational basis/substantive due process test.

Since footnote 23 makes clear that Lehr has no protectible liberty interest, sufficient to require some sort of process before the termination of his parental rights, it could be argued that the State could have terminated Lehr's parental rights without providing any notice, but that if a State chooses to provide some procedural protection it must not be arbitrary. If that's what Justice Stevens intends to say, I find that troubling.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 17, 1983

Re: 81-1756 - Lehr v. Robertson

Dear Lewis:

Thank you for your note. I am particularly happy that you agree that there is no merit to the equal protection claim.

With respect to the due process issue, my purpose in breaking the discussion into two parts was to identify what interest in liberty, if any, the natural father claimed to have been deprived of, and thereafter to determine whether the procedures were adequate. If we do not agree with his position that there was at least a putative interest in liberty at stake, I would think the discussion in Part II would be unnecessary and we could simply hold that no procedural protection of any kind was required. I should point out that at pages 44-50 of appellant's brief, the natural father tries to develop the position that his "liberty interest" is equivalent to that of the natural father in Stanley. Part I of my circulating draft is intended to refute this suggestion because of the plain difference between a father who has established no relationship with the natural child and one who actually raised the child as did the father in Stanley and Caban. It may well be that I have overwritten Part I, but I think some discussion of the character of the liberty interest is an essential predicate to the procedural analysis. I, of course, would be most interested in any criticism you have of any of the points I try to make in Part I but do not believe I could simply omit it.

Respectfully,

JPS

Justice Powell

Copies to the Conference

May 17, 1983

81-1756 Lehr v. Roberts

Dear John:

As of now, I am happy to join Part II of your opinion and the judgment.

My hesitation as to the first part of the opinion is that I do not understand it to be necessary. I do not think of this case as presenting a substantive due process issue.

On the procedural due process issue, I agree that the New York Statute is a satisfactory answer. I also agree that appellant's equal protection claim is meritless for the reasons you state.

Sincerely,

Justice Stevens

Copies to the Conference

LFP/vde

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 23, 1983

Re: No. 81-1756, Lehr v. Robertson

Dear John,

You have put together a good opinion. I do have a few suggestions, however, that I hope you will consider.

On page 17, the opinion states that appellant "had elected to pursue an improper remedy . . . ." (Emphasis added). Although I suspect that the disapproving connotation of the italicized language is unintended, I would feel more comfortable if the language could be changed to something like "had elected to pursue this particular remedy." I do not think we want to suggest that appellant did something improper in filing an affiliation proceeding since appellant's action was an effort to assume responsibility and establish a relationship with his child.

I am also somewhat troubled by your treatment of the equal protection issue. As I understand it, appellant's equal protection argument has two aspects: (1) discrimination between males and females as to who is entitled to veto an adoption, and (2) discrimination among putative fathers on the issue of who receives notice. Your opinion, however, does not treat these claims separately. Obviously, the latter aspect of appellant's argument requires only rational basis scrutiny since it does not involve gender-based discrimination, and the New York statutory scheme certainly survives such review. Therefore, although I prefer to see this part of appellant's equal protection argument treated separately, I think it can be dealt with very briefly.

As to the gender-based discrimination claim, I would suggest that the language at the top of page 18 be changed to read "when there is no substantial relation between the disparity and an important state purpose." I think this articulation more fairly represents the standard used in Craig v. Boren.

Finally, I find disturbing the discussion on page 19 regarding the difference between the legal ties a natural mother, as opposed to the natural father, has to an illegitimate child. I agree that, as a practical matter, it is easier for the natural father of an illegitimate child to evade legal responsibility because of his anonymity. Moreover, I recognize that the clause "responsibility does not devolve upon him in the same automatic fashion" is probably intended to be descriptive only. Nevertheless, the language contains connotations of approval of a scheme that imposes less legal responsibility on the natural father, and I would prefer to avoid any implication of that kind.

From my perspective, this generic discussion of the difference between natural mothers and natural fathers is not necessary to the rationale for finding no equal protection violation. Quilloin v. Walcott, combined with your previous discussion of the nature of appellant's relationship with his child, provides all the support you need. In Quilloin, the Court concluded that the State is not precluded from taking into account the extent of a person's commitment to the child's welfare as a justification for disparate treatment under a statutory scheme. On page 14 of the opinion, you noted that appellant "has never had any significant custodial, personal, or financial relationship with" his child and "did not seek to establish a legal tie until after she was two years old." Therefore, it seems clear that appellant's lack of a substantial relationship with his child would justify the fact that he was not entitled to veto the child's adoption while the natural mother, who did have such a relationship, had a veto power under the statute.

If you could make some revisions along these lines, I would be happy to join your opinion.

Sincerely,

Sandra

Justice Stevens

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 23, 1983

Re: 81-1756 - Lehr v. Robertson

Dear Sandra:

Thanks for your comments. I think they are all well taken. I propose the following changes:

Page 17 - Change to read "pursue this particular remedy."

Page 18 - Change to read "the disparity and an important state purpose."

Page 19 - Make the following revision after the citation to Planned Parenthood and before the citation of Quilloin:

> "And from the moment the child is born, the mother always has a relationship with the child. Because the natural father of an illegitimate child may be elsewhere, a similar relationship with him is not created in the same automatic fashion."

Page 20 - Add a new footnote after the second paragraph, reading as follows:

"Appellant also makes an equal protection argument based upon the manner in which the statute distinguishes among classes of fathers. For the reasons set forth in our due process discussion, supra, we conclude that the statutory distinction is rational and that appellant's argument is without merit."

Respectfully,

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 23, 1983

No. 81-1756, Lehr v. Robertson

Dear John,

Thank you for proposing various changes in the last section of your opinion in response to my letter. I still have a few reservations with regard to your treatment of the equal protection issue. May I suggest that the paragraph on page 19 be changed to read something like the following?

> "As we noted above, the existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interests of the child. In Quilloin v. Walcott, supra, we noted that the putative father, like appellant, 'ha[d] never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child. Appellant does not complain of his exemption from these responsibilities . . . .' 434 U.S., at 256. We therefore found that a Georgia statute that always required a mother's consent to the adoption of a child born out of wedlock, but required the father's consent only if he had legitimated the child, did not violate the Equal Protection Clause. Because, like the father in Quilloin, appellant has never established a substantial relationship with his daughter, see p. 14, supra, the New York statutes at issue in this case did not operate to deny appellant equal protection."

Sincerely,

Justice Stevens

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: MAY 25 '83

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1756

JONATHAN LEHR, APPELLANT *v.* LORRAINE ROBERTSON, ET AL.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

[May —, 1983]

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether an unmarried father who has not established any relationship with his child during the two years since her birth has a constitutional right to notice and an opportunity to be heard before she may be adopted. The appellant, Jonathan Lehr, claims that such a right is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment as interpreted in *Stanley* v. *Illinois*, 405 U. S. 645 (1972), and *Caban* v. *Mohammed*, 441 U. S. 380 (1979). We disagree.

Jessica M. was born out of wedlock on November 9, 1976. Her mother, Lorraine Robertson, married Richard Robertson eight months after Jessica's birth.[1] On December 21, 1978, when Jessica was over two years old, the Robertsons filed an adoption petition in the Family Court of Ulster County, New York. The court heard their testimony and received a favorable report from the Ulster County Department of Social Services. On March 7, 1979, the court entered an order of adoption.[2] In this proceeding, appellant

[1] Although both Lorraine and Richard Robertson are appellees in this proceeding, for ease of discussion the term "appellee" will hereafter be used to identify Lorraine Robertson.

[2] The order provided for the adoption of appellee's older daughter, Renee, as well as Jessica. Appellant does not challenge the adoption of Renee.

contends that the adoption order is invalid because he, Jessica's putative father, was not given advance notice of the adoption proceeding.[3]

The State of New York maintains a "putative father registry."[4] A man who files with that registry demonstrates his intent to claim paternity of a child born out of wedlock and is therefore entitled to receive notice of any proceeding to adopt that child. Before entering Jessica's adoption order, the Ulster County Family Court had the putative father registry examined. Although appellant claims to be Jessica's natural father, he had not entered his name in the registry.

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

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[3] Appellee has never conceded that appellant is Jessica's biological father, but for purposes of analysis in this opinion it will be assumed that he is.

[4] At the time Jessica's adoption order was entered, §372-c of the New York Social Services Law provided:

"1. The department shall establish a putative father registry which shall record the names and addresses of . . . any person who has filed with the registry before or after the birth of a child out of wedlock, a notice of intent to claim paternity of the child . . . .

"2. A person filing a notice of intent to claim paternity of a child shall include therein his current address and shall notify the registry of any change of address pursuant to procedures prescribed by regulations of the department.

"3. A person who has filed a notice of intent to claim paternity may at any time revoke a notice of intent to claim paternity previously filed therewith and, upon receipt of such notification by the registry, the revoked notice of intent to claim paternity shall be deemed a nullity *nunc pro tunc*.

"4. An unrevoked notice of intent to claim paternity of a child may be introduced in evidence by any party, other than the person who filed such notice, in any proceeding in which such fact may be relevant.

"5. The department shall, upon request, provide the names and addresses of persons listed with the registry to any court or authorized agency, and such information shall not be divulged to any other person, except upon order of a court for good cause shown."

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.[1] Appellant admittedly was not a member of any of those classes. He had lived with appellee prior to Jessica's birth and visited her in the hospital when Jessica was born, but his name does not appear on Jes-

[1]At the time Jessica's adoption order was entered, subdivisions 2–a of § 111–a of the New York Domestic Relations Law provided:

"2. Persons entitled to notice, pursuant to subdivision one of this section, shall include:

"(a) any person adjudicated by a court in this state to be the father of the child;

"(b) any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry, pursuant to section three hundred seventy-two of the social services law.

"(c) any person who has timely filed an unrevoked notice of intent to claim paternity of the child, pursuant to section three hundred seventy-two of the social services law;

"(d) any person who is recorded on the child's birth certificate as the child's father;

"(e) any person who is openly living with the child and the child's mother at the time the proceeding is initiated and who is holding himself out to be the child's father;

"(f) any person who has been identified as the child's father by the mother in written, sworn statement; and

"(g) any person who was married to the child's mother within six months subsequent to the birth of the child and prior to the execution of a surrender instrument or the initiation of a proceeding pursuant to section three hundred eighty-four-b of the social services law.

"3. The sole purpose of notice under this section shall be to enable the person served pursuant to subdivision two to present evidence to the court relevant to the best interests of the child."

sica's birth certificate. He did not live with appellee or Jessica after Jessica's birth, he has never provided them with any financial support, and he has never offered to marry appellee. Nevertheless, he contends that the following special circumstances gave him a constitutional right to notice and a hearing before Jessica was adopted.

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. Notice of that proceeding was served on appellee on February 22, 1979. Four days later appellee's attorney informed the Ulster County Court that appellant had commenced a paternity proceeding in Westchester County; the Ulster County judge then entered an order staying appellant's paternity proceeding until he could rule on a motion to change the venue of that proceeding to Ulster County. On March 3, 1979, appellant received notice of the change of venue motion and, for the first time, learned that an adoption proceeding was pending in Ulster County.

On March 7, 1979, appellant's attorney telephoned the Ulster County judge to inform him that he planned to seek a stay of the adoption proceeding pending the determination of the paternity petition. In that telephone conversation, the judge advised the lawyer that he had already signed the adoption order earlier that day. 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.

Thereafter, the Family Court in Westchester County granted appellee's motion to dismiss the paternity petition, holding that the putative father's right to seek paternity "... must be deemed severed so long as an order of adop-

tion exists." App. 228. Appellant did not appeal from that dismissal.[4] On June 22, 1979, appellant filed a petition to vacate the order of adoption on the ground that it was obtained by fraud and in violation of his constitutional rights. The Ulster County Family Court received written and oral argument on the question whether it had "dropped the ball" by approving the adoption without giving appellant advance notice. Tr. 53. After deliberating for several months, it denied the petition, explaining its decision in a thorough written opinion. *In the Matter of the Adoption by Lorraine and Richard Robertson of Jessica Martz*, 102 Misc. 2d 102 (1979).

The Appellate Division of the Supreme Court affirmed. *In the Matter of the Adoption of Jessica "XX"*, 77 App. Div. 2d 381 (1980). The majority held that appellant's commencement of a paternity action did not give him any right to receive notice of the adoption proceeding, that the notice provisions of the statute were constitutional, and that *Caban* v. *Mohammed*, 441 U. S. 380 (1979), was not retroactive.[5] Parenthetically, the majority observed that appellant "could have insured his right to notice by signing the putative father registry." *Id.*, at 388. One justice dissented on the ground that the filing of the paternity proceeding should have been viewed as the statutory equivalent of filing a notice of intent to claim paternity with the putative father registry.

The New York Court of Appeals also affirmed by a divided vote. *In the Matter of Jessica "XX"*, 54 N. Y. 2d 417 (1981). The majority first held that it did not need to consider

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[4] Without trying to intervene in the adoption proceeding, appellant had attempted to file an appeal from the adoption order. That appeal was dismissed.

[5] *Caban* was decided on April 24, 1979, about two months after the entry of the order of adoption. In *Caban*, a father who had lived with his two illegitimate children and their mother for several years successfully challenged the constitutionality of the New York statute providing that children could be adopted without the father's consent even though the mother's consent was required.

whether our decision in *Caban* affected appellant's claim that he had a right to notice, because *Caban* was not retroactive.[4] It then rejected the argument that the mother had been guilty of a fraud upon the court. Finally, it addressed what it described as the only contention of substance advanced by appellant: that it was an abuse of discretion to enter the adoption order without requiring that notice be given to appellant. The court observed that the primary purpose of the notice provision of § 111—a was to enable the person served to provide the court with evidence concerning the best interest of the child, and that appellant had made no tender indicating any ability to provide any particular or special information relevant to Jessica's best interest. Considering the record as a whole, and acknowledging that it might have been prudent to give notice, the court concluded that the family court had not abused its discretion either when it entered the order without notice or when it denied appellant's petition to reopen the proceedings. The dissenting judges concluded that the family court had abused its discretion, both when it entered the order without notice and when it refused to reopen the proceedings.

Appellant has now invoked our appellate jurisdiction.[5] He offers two alternative grounds for holding the New York statutory scheme unconstitutional. First, he contends that a putative father's actual or potential relationship with a child born out of wedlock is an interest in liberty which may not be destroyed without due process of law; he argues therefore

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[4] Although the dissenters in *Caban* discussed the question of retroactivity, see 441 U. S., at 401, 415–416, that question was not addressed in the Court's opinion.

[5] We postponed consideration of our jurisdiction until after hearing argument on the merits. 456 U. S. 970 (1982). Our review of the record persuades us that appellant did in fact draw into question the validity of the New York statutory scheme on the ground of its being repugnant to the Federal Constitution, that the New York Court of Appeals upheld that scheme, and that we therefore have jurisdiction pursuant to 28 U. S. C. § 1257(2).

destroyed without due process of law; he argues therefore that he had a constitutional right to prior notice and an opportunity to be heard before he was deprived of that interest. Second, he contends that the gender-based classification in the statute, which both denied him the right to consent to Jessica's adoption and accorded him fewer procedural rights than her mother, violated the Equal Protection Clause.[6]

The Due Process Claim.

The Fourteenth Amendment provides that no State shall deprive any person of life, liberty, or property without due process of law. When that Clause is invoked in a novel context, it is our practice to begin the inquiry with a determination of the precise nature of the private interest that is threatened by the State. See, *e. g.*, *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895–896 (1961). Only after that interest has been identified, can we properly evaluate the adequacy of the State's process. See *Morrissey* v. *Brewer*, 408 U. S. 471, 482–483 (1972). We therefore first consider the nature of the interest in liberty for which appellant claims constitutional protection and then turn to a discussion of the adequacy of the procedure that New York has provided for its protection.

I

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[6] The question whether the Family Court abused its discretion in not requiring notice to appellant before the adoption order was entered and in not reopening the proceeding is, of course, not before us. That issue was presented to and decided by the New York courts purely as a matter of state law. Whether we might have given such notice had we been sitting at the trial court, or whether we might have considered the failure to give such notice an abuse of discretion had we been sitting as state appellate judges, are questions on which we are not authorized to express an opinion. The only questions we have jurisdiction to decide are whether the New York statutes are unconstitutional because they inadequately protect the natural relationship between parent and child or because they draw an impermissible distinction between the rights of the mother and the rights of the father.

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. In deciding whether this is such a case, however, we must consider the broad framework that has traditionally been used to resolve the legal problems arising from the parent-child relationship.

In the vast majority of cases, state law determines the final outcome. Cf. *United States* v. *Yazell*, 382 U. S. 341, 351–353 (1966). Rules governing the inheritance of property, adoption, and child custody are generally specified in statutory enactments that vary from State to State.[7] Moreover, equally varied state laws governing marriage and divorce affect a multitude of parent-child relationships. The institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society.[8] In recognition of that role, and as part of their general overarching concern for serving the best interests of children, state laws almost universally express an appropriate preference for the formal family.[9]

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[7] At present, state legislatures appear inclined to retain the unique attributes of their respective bodies of family law. For example, as of the end of 1962, only eight states had adopted the Uniform Parentage Act. 9A U. L. A. 171 (1965 Supp.)

[8] See Hafen, Marriage, Kinship, and Sexual Privacy, 61 Mich. L. Rev. 463, 479–481 (1983) (hereinafter Hafen).

[9] *See Trimble* v. *Gordon*, 430 U. S. 762, 769 (1977) ("No one disputes the appropriateness of Illinois' concern with the family unit, perhaps the most fundamental social institution of our society."). A plurality of the Court noted the societal value of family bonds in *Moore* v. *City of East Cleveland*, 431 U. S. 494, 505 (1977) (Opinion of POWELL, J.):

"Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties

In some cases, however, this Court has held that the Federal Constitution supersedes state law and provides even greater protection for certain formal family relationships. In those cases, as in the state cases, the Court has emphasized the paramount interest in the welfare of children and has noted that the rights of the parents are a counterpart of the responsibilities they have assumed. Thus, the "liberty" of parents to control the education of their children that was vindicated in *Meyer* v. *Nebraska*, 262 U. S. 390 (1923), and *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), was described as a "right coupled with the high duty, to recognize and prepare [the child] for additional obligations." *Id.*, at 535. The linkage between parental duty and parental right was stressed again in *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944), when the Court declared it a cardinal principal "that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.*, at 166. In these cases the Court has found that the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional

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and the satisfactions of a common home. . . . Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life."

See also Hafen 475–476:

"Not all formal families are stable, nor do all necessarily provide wholesome continuity for their children, as the prevailing levels of child abuse and divorce amply demonstrate. But the commitments inherent in formal families do increase the likelihood of stability and continuity for children. These factors are so essential to child development that they alone may justify the legal incentives and preferences traditionally given to permanent kinship units based on marriage. The same factors can justify the denial of legal protection to unstable social patterns that threaten children's developmental environment."

protection. See also *Moore* v. *City of East Cleveland*, 431 U. S. 494 (1977) (plurality opinion). "[S]tate intervention to terminate [such a] relationship . . . must be accomplished by procedures meeting the requisites of the Due Process Clause." *Santosky* v. *Kramer*, 455 U. S. 745, 752 (1982).

There are also a few cases in which this Court has considered the extent to which the Constitution affords protection to the relationship between natural parents and children born out of wedlock. Because such children have no responsibility for their status, the Constitution protects them from punishment for the activities of their parents. *Trimble* v. *Gordon*, 430 U. S. 762, 770 (1977); *Jimenez* v. *Weinberger*, 417 U. S. 628, 632 (1974); *Weber* v. *Aetna Casualty*, 406 U. S. 164, 175–176 (1972). Of course, no punishment of the child is at issue in this case; rather, it is a parent who claims that the state has improperly deprived him of a protected interest in liberty. This Court has examined the extent to which a natural father's biological relationship with his illegitimate child receives protection under the Due Process Clause in precisely three cases: *Stanley* v. *Illinois*, 405 U. S. 645 (1972), *Quilloin* v. *Walcott*, 434 U. S. 246 (1978), and *Caban* v. *Mohammed*, 441 U. S. 380 (1979).

Stanley involved the constitutionality of an Illinois statute that conclusively presumed every father of a child born out of wedlock to be an unfit person to have custody of his children. The father in that case had lived with his children all their lives and had lived with their mother for eighteen years. There was nothing in the record to indicate that Stanley had been a neglectful father who had not cared for his children. *Id.*, at 655. Under the statute, however, the nature of the actual relationship between parent and child was completely irrelevant. Once the mother died, the children were automatically made wards of the state. Relying in part on a Michigan case[*] recognizing that the preservation of "a sub-

[*] *In re Mark T.*, 8 Mich. App. 122, 154 N. W. 2d 27 (1967).

sisting relationship with the child's father" may better serve the child's best interest than "uprooting him from the family which he knew from birth." *id.*, at 654–655, n. 7, the Court held that the Due Process Clause was violated by the automatic destruction of the custodial relationship without giving the father any opportunity to present evidence regarding his fitness as a parent.[5]

Quilloin involved the constitutionality of a Georgia statute that authorized the adoption of a child born out of wedlock over the objection of the natural father. The father in that case had never legitimated the child. It was only after the mother had remarried and her new husband had filed an adoption petition that the natural father sought visitation rights and filed a petition for legitimation. The trial court found adoption by the new father to be in the child's best interests, and we unanimously held that action to be consistent with the Due Process Clause.

Caban involved the conflicting claims of two natural parents who had maintained joint custody of their children from the time of their birth until they were respectively two and four years old. The father challenged the validity of an order authorizing the mother's new husband to adopt the children: he relied on both the Equal Protection Clause and the Due Process Clause. Because this Court upheld his equal protection claim, the majority did not address his due process challenge. The comments on the latter claim by the four dissenting Justices are nevertheless instructive, because they identify the clear distinction between a mere biological relationship and an actual relationship of parental responsibility.

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[5] Having "concluded that all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody," the Court also held: "that denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause." 434 U. S., at 658.

Justice Stewart correctly observed:

> "Even if it be assumed that each married parent after divorce has some substantive due process right to maintain his or her parental relationship, cf. *Smith* v. *Organization of Foster Families*, 431 U. S. 816, 862–863 (opinion concurring in judgment), it by no means follows that each unwed parent has any such right. *Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.*" 441 U. S., at 397 (emphasis added).[4]

In a similar vein, the other three dissenters in *Caban* were prepared to "assume that, *if and when one develops*, the relationship between a father and his natural child is entitled to protection against arbitrary state action as a matter of due process." *Caban* v. *Mohammed*, 441 U. S. 380, 414 (emphasis added).

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[4] In the balance of that paragraph Justice Stewart noted that the relation between a father and his natural child may acquire constitutional protection if the father enters into a traditional marriage with the mother or if "the actual relationship between father and child" is sufficient.

"The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures. By tradition, the primary measure has been the legitimate familial relationship he creates with the child by marriage with the mother. By definition, the question before us can arise only when no such marriage has taken place. 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. Cf. *Stanley* v. *Illinois*, *supra*. But here we are concerned with the rights the unwed father may have when his 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. It seems to me that 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."
Ibid.

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. 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," *Caban*, 441 U. S., at 392, 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." *Id.*, at 389, n. 7. But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds; moreover, by themselves those bonds have little meaning for society. "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children as well as from the fact of blood relationship." *Smith v. Organization of Foster Families for Equality and Reform*, 431 U. S. 816, 844 (1977) (quoting *Wisconsin v. Yoder*, 406 U. S. 205, 231–233 (1972)).[17]

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[17] Commentators have emphasized the constitutional importance of the distinction between an inchoate and a fully developed relationship. *See* Comment, 48 Brooklyn L. Rev. 95, 115–116 (1979) ("the unwed father's interest springs not from his biological tie with his illegitimate child, but rather, from the relationship he has established with and the responsibility he has shouldered for his child"); Note, 58 Neb. L. Rev. 610, 617 (1979) ("a putative father's failure to show a substantial interest in his child's welfare and to employ methods provided by state law for solidifying his parental rights . . . will remove from him the full constitutional protection afforded the parental rights of other classes of parents"); Note, 29 Emory L.J. 845, 854 (1980) ("an unwed father's rights in his child do not spring solely from the biological fact of his parentage, but rather from his willingness to admit his paternity and express some tangible interest in the child"). See also Poulin, Illegitimacy and Family Privacy: A Note on Maternal Cooperation in Paternity Suits, 70 Nw. U. L. Rev. 910, 916–919 (1976) (hereinafter

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. See J. Goldstein, A. Freud, and A. Solnit, Beyond the Best Interests of the Child 16–17 (1979 ed.). 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.

In this case, we are not assessing the constitutional adequacy of New York's procedures for terminating a developed relationship. Appellant has 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.[9] We are concerned only with whether New York has adequately protected his opportunity to form such a

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Poulin, Developments in the Law, 93 Harv. L. Rev. 1156, 1275–1277 (1980); Note, 18 Duquesne L. Rev. 375, 383–384, n. 73 (1980); Note, 19 J. Family L. 440, 460 (1980). Note, 57 Denver L.J. 671, 680–689 (1980). Note, 1979 Wash. U. L.Q. 1029, 1035; Note, 12 U. C. D. L. Rev. 412, 450, n. 218 (1979).

[9] "This case happens to involve an adoption by the husband of the natural mother, but we do not believe the natural father has any greater right to object to such an adoption than to an adoption by two total strangers. If anything, the balance of equities tips the opposite way in a case such as this. In denying the putative father relief in *Quilloin*, we made an observation equally applicable here:

"Nor is this 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. Rather, 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. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the 'best interests of the child.'" 434 U. S., at 255.

relationship.

II

The most effective protection of the putative father's opportunity to develop a relationship with his child is provided by the laws that authorize formal marriage and govern its consequences. But the availability of that protection is, of course, dependent on the will of both parents of the child. Thus, New York has adopted a special statutory scheme to protect the unmarried father's interest in assuming a responsible role in the future of his child.

After this Court's decision in *Stanley*, the New York Legislature appointed a special commission to recommend legislation that would accommodate both the interests of biological fathers in their children and the children's interest in prompt and certain adoption procedures. The commission recommended, and the legislature enacted, a statutory adoption scheme that automatically provides notice to seven categories of putative fathers who are likely to have assumed some responsibility for the care of their natural children.[*] If

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[*] In a report explaining the purpose of the 1976 Amendments to § 111-a of the New York Domestic Relations Law, the temporary state commission on child welfare that was responsible for drafting the legislation stated, in part:

"The measure will dispel uncertainties by providing clear constitutional statutory guidelines for notice to fathers of out-of-wedlock children. It will establish a desired finality in adoption proceedings and will provide an expeditious method for child placement agencies of identifying those fathers who are entitled to notice through the creation of a registry of such fathers within the State Department of Social Services. Conversely, the bill will afford to concerned fathers of out-of-wedlock children a simple means of expressing their interest and protecting their rights to be notified and have an opportunity to be heard. It will also obviate an existing disparity of Appellate Division decisions by permitting such fathers to be petitioners in paternity proceedings.

"The measure is intended to codify the minimum protections for the putative father which *Stanley* would require. In so doing it reflects policy decisions to (a) codify constitutional requirements, (b) clearly establish, as

this scheme were likely to omit many responsible fathers, and if qualification for notice were beyond the control of an interested putative father, it might be thought procedurally inadequate. Yet, as all of the New York courts that reviewed this matter observed, the right to receive notice was completely within appellant's control. By mailing a postcard to the putative father registry, he could have guaranteed that he would receive notice of any proceedings to adopt Jessica. 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. The New York legislature concluded that a more open-ended notice requirement would merely complicate the adoption process, create the risk of unnecessary controversy, and impair the desired finality of adoption decrees. Regardless of whether we would have done likewise if we were legislators instead of judges, we surely cannot characterize the state's conclusion as arbitrary.[9]

Appellant argues, however, that even if the putative father's opportunity to establish a relationship with an illegitimate child is adequately protected by the New York statutory scheme in the normal case, he was nevertheless entitled to special notice because the court and the mother knew that

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early as possible in a child's life, the rights, interests and obligations of all parties, (c) facilitate prompt planning for the future of the child and permanence of his status; and (d) through the foregoing, promote th best interest of children." App. to Brief for Appellant C–15.

[9] Nor can we deem unconstitutionally arbitrary the state courts' conclusion that appellant's absence did not distort its analysis of Jessica's best interests. The adoption does not affect Jessica's relationship with her mother. It gives legal permanence to her relationship with her adoptive father, a relationship they had maintained for 21 months at the time the adoption order was entered. Cf. J. Goldstein, A. Freud, and A. Solnit, Before the Best Interests of the Child 39–57 (1979). Appellant did not have any evidence to suggest that legal confirmation of the established relationship would be unwise. He did not even know the adoptive father.

he had filed an affiliation proceeding in another court. But the fact that he had elected to pursue this particular remedy can hardly be thought to have imposed any special duty on his adversaries.[7] A potential defendant who knows that the statute of limitations is about to run, or that a potential plaintiff is having difficulty in serving him with process, has no duty to give legal or factual advice to his adversary.[8] Nor, as a matter of constitutional law, is a judge under a duty to order that special notice be given to nonparties who are presumptively capable of asserting and protecting their own rights. Since the New York statutes adequately protected appellant's inchoate interest in establishing a relationship with Jessica, we find no merit in the claim that his constitutional rights were offended because the family court strictly complied with the notice provisions of the statute.[9]

The Equal Protection Claim.

The concept of equal justice under law requires the State to govern impartially. *New York Transit Authority* v. *Beazer*, 440 U. S. 568, 587 (1979). The sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective. *Reed* v. *Reed*, 404 U. S. 71, 76 (1971).[10] Specifically, it

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[7] There is no suggestion in the record that appellee engaged in any fraudulent practices that caused appellant to fail to protect his rights.

[8] This general presumption about our adversary system receives mild support in this context by a general concern for protecting the mother's privacy. Cf. *Roe* v. *Norton*, 422 U. S. 391 (1975), *vacating and remanding* 365 F. Supp. 63 (D. Conn. 1973). See Poulin, 922, 932; Barron, Notice to the Unwed Father and Termination of Parental Rights, 9 Family L.Q. 527, 542 (1975).

[9] As we have explained above, this is not a case in which the appellant was deprived of any constitutionally vested interest. It is thus unlike *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306 (1950), in which the petitioner had been deprived of a protected property interest without adequate notice.

[10] In *Reed*, the Court considered an Idaho statute providing that in dee-

may not subject men and women to disparate treatment when there is no substantial relation between the disparity and an important state purpose. *Ibid*; *Craig v. Boren*, 429 U. S. 190, 197–199 (1976).

The legislation at issue in this case, sections 111 and 111a of the New York Domestic Relations Law, is intended to establish procedures for adoptions. Those procedures are designed to promote the best interests of the child, protect the rights of interested third parties, and ensure promptness and finality.[25] To serve those ends, the legislation guarantees to

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ignating administrators of the estates of intestate decedents, "[o]f several persons claiming and equally entitled to administer, males must be preferred to females." The state had sought to justify the statute as a way to reduce the workload of probate courts by eliminating one class of contests. Writing for a unanimous Court, THE CHIEF JUSTICE observed that in using gender to promote that objective, the legislature had made "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause." 404 U. S., at 76. The state's articulated goal could have been completely served by requiring a coin flip. The decision instead to choose a rule that systematically harmed women could be explained only as the product of habit, rather than analysis or reflection, cf. *Califano v. Goldfarb*, 430 U. S. 199, 223 (1977) (STEVENS, J., concurring in the judgment), or as the product of an invidious and indefensible stereotype, cf. *id.*, at 218. Such legislative decisions are inimical to the norm of impartial government.

The mandate of impartiality also constrains those state actors who implement state laws. It requires them to apply the rules of law faithfully in all cases that the rules purport to control. And where they must interpret the rules in order to apply them, it requires their interpretations to satisfy the same standard of neutral justification that is imposed on the lawmaker. Thus, the Equal Protection Clause would have been violated in precisely the same manner if in *Reed* there had been no statute and the probate judge had simply announced that he chose Cecil Reed over Sally Reed "because I prefer males to females."

[25] Appellant does not contest the vital importance of those ends to the people of New York. It has long been accepted that illegitimate children whose parents never marry are "at risk" economically, medically, emotionally, and educationally. See E. Crellin, M. Pringle, P. West, Born Illegitimate: Social and Educational Implications 95–112 (1971); cf. T. Lash, H.

certain people the right to veto an adoption and the right to prior notice of any adoption proceeding. The mother of an illegitimate child is always within that favored class, but only certain putative fathers are included. Appellant contends that the gender-based distinction is invidious.

As we noted above, the existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interests of the child. In *Quilloin* v. *Walcott*, *supra*, we noted that the putative father, like appellant, "ha[d] never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child. Appellant does not complain of his exemption from these responsibilities . . . ." 434 U. S., at 256. We therefore found that a Georgia statute that always required a mother's consent to the adoption of a child born out of wedlock, but required the father's consent only if he had legitimated the child, did not violate the Equal Protection Clause. Because, like the father in *Quilloin*, appellant has never established a substantial relationship with his daughter, see p. 14, *supra*, the New York statutes at issue in this case did not operate to deny appellant equal equal protection.

We have held that these statutes may not constitutionally be applied in that class of cases where the mother and father are in fact similarly situated with regard to their relationship with the child. In *Caban* v. *Mohammed*, 441 U. S. 380 (1979), the Court held that it violated the Equal Protection Clause to grant the mother a veto over the adoption of a four-year-old girl and a six-year-old boy, but not to grant a veto to their father, who had admitted paternity and had participated in the rearing of the children. The Court made it clear, however, that if the father had not "come forward to participate in the rearing of his child, nothing in the Equal

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Sagal, D. Dodzinski, State of the Child: New York City II, at 47 (1980).

Protection Clause [would] precludel] the State from withholding from him the privilege of vetoing the adoption of that child." 441 U. S., at 392.

Jessica's parents are not like the parents involved in *Caban*. 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[6] or never established a relationship, the Equal Protection Clause does not prevent a state from according the two parents different legal rights.[7]

The judgment of the New York Court of Appeals is

Affirmed

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[6] In *Caban*, the Court noted that an adoption "may proceed in the absence of consent when the parent whose consent otherwise would be required . . . has abandoned the child." 441 U. S., at 392.

[7] Appellant also makes an equal protection argument based upon the manner in which the statute distinguishes among classes of fathers. For the reasons set forth in our due process discussion, *supra*, we conclude that the statutory distinction is rational and that appellant's argument is without merit.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 25, 1983

No. 81-1756 Lehr v. Robertson

Dear John,

Please join me.

Sincerely,

Sandra

Justice Stevens

Copies to the Conference

Sally - Fill me this

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 3, 1983

Re: 81-1756 - Lehr v. Robertson

Dear Bill:

Many thanks for your letter. I agree with most, but not all, of your suggestions. I would like to take them up in reverse order because I think your paragraph 6 is the one that is most significant.

I propose revising the paragraph that begins on the bottom of page 16 and runs over onto page 17 to read as follows:

> "Appellant argues, however, that even if the putative father's opportunity to establish a relationship with an illegitimate child is adequately protected by the New York statutory scheme in the normal case, he was nevertheless entitled to special notice because the court and the mother knew that he had filed an affiliation proceeding in another court. This argument amounts to nothing more than an indirect attack on the notice provisions of the New York statute. The legitimate state interests in facilituting the adoption of young children and having the adoption proceeding completed expeditiously that underlie the entire statutory scheme also justify a trial judge's determination to require all interested parties to adhere precisely to the procedural requirements of the statute. The Constitution does not require either a trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights.*/ Since the New York statutes adequately protected appellant's inchoate interest in establishing a relationship with Jessica, we find no merit in the claim that his

constitutional rights were offended because the family court strictly complied with the notice provisions of the statute.

"*/It is a generally accepted feature of our adversary system that a potential defendant who knows that the statute of limitations is about to run has no duty to give the plaintiff advice. There is no suggestion in the record that appellee engaged in fraudulent practices that led appellant not to protect his rights."

I agree that we can omit footnote 23.

I agree with the change in footnote 20 that you suggest in paragraph 4.

I propose revising the second and third sentences on page 10 to read this way:

"In some we have been concerned with the rights of the children, see e.g., Trimble v. Gordon, 430 U.S. 762 (1977); Jimenez v. Weinberger, 417 U.S. 628 (1974); Weber v. Aetna Casualty, 406 U.S. 164 (1972). In this case, however, it is a parent who claims that the state has improperly deprived him of a protected interest in liberty."

Your vote is more important to me than a quotation from a law review article, but I must confess that I am curious to know what it is about the quotation from Hafen in footnote 13 that makes you uncomfortable. I know the article as a whole exhibits a bias in favor of the formal family, but I do not believe that bias is any stronger than the stance the Court has taken in several opinions. I really think all of us would agree with each of the statements that Hafen makes in what I have quoted. Having said all this, I repeat, I would rather have your vote than Mr. Hafen's quotation but wonder how strongly you feel about it. OK

Finally, I am not sure that your criticism of my formulation of the question at the outset of the opinion is completely valid. I think appellant's argument does rest on a claim that all unmarried fathers have a constitutional right to notice and a hearing. I have not, however, stated the question presented quite that broadly. I have limited it to cases in which the unmarried father has had two years in which to establish such a relationship but has not done so. Moreover, although you may be correct that the phrasing of the question at the outset of the opinion is somewhat broad, our holding is limited to the situation in which the statutory scheme does protect the father's opportunity to obtain advance notice. As you know, he could have protected that opportunity in several ways, such as having his name on the birth certificate, marrying the mother, or perhaps persuading her to identify him as the father in a written sworn statement. What this boils down to, I suppose, is that if other members of the Court do not share your concern, I would prefer to leave the statement of the question as it is unless you feel quite strongly about it.

Respectfully,

John

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE W. J. BRENNAN, JR.

June 8, 1983

No. 81-1756 Lehr v. Robertson

Dear John:

Having given the matter some thought, I expect to join your opinion in this case. I have several concerns, however, about the due process portion of the opinion. I hope you will bear with me as I go through them.

1. Might you consider reformulating your statement of the question presented? The question you pose is not really in the case, since appellant does not go so far as to claim that all unmarried fathers have a constitutional right to notice and a hearing. Here is my suggestion:

> "The question presented is whether the Constitution requires a State to delay the adoption of a two-year-old child in order to provide notice and an opportunity to be heard to the child's natural father, when the father has neither established any formal or informal relationship with the child nor availed himself of a state procedure that would have assured he had notice and an opportunity to be heard. The appellant, Jonathan Lehr, claims that his right to notice and a hearing is protected by ..."

2. In footnote 13, I would feel more comfortable if you were to eliminate the long quotation from the Hafen article.

3. In the full paragraph on page 10, I am concerned by your description and use of Trimble v. Gordon, etc. First of all, I think those cases proscribe more than only "punishment" of children born out of wedlock. More importantly, I am not certain that children born out of wedlock have no interest in a relationship with their natural fathers. The child is not before us in this case except insofar as she is represented by her mother and adoptive father. I would be satisfied if you eliminated or reformulated the two sentences of text and the citation string in the middle of this paragraph.

4. In footnote 20, should we not say "appellant did not proffer any evidence" instead of "appellant did not have any evidence"?

5. I am not certain what footnote 23 adds to the discussion in part I of this section, and the analogy between liberty interests and "vested" property interests seems sure to cause trouble. I would rather this footnote were omitted.

6. I confess that I do not have a fully developed theory of the rights of unmarried fathers, but the question of timing figured in my analysis of this case and of the Christian Homes case before we remanded it. I think the State's interest in requiring a natural father--one who does not have a substantial existing relationship with his child--to follow specific, designated procedures to protect his rights is closely tied to the State's interests in having young children adopted at an early age and in having the adoption proceedings completed in "child time"--that is to say quickly. Due process permits measures to further these goals, including the State's refusal to consider at an advanced stage in the adoption ad hoc steps a father in this category may have taken outside of the approved procedure, even if the father's actions seem roughly equivalent to what the State requires.

I think this is as strong a reason (or stronger) for finding no due process violation in the circumstances of this case than the lack of duty to help an adversary. Would you consider incorporating something along these lines into your discussion in part II?

Sincerely,

WJB, Jr.

Justice Stevens

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drk 06/04/83

To: Mr. Justice Powell

From: [illegible]
81-1756 RE 6/4/83

Rene - what do you think? Changes of PS proposes to make (see letter of 6/3 to WJB) seem helpful to me. I am now inclined to join. Most of the opinion up to Part II seems unnecessary. I don't think, however, it creates law that we can't live with.

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...but can be lived
...Justice Brennan's
...ked it June 3)
...rom the Hafen
...footnote 13 of the opinion. As I read Justice Stevens' response, he did not agree to remove the quotation but said that he would do so if it were necessary to obtain Justice Brennan's vote. You may know something about this through discussions with Justice Stevens that I do not. I do not think, however, that removal of this quotation is critical.

(1)

Of more importance is Justice Stevens's statement of the question presented. It is ambiguous and could be read as stating that the issue is whether Lehr had a constitutional right to any notice, not whether the notice that Lehr received was sufficient on the facts of this case. While the ambiguity may be cleared up later in the opinion, it seems to me that Justice Brennan's formulation of the issue presented is the better one. Justice Stevens responded to Justice Brennan's suggestion by saying that unless other members of

(2)

the Court shared Justice Brennan's concerns he would prefer to leave the opening paragraph as it now stands. If you agree with me, you might write a note saying that you now join the entire opinion but agree with Justice Brennan's proposed formulation of the question presented.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 6, 1983

Re: No. 81-1756 - Lehr v. Robertson

Dear John:

I shall await the forthcoming dissent in this case.

Sincerely,

Harry

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 6, 1983

No. 81-1756 Lehr v. Robertson

Dear John:

Please join me in your opinion when you make the changes indicated in your letter of June 3. I remain somewhat uneasy with the opinion's first sentence on the ground you note--the question is a good deal broader than any of the answers we give. May I try one more suggestion?

> "The question presented is whether New York has sufficiently protected an unmarried father's inchoate relationship with a child whom he has never supported and rarely seen in the two years since her birth. The appellant, Jonathan Lehr, claims that the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as interpreted in Stanley and Caban, give him an absolute right to notice and an opportunity to be heard before the child may be adopted. We disagree."

I do not insist on my version at all. My only concern is that this opinion not be read to dispose of substantive arguments such as those made by the father in Kirkpatrick v. Christian Homes. As for the Bafen quote, I withdraw my objection.

Sincerely,

WJB, Jr.

Justice Stevens

Copies to the Conference

June 6, 1983

81-1756 Lehr v. Robertson

Dear John:

In view of changes you have made, and - as I understand it - propose to make in response to Bill Brennan, I now join your entire opinion.

I agree with Bill that the long quotation from the Hafen article in fn. 13 is best eliminated. I also prefer Bill's formulation of the question presented, though my join is not contingent on your adopting it.

Sincerely,

Justice Stevens

Copies to the Conference

LFP/vde

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 6, 1983

No. 81-1756 Lehr v. Robertson

Dear John:

Please join me in your opinion when you make the changes indicated in your letter of June 3. I remain somewhat uneasy with the opinion's first sentence on the ground you note--the question is a good deal broader than any of the answers we give. May I try one more suggestion?

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I do not insist on my version at all. My only concern is that this opinion not be read to dispose of substantive arguments such as those made by the father in Kirkpatrick v. Christian Homes. As for the Hafen quote, I withdraw my objection.

Sincerely,

WJB, Jr.

Justice Stevens

Copies to the Conference

I prefer Justice Brennan's first version myself-
RK

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 10, 1983

Re: No. 81-1756 Lehr v. Robertson

Dear John:

Please join me.

Sincerely,

WHR

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 14, 1983

Re: No. 81-1756, Lehr v. Robertson

Dear John:

As of now show me joining in the judgment.

(I am allergic to some of these psychiatrists!)

Regards,

WEB

Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 20, 1983

Re: No. 81-1756-Lehr v. Robertson

Dear Byron:

Please join me in your dissent.

Sincerely,

T. M.

T.M.

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 22, 1983

Re: No. 81-1756 - Lehr v. Robertson

Dear Byron:

Please join me in your dissent.

Sincerely,

Harry

Justice White

cc: The Conference

81-1756 Lehr v. Robertson (Rives)

JPS for the Court
1st draft 5/16/83
2nd draft 5/25/83
3rd draft 6/7/83
4th draft 6/13/83
5th draft 6/16/83
Joined by CJ, WJB, LFP, WHR, JPS

BRW dissent
1st draft 6/18/83
2nd draft 6/23/83
Joined by TM, HAB

drk 06/04/83

To: Mr. Justice Powell

From: Rives

Re: No. 81-1756, Lehr v. Robertson

I agree that Justice Stevens' proposed changes seem helpful and also agree that Part I is unnecessary, but can be lived with. I would make only two points. You noted on Justice Brennan's letter to Justice Stevens (dated June 6--you've marked it June 3) that "JPS agreed" to eliminate the long quotation from the Hafen article in footnote 13 of the opinion. As I read Justice Stevens' response, he did not agree to remove the quotation but said that he would do so if it were necessary to obtain Justice Brennan's vote. You may know something about this through discussions with Justice Stevens that I do not. I do not think, however, that removal of this quotation is critical.

(1)

Of more importance is Justice Stevens's statement of the question presented. It is ambiguous and could be read as stating that the issue is whether Lehr had a constitutional right to any notice, not whether the notice that Lehr received was sufficient on the facts of this case. While the ambiguity may be cleared up later in the opinion, it seems to me that Justice Brennan's formulation of the issue presented is the better one. Justice Stevens responded to Justice Brennan's suggestion by saying that unless other members of

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