



2014

The Ties that Bind: Reevaluating the Role of Legal Presumptions of Paternity

Heather Kolinsky

Washington and Lee University School of Law, hkolinsky@wlu.edu

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlufac>

Recommended Citation

Heather Kolinsky, *The Ties that Bind: Reevaluating the Role of Legal Presumptions of Paternity*, 48 *Loyola L.A. L. Rev.* 221 (2014).

This Article is brought to you for free and open access by the Faculty Scholarship at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Scholarly Articles by an authorized administrator of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

THE TIES THAT BIND: REEVALUATING THE ROLE OF LEGAL PRESUMPTIONS OF PATERNITY

*Heather Kolinsky**

As Justice Brennan observed in Michael H. v. Gerald D. so many years ago, we must “identify the point at which a tradition becomes firm enough to be relevant to our definition of liberty and the moment at which it becomes too obsolete to be relevant any longer.” This Article addresses one such tradition, the legal presumption of paternity, and examines it through the lens of equal protection, the changing roles of fatherhood, and the evolution of marriage.

The concept of who is a parent must change to both satisfy equal protection as well as modern scientific and societal realities. This Article argues that, historically, the constitutionally protected right to parent has been improperly conferred on a marriage rather than on an individual, particularly with respect to unwed natural fathers. This Article focuses on the need for a change in recognition of relationships between natural fathers and their children, particularly natural fathers of children born to intact marriages.

Through that lens, this Article traces the genesis of the legal presumption of paternity in the United States. It then undertakes an in-depth review and analysis of the United States Supreme Court’s “unwed father” cases from Stanley v. Illinois to Michael H. from an equal protection perspective. After considering the equal protection concerns raised by the United States Supreme Court’s precedent, the Article proposes that, based on evolving notions of what fathers and

* Heather M. Kolinsky, B.A. Stetson University, J.D. Rutgers University–Camden, L.L.M. Candidate, Emory University School of Law. Thank you to my research assistants Ana Senior, Jessica Debski, Susan Michele, and Ronald Christopher Cooper for their hard work, exemplary research, and patience; to Professors Seema Mohapatra, Jamila Jefferson-Jones, and Neelum Arya for making me accountable; and to Professors Judith Koons and Eang Ngov for reviewing drafts of this Article. I also extend my thanks to the participants at the 2014 Emerging Family Law Scholars Conference at Law and Society for their comments and critiques and to Barry Law School for its financial support. Finally, my love to my children, Julia Ryan and Luke, whose presence in my life reminds me every day how important the bond is between parent and child. Every parent and every child should be so lucky.

marriages are today, the legal presumption should be relegated to an administrative convenience that is fully rebuttable and not limited by time. The Article then proposes that in order to accomplish this shift and fully recognize all biological parents' rights, as well as the parental rights of others, another commonly held view must be challenged—that a child may only have two legal parents. The Article suggests that in such circumstances courts should recognize more than two parents in order to fully protect parental rights and the need for new parental forms is discussed. Finally, the Article proposes how such changes might be effected to better protect individual parental rights.

TABLE OF CONTENTS

I. INTRODUCTION	226
II. LEGAL PRESUMPTIONS OF PATERNITY	232
III. UNMARRIED BIOLOGICAL FATHERS AND THE RIGHT TO PARENT	237
A. The Supreme Court’s View	237
B. Stanley, Quilloin, Caban, Lehr, and Michael H.— Fashioning a Framework for Unwed Biological Father’s Rights—A Dantean Journey in Three Parts.....	240
1. <i>Stanley v. Illinois</i> —You Are Not a “Real” Parent but if No One Else Is Available, You Might Do	240
2. <i>Quilloin v. Walcott</i> , <i>Caban v. Mohammed</i> , and <i>Lehr v. Robertson</i> —The Adoption Cases—You Are Not a Real Parent; Married People Are Real Parents	243
a. <i>Quilloin v. Walcott</i>	243
b. <i>Caban v. Mohammed</i>	247
c. <i>Lehr v. Robertson</i>	250
3. <i>Michael H. v. Gerald D.</i> —Unmarried Biological Father of a Child Born of a Marriage—In Case You Didn’t Hear It the First Few Times, Marriages, Not Individuals, Have Rights So Biology Is Irrelevant.....	255
C. Paternity and Equal Protection—The Disconnect Between Natural Fathers’ Individual Rights and the Rights of a Marriage	260
IV. ADOPTING A NEW APPROACH—WHY DO WE NEED TO CHANGE?.....	265
A. Fathers Have Changed, But the Stereotypes Attached to Them Have Not.....	266
B. Marriage and the Notion of a “Formal Family” Has Changed	268
C. Viewing Relationships in a New Way—Changing the Message, Resolving the Equal Protection Issue	271
V. HOW COULD IT WORK?	272
VI. CONCLUSION	274

In an ideal world, perhaps all parents would be perfect. They would live up to their parental responsibilities by providing the fullest possible financial and emotional support to their children. They would never suffer mental health problems, lose their jobs, struggle with substance dependency, or encounter any of the other multitudinous personal crises that can make it difficult to meet these responsibilities. In an ideal world, parents would never become estranged and leave their children caught in the middle. But we do not live in such a world. Even happy families do not always fit the custodial-parent mold; unhappy families all too often do not. They are families nonetheless.¹

I. INTRODUCTION

Given certain biological realities, when a woman gives birth to a child, she is deemed to be that child's mother.² The biological father, on the other hand, cannot be established as the child's father based upon his mere presence at or absence from the child's birth.³ Rather, the law has long presumed that a child's biological father is the man married to the biological mother at the time of the child's birth.⁴

To some extent, these biological and cultural assumptions are fueled by the social expectation, long held as the norm by western society, that the woman, as mother, cares for the children, and the

1. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2584 (2013) (Sotomayor, J., dissenting).

2. See John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology As the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 370 (1991). There is a "presumption of biology" conferred upon mothers who carry a child and subsequently give birth to it—*mater est quam gestation demonstrant* (by gestation mother is demonstrated). *Id.* (citing *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 192–202 (1986); U.S. CONG. OFFICE OF TECH. ASSESSMENT, INFERTILITY: MEDICAL AND SOCIAL CHOICES 36, 282 (1988)). Hill notes, however, that the problem inherent in this presumption is that in the context of the ever-evolving world of surrogacy and assisted reproductive technology, it is now quite possible that the woman who carries and bears a child is not the child's biological mother. *Id.*

3. See *Nguyen v. INS*, 533 U.S. 53, 62 (2001) (holding that a father's presence at the birth of his child is not "incontrovertible proof of fatherhood"); *Lehr v. Robertson*, 463 U.S. 248, 260 n.16 (1983) (holding that father's parental claims must be gauged by other means than mere birth).

4. See generally Mary Kay Kisthardt, *Of Fatherhood, Families and Fantasy: The Legacy of Michael H. v. Gerald D.*, 65 TUL. L. REV. 585, 589 (1991) (citing H. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 15–16 (1971) ("[T]he common law developed the presumption that a child born to a married woman was the child of her husband.")).

man, as father, provides financial support for those children.⁵ Superimposed on this assignment of parental roles is the expectation that these roles will be assumed within the confines of a legally recognized relationship—a marriage consisting of a man and woman and their biological children.⁶ Thus, marriage, not biology, often confers parental status on a father. These expectations often push certain groups of fathers to the periphery in terms of both constitutionally protected rights and caregiving roles.

This expectation has been so pervasive historically that the default understanding was that a biological father who did not marry his child's biological mother was not committed emotionally or as a

5. See NANCY E. DOWD, *REDEFINING FATHERHOOD* 34 (2000). Roman Imperial legislation required fathers to support children born of a legitimate marriage or concubinage, which replaced the classical Roman law of *patria potestas*. R.H. Helmholz, *Support Orders, Church Courts, and the Rule of Filius Nullius: A Reassessment of the Common Law*, 63 VA. L. REV. 431, 433–34 (1991) (citing W. BUCKLAND, *A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN* 103 (3d ed. 2007)). Derived from natural law, this obligation originally imposed a duty on all parents to nurture and support their children. *Id.* at 435. However, this support was still framed in the context of monetary support or the idea of nourishing the child. *Id.* In the 1970s there was a shift away from fathers as “walking wallets” in the context of divorce, to a full-fledged fathers’ rights movement. See Martha Fineman, *The Neutered Mother*, 46 U. MIAMI L. REV. 653, 656–59 (1992). Fineman traces the arc from father as superior parent with absolute control and ownership of children, and mother as the inferior parent, to the “tender years doctrine” fashioning mother as necessary caretaker and father as financial provider, to concepts of shared custody and no presumptions in the context of divorce that mother was the better caregiver or the only parent who should control custody. *Id.* Fast-forward to today, and even the debate over same-sex marriage has had to tackle these long-entrenched stereotypes. *Amici in United States v. Windsor* noted that the Bipartisan Legal Advisory Group (BLAG) argued denying recognition to same sex marriage was appropriate to support mothers and fathers raising their biological children, relying on the archaic, longstanding stereotype that mothers are nurturers and fathers are providers. Brief For Amici Curiae Scholars of the Constitutional Rights of Children in Support of Respondent Edith Windsor Addressing the Merits and Supporting Affirmance at 30, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 840028; see Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003); Knussman v. Maryland, 272 F.3d 625 (4th Cir. 2001).

6. “A traditional family is typically imagined: a husband and wife—formally married and living together—with their biological children. The husband performs as the head of household, providing economic support and discipline for the dependent wife and children, who correspondingly owe him duties of obedience and respect.” Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL’Y & L. 239, 247 n.21 (2001) (quoting Martha Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2182 (1995)); see Mary A. Totz, *What’s Good for the Goose Is Good for the Gander: Toward Recognition of Men’s Reproductive Rights*, 15 N. ILL. U. L. REV. 141, 198 (1994) (citing SARAH WEDDINGTON, *A QUESTION OF CHOICE* 51–53 (1993) (noting that historically society presumed that women would want to marry and bear children and men who married these women would support them, and those children, financially); see also Kisthardt, *supra* note 4, at 588 (“The common-law rules also reflected the notion that the father-child relationship was primarily an economic one.”).

caregiver.⁷ The law also presumed a biological father to be less of a parent than the biological mother's spouse at the time of that child's birth.⁸ Indeed, it prevented a man from being legally recognized as the father of his biological child when the mother was married to another man, even though he was not the biological father, at the time of that child's birth.⁹

Legal determinations of paternity have their genesis in these social norms, but they no longer reflect the reality of parental roles and the institution of marriage itself.¹⁰ The *law* also fails to recognize

7. *Stanley v. Illinois*, 405 U.S. 645, 654 (1972); *see Lehr v. Robertson*, 463 U.S. 248, 260 n.16 (1983) (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)). In fact, Kisthardt notes that it was "not surprising . . . states enacted laws that presumed unwed fathers were irresponsible and unconcerned about their children" and denied them legal rights such as custody where historically an illegitimate child was a child of no one and often placed in the custody of the church. Kisthardt, *supra* note 4, at 595. In fact, as late as the 1960s, states were still refusing to acknowledge the rights of unwed fathers. It was not until 1972 that the Supreme Court made it unequivocally clear that unwed fathers had a constitutionally protected right to parent their children and, at least to some extent, an automatic presumption that such a father was unfit was unconstitutional and inappropriate. *Stanley*, 405 U.S. at 649.

8. "Formal, legal, heterosexual marriage continues to dominate our imagination when we confront the possibilities of intimacy and family." Fineman, *supra* note 5, at 663–64. Thinking beyond the implications of legal presumptions of paternity, one has to wonder if a legal discourse that is no longer guided by a normative male (married, employed, heterosexual) would encourage a better recognition of gendered roles. A question that needs to be considered is whether removing the presumption helps to create a new caregiving paradigm that acknowledges mother and father as valuable distinct roles separate and apart from the stereotypically gendered roles of wife-caregiver and husband-financier.

9. *See Michael H. v. Gerald D.*, 491 U.S. 110, 113 (1989). There is also a sense, particularly with respect to adulterous fathers, that they are being penalized for a married woman stepping outside accepted social norms. Laws that punish parents for "immoral" or non-normative conduct, continue to proliferate. The Defense of Marriage Act is illustrative. Defense of Marriage Act of 1996, Pub. L. No. 104-199; 110 Stat. 2419 (1996) (section 3 of DOMA was struck down by the Supreme Court in 2013 in *United States v. Windsor*, 133 S. Ct. 2675 (2013)). In *Windsor*, BLAG asserted that DOMA advanced child welfare by: "(1) providing a stable structure to raise unintended and unplanned offspring; (2) encouraging the rearing of children by their biological parents; and (3) promoting childrearing by both a mother and father." Brief for Amici Curiae Scholars of the Constitutional Rights of Children, *supra* note 5, at 7 (citation omitted). *Amici* argued that these articulated justifications "draw invidious distinctions between families headed by opposite-sex parents and families headed by same-sex parents and, by implication, between the children in these families." *Id.* at 1–2. Thus, the stated intent of the law was nothing more than punishment for an identically situated class of children based on nothing more than moral disapproval of their parents' conduct. *Id.* at 2. Again, a moral judgment, given the form of law and affirmative power to deny parents' rights had an impact on those parents, and their children. Consequently, it also has a direct impact on the rights of parents to raise their children.

10. Surrogacy and other types of assisted reproductive technology arrangements have "force[d] us to confront deeply held beliefs about what makes a 'mother' or a 'father,' . . . and perhaps most fundamentally, what makes a 'family.'" *In re F.T.R.*, 833 N.W.2d 634, 643 (Wis. 2013) (quoting Darra L. Hoffman, "Mama's Baby, Daddy's Maybe": A State-By-State Survey of Surrogacy Laws and Their Disparate Gender Impact, 35 WM. MITCHELL L. REV. 449, 450

the connection and bond a biological father may have to his unborn or newly born child.¹¹ Instead, they reinforce stereotypical understandings about mothers and fathers and do little to facilitate a better recognition of the roles of all caregivers, whether social, legal, or biological. These laws also blur the lines between parental identity and family identity in a way that undercuts a person's fundamental right to procreate and bear children. Thus, a right of association supplants an individual right.¹² At this moment, such presumptions are all the more harmful because they no longer reflect the way we parent as a society, nor do they properly recognize the types of families that can and are being formed to rear the current generation of children in this country.

These decisions and assumptions flow from a faulty legal and social premise. The United States Supreme Court has recognized that being a parent is a fundamental right.¹³ However, the level of scrutiny given to laws which control recognition of paternity changes depending upon the legal relationship between the *father and mother* at the time of birth.¹⁴ Unfortunately, as *Michael H. v. Gerald D.*¹⁵ illustrates, the stance taken by the Court is that when a man is the natural father of a child born to an intact marriage of the natural mother and another man, then the natural father's fundamental right to parent is trumped by "the marriage."¹⁶ However, that legal presumption is based on the assumption that parenthood as a

(2009)). Additionally, in terms of the "traditional" family unit, it no longer looks exactly as it did even thirty years ago. By some estimates, approximately two million children are being raised by LGBT parents, either in relationships where the parents are co-habiting (perhaps in part because they cannot marry) or married, and as single parent families. See Movement Advancement Project et al., *All Children Matter: How Legal and Social Inequalities Hurt LGBT Families*, CENTER FOR AM. PROGRESS 1, 7 (2011), http://cdn.americanprogress.org/wp-content/uploads/issues/2011/10/pdf/all_children_matter.pdf.

11. See generally Part IV *infra* (discussing the evolution of the paternal role and the outdated nature of the presumption).

12. This, of course, is a problem because courts have articulated time and again that no child is guaranteed the "better" parents. Nor should a parent's right be dependent on gender or marital status. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2572 (2013) (Scalia, J., dissenting).

13. This right has been found in the context of procedural and substantive due process challenges, as well as equal protection. See *Cleveland Bd. of Educ. v. LeFleur*, 414 U.S. 632, 639-40 (1974); *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

14. See, e.g., *Adoptive Couple*, 133 S. Ct. at 2557; *Michael H.*, 491 U.S. at 110; *Caban v. Mohammed*, 441 U.S. 380, 380 (1979).

15. 491 U.S. 110, 113 (1989).

16. *Michael H.*, 491 U.S. at 113.

fundamental right is designed to protect a marital family unit instead of the individuals within that family unit.¹⁷ It is also based on the presumption that an unwed father is not a parent and has no desire to be a parent unless proven otherwise. This legal scaffolding has a false bottom. As Justice Brennan correctly observed in *Michael H.*, the right emanates from the individual and that is what should be protected.¹⁸

The result of this predicate is an imbalance that leaves fathers and children vulnerable to laws governing the most intimate of relationships.¹⁹ The law has simply not kept pace with the social and scientific realities of our generation, and that inability continues to have an impact on parental rights.²⁰ There are times when it is important to take a step back and reassess the impact of a law or policy, both emotionally and practically, in light of significant shifts in society, as the United States Supreme Court's decision in *United States v. Windsor*²¹ so aptly illustrates.²²

17. This is more interesting in *Michael H.*, considering there were two familial units that the child had been a part of and the Court chose to recognize the unit that had married parents, not the unit that consisted of the biological parents and the child. Justice Alito adopted a similar approach in his dissent in *Windsor*, focusing on family and marriage, instead of focusing on a person's right to marry. *United States v. Windsor*, 133 S. Ct. 2675, 2715 (2013). Justice Alito focused solely on same-sex marriage which, if supported, would remove the right to marry from a subset of citizens just as *Michael H.* denied a subset of fathers full recognition of their fundamental right to parent because a moral judgment was layered upon a right and codified by the law. *Id.*

18. *Michael H.*, 491 U.S. at 147 (Brennan, J., dissenting). Instead, what has happened is that the right is supplanted by a simple recognition of a legal relationship with the imposition of stereotypes that do neither the biological parent, nor the legal parent, any justice.

19. See Darren Rosenblum, *Unsex Mothering: Toward a New Culture of Parenting*, 35 HARV. J. L. & GENDER 57, 76–78 (2012). While it impacts each member of a biological family unit, this Article will focus almost exclusively on the impact upon a biological father whose child is born within a marital relationship that is not his.

20. See *id.*; *In re F.T.R.*, 833 N.W.2d at 644. It is possible for a child to have as many as five different “parents” and there are a total of sixteen different reproductive combinations, including sperm donors, egg donors, a surrogate or gestational host, and intended parents. Hill, *supra* note 2, at 355.

21. 133 S. Ct. 2675, 2715 (2013).

22. *Id.* at 2689 (“The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion.”); see *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (“Times can blind us to certain truths and later generations can see that laws once thought necessary and proper serve only to oppress.”). What *Windsor* also illuminates is the battles we still continue to fight in terms of using “tradition” as the rationale for decisions that harm discrete, at-risk groups. Justice Scalia posits that this fight is not black and white and that disagreement over something so fundamental as marriage can still be politically legitimate. *Windsor*, 133 S. Ct. at 2711. However, this fight is black and white—or it was black and white until several decades ago, when traditional marriage did not include interracial marriage. See *Pace v. Alabama*, 106 U.S. 583 (1883) (finding Alabama’s anti-miscegenation statute constitutional). The ruling in *Pace*

The legal presumption of paternity assigned to marriage simply does not work the way it was intended anymore. In fact, it serves as the foundation for the stripping away of equal protection for biological fathers the farther removed they become from the “traditional” marital unit. The presumption still serves a helpful administrative purpose in easily identifying fathers in simple circumstances, but that should be the limit of its role. Instead, a putative father should always be able to file a claim, and the courts should protect the inchoate relationship between father and child. Then, once the father has legal recognition, the court can award legal parental rights as appropriate, and impose financial responsibility commensurate with those rights. Thus, instead of an all-or-nothing distribution of rights, recognition based on biology is simply a starting point offering biological fathers the constitutional protection to which they are entitled.²³

The second change needed is to abandon the assumption that a caregiving unit can only have two legally recognized parents. Why can’t a child have more than one father, or more than one mother, more than two “primary legal” parents?²⁴ Therein lies the seed for reshaping a more complete, modern concept of paternity and parentage.²⁵ Imagine a circumstance where simple designations of “biological and legal parent” existed such that any iteration or combination of blended families could be accommodated and the

was later overturned in *Loving v. Virginia*, 388 U.S. 1 (1967), where the Supreme Court found that denying right of marriage to interracial couples violated Equal Protection and Due Process under the Fourteenth Amendment. *Loving*, 388 U.S. at 10–11. If the goal is truly a governmental interpretation of the Constitution that protects all persons equally, then it should protect everyone’s fundamental rights to marry, procreate, and live their lives without stereotypes built into the very laws designed to allow the same citizens to live those lives protected by the Constitution.

23. See generally Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. (2008) (discussing the benefits and burdens of using biology as a basis for legal parenthood).

24. See, e.g., 2013 Cal. Legis. Serv. S.B. 274, Ch. 564 (West); Joanna L. Grossman, *California Allows Children to Have More Than Two Legal Parents*, JUSTIA (Oct. 15, 2013), <http://verdict.justia.com/2013/10/15/california-allows-children-two-legal-parents>.

25. This Article addresses paternity, more specifically, the impact of the marital legal presumption on a sub-class of fathers as an illustration of why such presumptions regarding parental roles are problematic and need to change. However, this is a preliminary step in discussing the much larger issue of reconsidering parental forms as part of a broader discussion of how we conceive the concept of “parent.” I will touch upon parental forms, but I will not delve into the issues with regard to parental forms except as a natural extension of the discussion at hand.

state could still protect the interests of children. Biological parents would no longer lose their recognition and rights unless they voluntarily relinquished them, but the law would define how and to what extent those rights are exercised.²⁶ Parents, no matter the circumstance, could be recognized and protected inside or outside of the marital relationship and given status. Ultimately, this new paradigm of familial relationships would better honor the connection between parents and their children, regardless of their genesis.

Part II of this Article discusses the legal presumption of paternity, and how it has developed in this country. Parents' constitutional rights, specifically those of unmarried biological fathers, are examined in Part III. Part IV discusses reasons for reconsidering the purpose of legal presumptions of paternity. Finally, in Part V, different methods of effecting such changes are considered, including limiting the effects of legal presumptions of paternity and recognizing more than two primary parents as an appropriate caregiving unit.

II. LEGAL PRESUMPTIONS OF PATERNITY

Legitimacy has always been inextricably linked to a child born in wedlock.²⁷ In England, the common law provided a simple test to establish legitimacy of a child born of a lawful marriage.²⁸ Known as the “four seas” rule, the law provided that “if the husband be within the four seas, within the jurisdiction of the king of England, if the wife has issue, no proof is to be admitted to prove the child a bastard unless the husband has an apparent impossibility of procreation.”²⁹ In other words, if the four seas requirement was satisfied, and the child was born within a month or a day after marriage between parties of

26. For the purposes of this Article, involuntary termination of parental rights when there is neglect, abuse, or other issues between parent and child are not discussed.

27. “We term all bastards that are born out of lawful marriage.” THOMAS COVENTRY, COKE UPON LITTLETON 243 b § 399 (Saunders and Benning 1830). Thus a child born out of wedlock was deemed *fillius nullius*—the child of no one. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 129 (J. Chitty ed. 1857). Early jurisprudence in the United States recognized that while a bastard was generally considered the relative of no one, a mother had a right to custody and control of him as his natural guardian. *E.g.*, *Wright v. Wright*, 2 Mass. 109, 110 (1806); June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1309–10 (2004).

28. COVENTRY, *supra* note 27.

29. *Id.* Coke provided examples including “if the husband be but eight years old, or under the age of procreation.” *Id.*

full lawful age, the child was deemed legitimate.³⁰ Thus, the non-access of the legal father was the only legitimate factual question to be determined when the paternity of a child born into a marriage was at issue.³¹

The ability to rebut the presumption evolved over time so that if there was any chance the child was born of the marriage, then legitimacy was presumed; but if the evidence overwhelmingly suggested otherwise, then the presumption would be disregarded in favor of reality.³² Thus, as the New York Court of Appeals explained in *In re Findlay*,³³ “The presumption does not consecrate as truth the extravagantly improbable, which may be one, for ends juridical, with the indubitably false.”³⁴

There were good reasons for a simple rule that presumed legitimacy. Presumptions served a practical purpose at a time when there was no other way to determine a child’s parentage. It protected the mother from accusations of infidelity; neither party to a marriage could testify as such.³⁵ It also protected the passage of estates and property, creating a simple rule for which children qualified as issue.³⁶

Initially, the American courts took a similar view, although there was some recognition that the level of formalism built into the English test led in some instances to ridiculous results.³⁷ As time has

30. *Id.*

31. See *Shuler v. Bull*, 15 S.C. 421, 428–29 (1881) (quoting *State v. Shumpert*, 1 S.C. 87 (1869)). That rule, however, was later overruled in *Pendrell v. Pendrell*, 2 Strange 925 (1732).

32. See *In re Findlay*, 170 N.E. 471, 473 (1930); see also *Serafin v. Serafin*, 258 N.W.2d 461 (Mich. 1977) (discussing the evolution of the ability to rebut the presumption).

33. 170 N.E. 471 (1930).

34. *Id.* at 473.

35. This is more commonly known as Lord Mansfield’s rule. It provided that evidence could not be offered in court to bastardize a child that was otherwise born of a marriage. *Goodright v. Moss*, 2 Cowp. 591, 592 (1777); see *Serafin*, 258 N.W.2d at 464 n.1 (Coleman, J., concurring). However, as a practical matter, evidence could be offered to prove or disprove the marriage itself, and the time of birth to establish it actually occurred during the marriage. *Goodright*, 2 Cowp. at 593–94.

36. See, e.g., *Page v. Dennison*, 1 Grant 377, 380 (Pa. 1856) (opining that the English ruling class preferred such a restrictive rule because it provided a “mode of ascertaining the line of succession in their tenants, and their other rights of lordship which was much more easily understood than any legitimate process of arriving at the real truth”).

37. While early American courts continued to recognize the concept of *pater est quem nuptioe demonstrant*, there was recognition that the general rule had undergone some changes that permitted introduction of evidence to overcome the presumption. *Shuler v. Bull*, 15 S.C. 421, 422–23 (1881). The court recognized that “policy, public decency, and the peace of families” could still be honored while making more realistic inquiries into whether a child was actually the

passed, the states have shifted positions on the issue of a putative father's right to maintain an action for paternity with respect to a child born of a marriage.

Some states still refuse to recognize a putative father's right to challenge the marital presumption. In Alabama for example, no one, including a biological father, has standing to challenge the paternity of a child born of a marriage except the presumed legal father.³⁸ Recently, an Alabama court reaffirmed the strident nature of this policy, refusing to permit a biological father to intervene in a divorce proceeding where the presumed father sued for divorce on the grounds of adultery, sought a paternity determination, and then refused to cede his paternal rights once it was established he was not the biological father.³⁹

In Florida, a putative father generally has no right to maintain a paternity action where a child is born of a marriage. There is an exception, but it requires the father to demonstrate the following

issue of a particular marriage such that the fact of the marriage alone was not necessarily enough. *Id.* The Pennsylvania Supreme Court went further, noting that while there was a time that "courts paid very little regard to the fact of paternity, and satisfied themselves with the facts of marriage and *maternity* in questions of heirship" such strict adherence to the maxim of a man who marries a woman becomes the father of her children had become shocking to "modern notions." *Page*, 1 Grant at 379–80. Thus, in a progressive stance, the court aptly noted that allowing absurd notions of ancient jurisprudence to be perpetuated should not be tolerated as "a system generally retains the dregs of an error, long after it has been discovered and condemned." *Id.* at 380–81. In comparison to the progressive stance taken by the Pennsylvania Supreme Court in 1856, the Fifth District Court of Appeal in Florida in 2001 took the stance that a child born of a marriage was the issue of that marriage even though the wife admitted an affair with the man challenging paternity, and that man had been permitted to visit with the child and offered financial support. *Bellomo v. Gagliano*, 815 So. 2d 721 (Fla. 5th Dist. Ct. App. 2002). Thus, while the courts may have sidestepped the dregs of imposing paternity on an unwilling legal father, modern courts are still reluctant to recognize paternity of a willing biological father outside a legal marriage who has not otherwise voluntarily ceded his rights. Clearly, some dregs of error remain.

38. ALA. CODE § 26-17-607(a) (2013); *Ex parte* C.A.P., 683 So. 2d 1010, 1012 (Ala. 2000). In *C.A.P.*, the Alabama Supreme Court justified this position, even where the child was conceived while the biological parents were cohabitating, but was born after the biological mother married another man, because "it is not logical that two men could be presumed to be the child's father. The presumption in favor of [the husband] is an ancient one, supported by logic, common sense, and justice." *Id.* at 1010–11 (alteration in original) (quoting *Ex Parte Presse*, 554 So. 2d 406, 412 (Ala. 1989)).

39. *D.F.H. v. J.D.G.*, 125 So. 3d 146, 148 (Ala. Civ. App. 2013). "The court finds that the presumption that [the husband] is the father of the child born of his marriage is among the weightiest of presumptions in the law, and the relationship between [the child and the husband] as daughter and father should not be overcome even if the allegations of [D.F.H.] are true. [D.F.H.] assumed the risk that this very circumstance would occur when he entered into a sexual relationship with [the wife]. While [D.F.H.'s] consequences are substantial, the court does not have the authority to overturn the long-standing law in the area—law which protects innocent children from the mistakes of adults." *Id.* (citing trial court's opinion).

three things: (1) the biological mother assents to the paternity action; (2) the biological father has an established relationship with the child; *and* (3) the legal father has been remiss in some way; or if he can otherwise demonstrate the marriage is no longer “intact.”⁴⁰

Other states have given putative fathers a conditional right to challenge paternity. The Colorado Supreme Court upheld a putative father’s equal protection claim and found that he was entitled to bring an action for paternity of a child born of an intact marriage during the same period that the mother of that child was entitled to bring an action against him under the Uniform Parentage Act.⁴¹ Thus, an unwed biological father has the right to challenge paternity for five years in Colorado.⁴²

40. *See* J.S. v. S.M.M., 67 So. 3d 1231 (Fla. 2d Dist. Ct. App. 2011) (finding no right to maintain action where child born and conceived during marriage and married parents oppose paternity claim); *Bellomo*, 815 So. 2d at 721 (finding putative father had no right to challenge presumption where both mother and legal father objected, even though he had regularly visited child for first twelve months of child’s life and offered to contribute financially); *Fernandez v. McKenney*, 776 So. 2d 1118 (Fla. 5th Dist. Ct. App. 2001) (permitting paternity claim where biological father raised children most of their lives, children were born of estranged marriage, legal father failed to support financially although he still wanted visitation, and mother was now married to biological father); *S.D. v. A.G.*, 764 So. 2d 807 (Fla. 2d Dist. Ct. App. 2000) (putative father could not intervene in divorce proceeding to challenge paternity where legal parents opposed, more than two and a half years had passed, and putative father had no relationship with child); *I.A. v. H.H.*, 710 So. 2d 162 (Fla. 2d Dist. Ct. App. 1998) (holding putative father has no right to initiate paternity proceeding if both married parents objected); *see also* *Daniel v. Daniel*, 695 So. 2d 1253 (Fla. 1997) (holding legal father no longer required to support child after marriage ended and father had not committed to supporting child); *Dep’t of Health and Rehab. Servs. v. Privette*, 617 So. 2d 305 (Fla. 1993) (“Once children are born legitimate, they have a right to maintain that status both factually and legally if doing so is in their best interests.”). *But see* *Lander v. Smith*, 906 So. 2d 1130 (Fla. 4th Dist. Ct. App. 2005) (holding putative father could challenge paternity, even when both married parents objected, where child was conceived and born while mother was married but separated; biological father’s name was placed on birth certificate; he offered support; and he had relationship with child).

41. *R. McG. v. J.W.*, 615 P.2d 666, 671 (Colo. 1980) (addressing both federal and state constitutional claims). The court held that “so long as the UPA grants a natural mother judicial access for a period of years to seek a determination of paternity against the natural father of a child born during the marriage of the natural mother to another, equal protection of the laws under the United States and Colorado constitutions mandates that a claiming natural father be granted judicial access and standing to establish his paternity of that child during that same period of time.” *Id.* (interpreting CO. REV. STAT. §§ 19-6-105, 107 (1978)). Reflecting an undercurrent present in so many opinions, Justice Lohr, while conceding some unwed natural fathers may be entitled to parental rights, stated that “it requires more imagination than I can summon to find any legitimate expectation of a legally recognized relationship based solely on the blood ties between the child conceived of an adulterous relationship and the natural father of that child.” *Id.* at 676 (Lohr, J., dissenting).

42. *Id.* at 671 (majority opinion).

Similarly, the Supreme Court of Massachusetts recognized that, as a matter of policy, a putative father could maintain an action in equity to challenge the paternity of his biological child born of the mother's marriage to another man, but only if he could demonstrate a substantial parent-child relationship by clear and convincing evidence.⁴³ Clearly, this kind of evidentiary requirement can be daunting because demonstrating a sufficient relationship as a threshold matter will be difficult in all but the most unusual circumstances because it requires access.⁴⁴

On the other hand, the Texas Supreme Court has held that unmarried putative fathers have a right to seek paternity even if the married mother and father oppose the action.⁴⁵ The court clarified, however, that such a right would only extend to fathers whose "early and unqualified acceptance of parental duties" could be demonstrated.⁴⁶

43. *C.C. v. A.B.*, 550 N.E.2d 365, 371–72 (Mass. 1990). The court carved out this equity exception even though there was a Massachusetts statute that did not otherwise permit a putative father to seek a paternity determination and the Supreme Court itself had decided several years earlier such a claim was not cognizable. *Id.* at 368. In 1985 the Massachusetts Supreme Court had held that a putative father had no constitutional or common law right to challenge the paternity of a child conceived during an intact marriage. *P.B.C. v. D.H.*, 483 N.E.2d 1094 (Mass. 1985). In that case, the child was conceived while the mother was married, born after the mother was divorced, and the putative father sought paternity testing and an adjudication after the mother remarried the legal father. *Id.* The court based its decision on affording legitimacy to children wherever possible and "strengthening and encouraging family life for the protection and care of children." *Id.* at 1099.

44. *See, e.g.*, *C.D. v. S.M.*, 978 N.E.2d (2012).

45. *In re J.W.T.*, 872 S.W.2d 189 (Tex. 1994). The court, relying on state constitutional grounds, found that a statute that prevented putative fathers from making such claims violated due process. *Id.* The unusual facts of this case indicated that the child was likely conceived while the married mother was cohabitating with the putative father during her divorce from her husband, with whom she later reconciled. *Id.*; *see also* *Henderson v. Wietzkowski*, 841 S.W.2d 101 (Tex. Ct. App. 1992) (holding statute prohibiting putative father from bringing paternity action violated due course of law provision of State Constitution); Wolfgang Hirczy, *Larry Succeeds Where Michael Failed: Texas Courts Recognize Parental Rights Claims Denied by the United States Supreme Court*, 59 ALB. L. REV. 1621 (1996) (discussing the expansion of individual rights on state constitutional grounds).

46. *In re J.W.T.*, 872 S.W.2d at 198. Texas law permits a putative father to file a paternity challenge within the first four years of a child's birth. TEX. FAM. CODE ANN. § 160.607 (Vernon 2011). However, a presumed father may challenge paternity at any time on the basis of fraud. *Id.*

III. UNMARRIED BIOLOGICAL FATHERS AND THE RIGHT TO PARENT

A. *The Supreme Court's View*

The Supreme Court acknowledges that “the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”⁴⁷ Indeed “freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”⁴⁸ Thus, the Due Process Clause has been invoked to protect the integrity of the family unit.⁴⁹ However, the Court has acknowledged that “[t]o [simply] say that the test of equal protection should be the ‘legal’ rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such ‘legal’ lines as it chooses.”⁵⁰

At the heart of any Supreme Court decision regarding paternity is a recognition, on some tangible level, a biological parent’s connection to his or her child is an inalienable right, tied to life, liberty, and the pursuit of happiness, and it is a connection that should only be severed by the state under limited circumstances.⁵¹ However, Justice Stewart, echoing a widely held belief at the time, posited that a biological father’s parental rights are inferior to those of the mother. He wrote that “[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring . . . 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.”⁵² Thus, in Justice Stewart’s view, biology merely

47. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (quoting *Prince v. Massachusetts*, 321 U.S. 158 (1944)).

48. *Id.* (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974)).

49. *Cleveland Bd. of Educ.*, 414 U.S. at 639–40.

50. *Glonn v. Am. Guarantee & Liab. Ins. Co.*, 391 U.S. 73, 75–76 (1968).

51. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding in a case involving involuntary sterilization that procreation is a basic, fundamental right).

52. *Lehr v. Robertson*, 463 U.S. 248, 260 & n.16 (1983) (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)). Justice Stewart first writes that parental rights (presumably those that deserve constitutional protection) require more than just a biological connection to a child but then he suggests that a woman acquires them via gestation and birth—even though she has not shown any indication of an intent to care for the child, support the child, or to develop a substantial relationship with the child. *Id.* As if to punctuate the dated notions he espoused, Justice Stewart also indicated that when a biological father and mother’s wishes

presents an opportunity for a natural father to develop a relationship with his natural child, but to realize that opportunity, an unwed father must take some affirmative action to “grasp that opportunity and accept . . . some measure of responsibility for the child’s future in order to enjoy ‘the blessings of the parent-child relationship.’”⁵³ However, once that opportunity has been grasped, the Court has acknowledged that, “a father, no less than a mother, has a constitutionally protected right to the ‘companionship, care, custody, and management’ of ‘the children he has sired and raised.’”⁵⁴

More recently, in *Adoptive Couple v. Baby Girl*,⁵⁵ Justice Scalia observed that the Court’s decision “needlessly demean[ed] the rights of parenthood.”⁵⁶ Justice Scalia observed:

It has been the constant practice of the common law to respect the entitlement of those who bring a child into the world to raise that child. We do not inquire whether leaving a child with his parents is “in the best interests of the child.” It sometimes is not, he would be better off raised by someone else. But parents have their rights, no less than children do. This father wants to raise his daughter and the

conflict, it is in the best interest of children to favor the mother as her parental rights take precedence over any substantive constitutional claims the biological father may have in that circumstance. *See Caban*, 441 U.S. at 397 (Stewart, J., dissenting). Justice Stewart’s comment is all the more troubling because *Caban* involved an adoption proceeding that would have severed the biological father’s relationship with his children completely.

53. *Lehr*, 463 U.S. at 262. Of course, a married biological father, or frankly, a man married to the biological mother, has no comparable requirement as marriage creates a presumption he has affirmatively undertaken the care of the child financially, which is the subtext that underlies many of these decisions in addition to a bias in favor of a married family versus a natural biological family.

54. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652 (1975). *Weinberger* involved a challenge to the Social Security Act by a widower who wished to stay home with his children after his wife passed away. The Act permitted payment of benefits to deceased workers’ widows, but not to widowers, based on an overly generalized view that only mothers would want to stay home and care for their children rather than work. *Id.* at 643. At the time, cases before the Supreme Court began to reflect attempts to diminish gender stereotyping that damaged women’s ability to work, but as *Weinberger* illustrates, the underlying stereotype cut both ways, harming a woman’s ability to provide for her family and harming a father’s ability to choose to exit the workforce and be the primary caregiver for his children instead of the primary financial support for his family. By recognizing that men did not have to be primary earners and that they may too want to stay home with their children, the Court’s decision protected both men and women from “archaic and overbroad” generalizations. *Id. But see Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

55. 133 S. Ct. 2552 (2013).

56. *Id.* at 2572 (Scalia, J., dissenting).

statute amply protects his right to do so. There is no reason in law or policy to dilute that protection.⁵⁷

Unfortunately, the primary Supreme Court jurisprudence with respect to unmarried biological fathers, particularly those whose children are born of a marriage, is at odds with Justice Scalia's observation in *Baby Girl* and more aligned with Justice Stewart's opinion.⁵⁸ In the Supreme Court's seminal cases on the rights of unwed biological fathers, *Stanley v. Illinois*⁵⁹, *Quilloin v. Walcott*⁶⁰, *Caban v. Mohammed*⁶¹, *Lehr v. Robertson*⁶², and *Michael H. v. Gerald D.*,⁶³ the beginning premise is that an unwed biological father is not a "parent."⁶⁴ The corollary, of course, is that an unwed biological father does not *intend* to be a parent.⁶⁵ Both of these presumptions are based solely on the lack of marital status. This is a problem in and of itself,⁶⁶ but it is compounded by the fact that these are fathers who, as a group, are not perceived to have the same kind of connection to their children, simply because they are men and do not give birth.⁶⁷

The Supreme Court, in defining both parental rights and the rights of illegitimate children, has come to conclude that unwed biological fathers will never enjoy the same instant recognition as a

57. *Id.* This is interesting considering Justice Scalia would not afford similar rights in *Michael H.*, where he chose to protect the more socially desirable family unit at the expense of a biological father's established relationship with his daughter. *Michael H.*, 491 U.S. at 129.

58. *Adoptive Couple*, 133 S. Ct. at 2571–72 (Scalia, J., dissenting); *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting).

59. 405 U.S. 645 (1972).

60. 434 U.S. 246 (1978).

61. 441 U.S. 380 (1979).

62. 463 U.S. 248 (1983).

63. 491 U.S. 110 (1989).

64. Instead, he has the *opportunity* to become a parent. *Lehr*, 463 U.S. at 262 (observing that the biological connection offers a natural father the opportunity to develop a parent-child relationship with his offspring).

65. *See, e.g., Stanley*, 405 U.S. at 650, 665–66; *Lehr*, 463 U.S. at 263 (marriage is best way for biological father to protect parent-child relationship).

66. What this means, in essence, is that in order to best protect his fundamental right to parent, a biological father *must* marry the mother of his child. To do anything less is to risk that relationship, even if the father has otherwise done everything a married father might do, and perhaps even more. Considering that the right to marry, and conversely the right not to marry, is also a fundamental right, it creates a troubling situation where a man may be forced to marry when he would otherwise not want to do so. It also means that his ability to protect his relationship with his child is dependent upon a third person who may not want to marry and who retains near complete control of the father's parent-child relationship regardless of his desire to parent and his connection with that child.

67. *See Kisthardt, supra* note 4.

parent as biological mothers.⁶⁸ Further, absent affirmative acts, those fathers may be deprived of their parent-child connection with a biological child without their consent or, in some instances, without their knowledge, and sometimes even in the face of active fraud on the part of the mother.⁶⁹

B. Stanley, Quilloin, Caban, Lehr, and Michael H.—*Fashioning a Framework for Unwed Biological Father's Rights—A Dantean Journey in Three Parts*

1. *Stanley v. Illinois*—You Are Not a
“Real” Parent but if No One Else Is Available,
You Might Do

In Illinois in the mid-twentieth century, the starting point for considering any man's parental connection to a child was not whether the man was the biological father of that child, but rather, whether the man was *married* to the mother of that child.⁷⁰ That relationship, that official governmental act, was the fountainhead from which all paternal rights flowed because, according to the state

68. See, e.g., *Lehr*, 463 U.S. at 262.

69. *Lehr*, 463 U.S. at 261–63; *In re Adoption of A.A.T.*, 196 P.3d 1180, 1184–85 (Kan. 2008) (finding father not entitled to notice of adoption even where mother lied and took extreme measures to hide child's birth from father, because he failed to affirmatively assert his parental rights prior to and at the time of the child's birth). In *A.A.T.*, the Kansas Supreme Court noted other instances where deception on the mother's part, or lack of awareness on the father's, did not prevent a termination of the natural father's right to his relationship with his child. *Id.* at 1194 (citing *In re Adoption of S.J.B.*, 745 S.W.2d 606 (Ark. 1998) (holding that although father unaware of child, notice of adoption proceeding not constitutionally required when “biological father was not interested enough in the outcome of his sexual encounter . . . to even inquire concerning the possibility of her pregnancy”); *In re Zacharia D.*, 862 P.2d 751 (Cal. 1993) (holding biological father who was unaware of paternity until child turned fifteen months old was not constitutionally entitled to reunification services); *In re Tinya W.*, 765 N.E.2d 1214, 1218 (Ill. 2002) (finding father unfit based on failure to provide any financial or emotional support to child, despite father's lack of awareness of paternity); *In re Paternity of Baby Doe*, 734 N.E.2d 281 (Ind. App. 2000) (finding state's interest in child's early permanent placement precludes father from contesting adoption when father unaware of paternity and not timely included on putative father registry). In *A.A.T.*, the court concluded that the natural father's constitutional rights were not violated because the mother's private act, not a state action, led to the adoption of his child against his wishes. *A.A.T.*, 196 P.3d at 1198. Instead, the state had a right to protect the child where the mother did not want the child and surrendered him for adoption. *Id.* at 1197–98. Carbone has noted that several, but not all, states have given unwed fathers rights beyond those offered by the Supreme Court. *Carbone*, *supra* note 27, at 1323.

70. In Illinois at the time, a parent was statutorily defined as “the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent.” *Stanley*, 405 U.S. at 650 (quoting 37 ILL. COMP. STAT. ANN. § 701-14 (West 1972)).

of Illinois, most unmarried fathers were considered unsuitable and neglectful parents.⁷¹ It was such that, if an unwed mother died, her child became a ward of the state, regardless of whether the biological father was part of his children's lives or whether he was a fit parent.⁷² The biological father of those children was not even afforded a right to be heard; instead he simply was, to borrow a phrase, *pater nullius*, the father of no one.⁷³

These presumptions were at the heart of the controversy in *Stanley v. Illinois*. In that case, Peter Stanley cohabitated with Joan Stanley on and off for eighteen years, and during that time they had three children.⁷⁴ When Joan died, the children were declared wards of the state because Peter and Joan had never married.⁷⁵

Peter brought an equal protection claim arguing that he was not being treated the same as unwed biological mothers or married or divorced biological fathers.⁷⁶ He argued that no other class of biological parents were required to come before the courts of the state of Illinois to prove their fitness to be a parent before being recognized as such.

The Supreme Court held that the subject statute violated due process because Stanley, as an unmarried biological father, was entitled to a hearing to demonstrate he was a fit parent.⁷⁷ The

71. *Id.* In its brief, the State of Illinois submitted that based both on history and culture there were “very real differences . . . between the married father and the unmarried father, in terms of their interests in children and their legal responsibility for their children” and that the presence or absence in the home on a day-to-day basis is a very real difference between married and unmarried fathers, and that studies support the proposition “that men are not naturally inclined to childrearing.” *Id.* at 654 n.5 (citations and internal quotation marks omitted). It also took the position that illegitimate children required more protection than legitimate children because a “legitimate child usually is raised by both parents with the attendant familial relationships and a firm concept of home and identity, the illegitimate child normally knows only one parent—the mother.” *Id.* at 653 n.5.

72. *See In re Stanley*, 256 N.E.2d 814 (Ill. 1970). Conversely, married fathers, divorced fathers, widowed fathers, separated fathers, and unwed mothers were entitled to a presumption they were fit to raise their children. *Stanley*, 405 U.S. at 647.

73. Just as a child who is born outside of a marriage was deemed *fillius nullis*, so too an unwed father of an illegitimate child at that time in Illinois simply had no legal status as a parent. His child's illegitimacy and his marital status rendered him presumptively unfit, but more importantly it denied him any opportunity to be heard on the matter. *Stanley*, 405 U.S. at 647.

74. *Id.* at 646.

75. *Id.*

76. *Id.*

77. In explaining the procedural due process problem with the state's presumption, Justice Douglas explained, “what is the state interest in separating children from fathers without a hearing designed to determine whether the father is unfit in a particular disputed case? We observe that the State registers no gain towards its declared goals when it separates children from

Supreme Court did not address the underlying statutory definition or the requirement that Stanley demonstrate his fitness to the court. The Court's primary concern was that the state failed to allow Stanley a hearing before presumptively terminating his rights and declaring his children wards of the state.⁷⁸

The Supreme Court's decision itself was somewhat contentious, and the dissenting justices took the majority to task for deciding a constitutional issue that had not been raised—procedural due process.⁷⁹ However, the negative space created by that decision spoke volumes about the Court's position on unwed biological fathers. In not ruling on the equal protection issue decided by the Illinois Supreme Court, the Court inherently found that unwed biological fathers do not have the same fundamental constitutional rights as biological mothers, whether married or not, and do not have the same rights as married biological or non-biological fathers.⁸⁰ In essence, Stanley's marital status made him presumptively unfit to parent.

A passage in the dissent is telling about the presumptions underlying this decision, both in the dissent and in the majority opinion. Chief Justice Burger wrote:

I believe that a State is fully justified in concluding, on the basis of common human experience, that the biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often *casual encounter*. This view is reinforced by the observable fact that most unwed mothers exhibit a concern for their offspring either

the custody of fit parents. Indeed, if Stanley is a fit father, the State spites its own articulated goal when it needlessly separates him from his family." *Id.* at 652–53.

78. In coming to this conclusion, the Court noted that "[i]t may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children." *Id.* at 654. Thus, the Court found that "all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody." *Id.* at 658.

79. *Id.* at 659–63 (Burger, C.J., dissenting).

80. *Id.* Interestingly, the dissent makes much of the fact that there was no adult with a legally enforceable obligation for care and support of the children, which is what necessitated the dependency proceeding in the first place. However, the reason that there was none was because the State of Illinois deprived Stanley of a legally recognized relationship from which such an obligation would flow. And, the State did so in the interest of illegitimate children because unwed biological fathers were not desirable parents.

permanently or at least until they are safely placed for adoption, while unwed fathers rarely burden either the mother or the child with their attentions or loyalties. Centuries of human experience buttress this view of the realities of human conditions and suggest that unwed mothers of illegitimate children are generally more dependable protectors of their children than are unwed fathers.⁸¹

Chief Justice Burger found these “generalizations” provided a sufficient basis to “sustain a statutory classification whose objective was not to penalize unwed parents but to further the welfare of illegitimate children.”⁸² As such, he refused to construe the Equal Protection Clause to require the statutory definition of *parent* to be drawn so “meticulously” to include “such *unusual* unwed fathers” like Stanley, while excluding the not so unusual unwed fathers who, according to Chief Justice Burger, as a group, want nothing to do with their illegitimate children.⁸³

2. *Quilloin v. Walcott*⁸⁴, *Caban v. Mohammed*⁸⁵, and
*Lehr v. Robertson*⁸⁶—The Adoption Cases—
You Are Not a Real Parent; Married People Are Real Parents

a. *Quilloin v. Walcott*

Leon Quilloin challenged the constitutionality of Georgia’s adoption laws, which denied an unmarried biological father the right to prevent the adoption of his illegitimate child, on equal protection grounds.⁸⁷

81. *Id.* at 665–66 (emphasis added).

82. *Id.* at 666. It seems naïve to think that this statutory classification was not designed to punish fathers who do not marry a woman with whom they have a child. The statutory classification essentially required marriage or, as the State put it, “a formal legal proceeding akin to marriage,” in order for Stanley to exercise his fundamental right to the care, custody, and companionship of his children. That is a penalty, and one that is drawn too broadly as it excludes an entire group of fathers from legal protection.

83. *Id.*

84. 434 U.S. 246 (1978).

85. 441 U.S. 380 (1979).

86. 463 U.S. 248 (1983).

87. *Quilloin*, 434 U.S. at 247. At the time, a child born in wedlock could not be adopted without the consent of each living parent who had not voluntarily surrendered their rights or been adjudicated unfit. *Id.* at 248. Unless an illegitimate child was otherwise legitimated by the biological father prior to the adoption, however, the mother was the only recognized parent and had exclusive authority to consent to an adoption. *Id.* at 249. In order to legitimate his child, a

Leon Quilloin and Ardell Williams had a child in December 1964.⁸⁸ Quilloin was listed as the father on the child's birth certificate, and the child was named Darrell Quilloin.⁸⁹ Quilloin and Williams never married or maintained a home together, and in September 1967, Williams married Randall Walcott.⁹⁰ For the first few years of the Walcotts' marriage, the child lived with his maternal grandmother, but he began living with the Walcotts in 1969.⁹¹ In 1976, Randall Walcott sought to adopt his stepson, and the adoption was granted over Quilloin's objection.⁹²

This case took up where *Stanley* left off, considering the "degree of protection a State must afford to the rights of an unwed father in a situation . . . in which the countervailing interests are more substantial."⁹³ The Court in *Quilloin* was faced with the dilemma of balancing the state's interests in recognizing the rights of biological mothers and fathers, both individually and in and among family units.⁹⁴ Ultimately, the Court had to determine whether the best-interests-of-the-child standard adequately protected Quilloin's parental rights when any other parent's rights in Georgia were protected by a standard measuring whether he or she was a "fit" parent.⁹⁵

The general rule regarding adoption in Georgia was that written consent of the living parents of the child was required.⁹⁶ However, an exception for illegitimate children was carved out, requiring only a mother's consent, unless the father had legitimated the child by

biological father had to either marry the mother and acknowledge the child as his own, or obtain a court order declaring the child legitimate and capable of inheriting from his father. *Id.*

88. *Id.*

89. *Id.* at 250 n.6.

90. *Id.* at 247.

91. *Id.* at 247 n.1.

92. *Id.* at 247.

93. *Id.* at 248. More substantial apparently than no available parent other than the state.

94. *Id.* at 248.

95. *Id.* at 254. In this case, the courts, both in Georgia and the Supreme Court, unnecessarily substituted "fit" with "best interests" based upon Quilloin's failure to marry Williams.

96. *Id.* at 248 n.2 (quoting GA. CODE ANN. § 74-403(1) (1975): "no adoption shall be permitted except with written consent of the living parents of a child"). Section 74-403(2) provides that consent is not required from a parent who has surrendered rights in an adoption proceeding, is found to have abandoned the child or failed to comply with court-imposed support orders, has had their parental rights terminated, is insane or otherwise incapacitated from giving consent, or cannot be found by diligent search. *Id.*

marriage or court order.⁹⁷ Quilloin had not attempted to legitimate the child until Walcott petitioned to adopt him.⁹⁸

Unlike *Stanley*, Quilloin's request for legitimation and visitation rights, as well as his objection to the adoption petition, were heard by the court.⁹⁹ The court found that Quilloin had never abandoned the child; he had provided financial support, albeit irregularly; and he had visited with the child and had given gifts to his son.¹⁰⁰ However, Williams had decided the child's contact with Quilloin was having a disruptive effect on her family.¹⁰¹ Furthermore, the child expressed the desire to be adopted by Walcott, although he also expressed a desire to continue to visit with Quilloin on occasion after the adoption.¹⁰² However, under Georgia law, the child could not be adopted unless his biological father's rights, including his right to visitation, were terminated.¹⁰³ The trial court granted the adoption, finding that it was in the best interests of the child.¹⁰⁴

The Supreme Court found that Quilloin's substantive due process rights were not violated by the application of a "best-interests-of-the-child" standard.¹⁰⁵ While the Court acknowledged that substantive due process would be violated if the state attempted to break up a natural family over the parents' objections without some showing of unfitness and based solely on the best interests of the child,¹⁰⁶ the Court again proceeded from a faulty assumption, that the relationship between Quilloin and his son was not a "natural family." Of course, the definition of a family unit, the one alluded to and given legal deference, was the family unit

97. *Id.* at 248 n. 3, 249 n.4.

98. *Id.* at 250. The law in Georgia was changed after this case in an attempt to ensure that biological fathers had notice and an opportunity to consent or object to an adoption.

99. *Id.* Thus, the due process concerns raised in *Stanley* were not present in this case.

100. *Id.* at 251.

101. *Id.*

102. *Id.* at 251 n.11.

103. *Id.* Comparing this circumstance to one in which Quilloin might have been married to Williams, no matter how briefly, further highlights the inequity in using marriage as a determinant for fatherhood. As a divorced father, Quilloin's less-than-stellar parenting and financial support would not have deprived him of his rights to visitation and custody of his son. He could not be deprived of those rights, let alone have them terminated, simply because the child's mother did not think it was beneficial for her "new" family.

104. *Id.* at 251. The trial court also decided that legitimation and visitation were not in the best interests of the child. *Id.*

105. *Id.* at 254.

106. *Id.* at 255 (Stewart, J., concurring) (quoting *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 862–63 (1977)).

where a marriage was involved, even though the stepparent seeking adoption was not the child's biological father. The Court was clear in explaining its rationale that this was not a case where an unwed father sought actual or legal custody of his child,¹⁰⁷ nor was it a case where the proposed adoption would place the child with an entirely new set of parents.¹⁰⁸ Instead,

the result of the adoption [was] to give full recognition to a family unit already in existence, a result desired by all concerned, except [Quilloin]. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than the adoption, and denial of legitimation, were in the "best interest of the child."¹⁰⁹

The problem, of course, is that bestowing full recognition on the family unit favored by law (the marital family unit of one mother and one father) is accomplished at the expense of another family unit that has been in existence as well.¹¹⁰ Thus, once again, although not as obviously as in *Stanley*, the Court suggested that unwed biological fathers are not parents because they have not affirmatively and legally sought to formalize their bond with their child's mother.¹¹¹ It

107. *Id.* Again, this begs the question. Quilloin was listed as the child's father on his birth certificate. He had access to the child. He supported the child financially and was not required by court order to do more than he was doing. In a family dynamic such as this, he may have felt he had what he wanted. He probably saw no need to legitimate his natural relationship with his son under those circumstances. He was not trying to break up the current "family." Rather, one can imagine he simply wanted to have a relationship with his son. However, because the child's mother decided it was no longer appropriate, he was denied those basic rights because his relationship existed outside the preferred marital unit.

108. *Id.*

109. *Id.*

110. In fact, one could argue there were three distinct family units in addition to the one the Court decided to protect. The first, the family unit of Quilloin and his son Darrell; the second, Quilloin, his son Darrell, and Darrell's mother, Williams; and the third, the family unit of Quilloin, Williams, Walcott, Darrell's step-father, Darrell, and Darrell's half-brother.

111. *Quilloin* fails in another interesting way because clearly Quilloin satisfied the "biology plus" standard in the sense that he acknowledged paternity and developed a relationship with his child. He is the father listed on the child's birth certificate. However limited, he had an ongoing relationship with his child; one that his child desired to continue. To truly protect his rights, particularly in this case, his legitimation petition should have been decided as others are and then if he objected there would be no adoption. At that point, the heart of the issue, visitation, could have been decided by the Court in the child's best interests. Evidence could have been offered by the child's mother on the disruption to the stepfamily. But instead, Quilloin was required to subject himself to things not required of any other "living parent" and to be content with lesser protections than those parents when he did seek legal recourse.

affirmed the Georgia statute that permitted unwed biological fathers to be treated differently than other “living” parents. And, in doing so, the Court favored marriage over biology as the proper indication of parenthood and afforded less constitutional protection to biological fathers because they are perceived as not being “real” parents.¹¹²

b. *Caban v. Mohammed*

Caban involved an equal protection challenge to a New York statute that treated unmarried biological parents differently with respect to consent to adoption.¹¹³ While Abdiel Caban and Maria Mohammed were living together and holding themselves out as husband and wife they had two children: David, in 1969, and Denise in 1971.¹¹⁴ Caban was listed as the children’s father on their birth certificates.¹¹⁵ The children lived with Caban until December 1973, when their mother moved out and married Kazin Mohammed in January 1974.¹¹⁶ Caban was able to see the children every weekend for the ensuing nine months because their maternal grandmother permitted him to do so.¹¹⁷ In September 1974, the children’s maternal grandmother took the children to Puerto Rico to live with her, with the plan that the Mohammeds would join them once they had saved enough money for a business.¹¹⁸

Instead, Caban traveled to Puerto Rico where their maternal grandmother permitted him to take the kids for a visit, but Caban returned to New York with the children.¹¹⁹ When she was unable to secure the children’s return from Caban, Mohammed filed a custody

112. In responding to Quilloin’s equal protection argument, the Court found that his interests were readily distinguishable from a separated or divorced father because although he was subject to the same child support obligation, “he never exercised actual or legal custody over his child, he never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child.” *Id.* at 256. What the Court says next is telling, however, as it observed that Quilloin “does not complain of his exemption from these responsibilities and, indeed, he does not even now seek custody of his child. In contrast, legal custody of children is . . . a central aspect of the marital relationship, and even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage.” *Id.* Again, the Court makes stereotypical assumptions about what a real father in a real family looks like and defers to the other aspect of this relationship—money.

113. *Caban v. Mohammed*, 441 U.S. 380, 381–82 (1979).

114. *Id.* at 382.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 383.

proceeding in New York.¹²⁰ Then, both parents and their respective spouses petitioned to adopt the children in early 1976.¹²¹

After a hearing and testimony, the court granted the Mohammeds' petition terminating Caban's parental rights and obligations.¹²² The surrogate based his decision on a New York statute that did not require an unwed father's consent to the adoption of his children, although he was entitled to an opportunity to be heard.¹²³ Conversely, Caban was not entitled to adopt his own children because Mohammed, as the children's biological mother, was permitted to object.¹²⁴

The Supreme Court found that it was clear the New York statute treated unmarried parents differently based solely on their sex.¹²⁵ The Supreme Court then found that such a distinction did not serve an important governmental objective based on the children's age, particularly in a case such as this one where the children had developed a relationship with Caban.¹²⁶ Thus, the Court rejected a broad, gender-based distinction based on any "universal difference between maternal and paternal relations at every phase of a child's development."¹²⁷ The Court also found the justification that such a distinction supported the state's interest in adoption of illegitimate children failed because the distinction did not bear a substantial relationship to the stated purpose, particularly in the case of older children.¹²⁸

In his dissent, Justice Stewart took issue with affording unwed fathers rights equal to unwed mothers because of the special needs of illegitimate children who start life with "formidable handicaps."¹²⁹

120. *Id.*

121. *Id.*

122. *Id.* at 383–84.

123. *Id.* at 384.

124. *Id.*

125. *Id.* at 388.

126. *Id.* at 389.

127. *Id.*

128. *Id.* at 391–93. The Court noted that an unmarried father's consent had never been required in New York, although parental consent had been required since the late 19th century. *Id.* at 390 n.8. The Court observed that there were no legislative reports explaining the reason for the choice to exclude unmarried fathers from the consent requirements. *Id.* The Court acknowledged, however, that one New York court found if unwed fathers' consent were required the adoption might be delayed or eliminated because of the "unavailability" of the natural father. *Id.* at 390 (quoting *In re Malpica-Orsini*, 331 N.E.2d 486, 490–91 (N.Y. Ct. App. 1975)).

129. *Id.* at 395.

Justice Stewart observed that the validity of a father's parental claims is traditionally determined based upon whether there is a legitimate familial relationship with the child's mother through marriage.¹³⁰ In other words, if a biological father is not married to the child's mother, his parental rights may not receive constitutional protection.¹³¹ In Justice Stewart's view, the lack of a legal tie to the biological mother provided a constitutionally valid ground for the distinction and the loss of a biological father's constitutional rights without further consideration.¹³² He further explained that when a mother's and father's wishes about the child conflict, "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."¹³³

While Caban ultimately was able to protect his relationship with his children, the case is troubling because he was the biological father who had been living with his children, who was forced to seek adoption to assert his rights against a stepfather.¹³⁴ *Caban* is arguably an anomaly because it was really a custody battle dressed in adoptive clothes. Unfortunately, given the structure of the adoption statutes in New York at the time, the advantage was decidedly with Mohammed, and she had legal power to completely sever Caban's connection with his children, an advantage she would not have had if they were married.¹³⁵ While she might have curtailed his access to the children, he would still have been their father, and would still have been entitled to access if they had been previously married.¹³⁶

Even more troubling is that this case was not about visitation, who would have primary custody, who got to talk to the children on the phone, or who could be involved in the children's school functions. This was an all-or-nothing decision with Caban's relationship with his children hanging in the balance. Justice Stewart was contemplating a complete termination of a father's relationship

130. *Id.* at 397.

131. *Id.* ("The Constitution does not require that an unmarried father's substantive parental rights must always be coextensive with those afforded to fathers of legitimate children.")

132. *Id.*

133. *Id.* at 397.

134. *Id.* at 380.

135. *Id.* at 385-87.

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

with his children, no matter how significant, and the loss of that father's constitutional right to the care, custody, and companionship of those children. Thus, if an unwed biological father disagrees with the biological mother and she chooses to end that relationship, as occurred in *Quilloin*, regardless of the relationship between parent and child, in most circumstances, the Court is not reluctant to give that father "less constitutional protection."¹³⁷

What becomes apparent upon a reading of both dissents is that the justices were more preoccupied with removing a child's stigma of illegitimacy than in protecting the constitutional right of that child's father to be a part of that child's life.¹³⁸ Both dissents discuss "custody" of the child at birth.¹³⁹ While there may be a justification for having the biological mother maintain presumptive custody of a child under these circumstances, there is a significant difference between designating presumptive custody—and perhaps collateral visitation issues—and the absolute termination of parental rights without consent.

Caban stands in stark contrast to the other cases involving competing interests and desires between unwed biological fathers and mothers in that the Court chose to award the natural father rights based on the preexisting, significant relationship he maintained with his children. However, the ever-present discussion of marriage reflects a presumption that unmarried fathers are different.

c. *Lehr v. Robertson*

In 1983, the Supreme Court again took up the issue of the proper level of protection required when an unwed biological father's attempt to exercise his parental rights conflicted with the desires of the child's biological mother.¹⁴⁰ The case involved the termination of an unwed biological father's parental rights in favor of a stepparent adoption over that father's objection and petition for visitation.¹⁴¹

137. This is unfortunate because given an unwed biological father's vulnerable position *vis a vis* a biological mother who has conflicting views, and his vulnerable status as an "unmarried" father, he arguably requires more protection in order to properly exercise his parental rights, not less.

138. *Id.* at 402–04 (Stevens, J., dissenting).

139. *Id.* at 394–401 (Stewart, J., dissenting); *id.* at 401–17 (Stevens, J., dissenting).

140. *Lehr v. Robertson*, 463 U.S. 248, 248–49 (1983).

141. *Id.* at 250.

Jonathan Lehr and Lorraine Robertson had a daughter, Jessica, out of wedlock on November 9, 1976.¹⁴² Lehr lived with Robertson prior to Jessica's birth and visited her in the hospital when Jessica was born, but he did not live with them after Jessica was born, nor did he provide financial support or, as the Court noted, "offer to marry" Lorraine.¹⁴³ His name was not listed on Jessica's birth certificate.¹⁴⁴

Lorraine married Richard Robertson eight months after Jessica was born and on December 21, 1978, the Robertsons filed an adoption petition in Ulster County, New York.¹⁴⁵ Lehr was given no notice of the proceeding.¹⁴⁶ However, approximately one month later, Lehr filed a "visitation and paternity petition" in Westchester County, seeking a determination of paternity, an order of support, and reasonable visitation privileges.¹⁴⁷ Lorraine received notice of this proceeding in February 1979.¹⁴⁸ On March 3, 1979, Lehr received notice of the pending adoption proceeding for the first time.¹⁴⁹ However, Lehr was advised on March 7, 1979, that, despite his pending paternity action, the judge in Ulster County had signed the adoption order.¹⁵⁰ Because of the order of adoption, Lehr's paternity action was dismissed.¹⁵¹

Lehr challenged the adoption order on several grounds, but each New York court that reviewed the case found that the trial court did not abuse its discretion in signing the order without providing notice to Lehr, even in light of the pending paternity action.¹⁵²

Lehr advanced two arguments before the Supreme Court, each challenging the constitutionality of the New York statutes that did not require notice to a putative father who did not satisfy the state's recognition requirements. First, he argued that a putative father's

142. *Id.*

143. *Id.* at 252.

144. *Id.*

145. *Id.* at 250.

146. *Id.* at 248.

147. *Id.* at 252.

148. *Id.*

149. *Id.* at 253.

150. *Id.*

151. *Id.*

152. *Id.* at 253–55. The Court of Appeals also specifically found that *Caban*, which was decided by the Supreme Court about two months after the entry of adoption, was inapplicable because it was not retroactive. *Id.* at 254.

actual or potential relationship with his child is a liberty interest that could not be destroyed without due process.¹⁵³ Second, he argued that the “gender-based classifications 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.”¹⁵⁴

The Court, again focusing on the family as the place from which parental rights emanate, stated that

[t]he 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. 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.¹⁵⁵

The opening line of Justice Stevens’s opinion is, once again, quite telling: “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.”¹⁵⁶ Lehr may have been absent from Jessica’s life for a period of time, but the underlying facts indicate that Lehr was seeking both a determination of paternity and visitation with Jessica when her mother and stepfather sought to have her adopted.¹⁵⁷ And, of course, Justice Stevens does not acknowledge the whole story when framing the issue factually.¹⁵⁸

The Court, relying on Justice Stewart’s opinion in *Caban*, drew a distinction between the “developed parent-child relationship” in *Stanley* and *Caban*, and the potential relationship in *Quilloin* and *Lehr* to explain how an unwed biological father must *prove* his

153. *Id.* at 255.

154. *Id.*

155. *Id.* at 256–57. This begs the question as to why this preference is “appropriate” and what, of course, is a “formal” family. And, if the formal family is so critical to society, then why permit divorce or, more importantly, remarriage thereafter?

156. *Id.* at 249–50. I would suggest Justice Stevens’s framing of the issue reflects an inherent bias against unwed fathers; here, yet again, Justice Stevens is exposing just another deadbeat scofflaw dad who failed to marry the mother of his child and now wants the Equal Protection Clause to protect his relationship with that child.

157. *Id.* at 252.

158. *Id.* at 267–68.

parental rights *deserve* constitutional protection.¹⁵⁹ In the Court's view the "mere existence of a biological link" did not merit equivalent constitutional protection, a constitutional protection that is afforded to biological mothers and married fathers, even if they later separate or divorce from the child's mother, and even if they are not the child's biological father.¹⁶⁰

The Court expressed the distinction, and the test for "biology plus,"¹⁶¹ as follows: "When an unwed father demonstrates his full commitment to the responsibilities of parenthood by 'coming forward to participate in the rearing of his child,' his interest in personal contact with his child acquires substantial protection under the due process clause."¹⁶² The basis for the distinction, according to Justice Stevens, is "the importance of the familial relationship, to the individuals involved and to the society, stem[ming] from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promoting a way of life through the instruction of children as well as for the fact of blood relationships."¹⁶³

In addressing *Lehr*'s equal protection claim, the Court noted that the interest in efficient adoption procedures in New York was of vital importance, in part, because "illegitimate children whose parents never marry are 'at risk' economically, medically, emotionally, and educationally."¹⁶⁴ The Court held that "[i]f one parent has an established custodial relationship with the child, and the other parent has either abandoned or never established a relationship, the Equal

159. *Id.* at 261. I would actually take issue with the Court's characterization of the relationship in *Quilloin* as a "potential" relationship. *Quilloin* was present in his child's life and to such an extent that the child expressed a preference to continue seeing *Quilloin*. *Quilloin* is more aptly characterized as a preference of a marital family unit over a natural family unit. And, in that sense, it is more like *Caban* than *Lehr*.

160. *Id.*

161. Carbone, *supra* note 27, at 1132.

162. *Lehr*, 463 U.S. at 261.

163. *Id.* (quoting *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1977) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231–33 (1972))). It is interesting that the Court chooses to cite this passage from *Foster Families* and *Yoder*. Both cases involved protection of the family unit in terms of raising children, they did not deal with the loss of parental rights. In those cases, the Court was protecting the parents' rights from State interference, not choosing marriage over biology and determining who was a parent. *Foster Families*, 431 U.S. 816; *Yoder*, 406 U.S. 205.

164. *Lehr*, 463 U.S. at 266 n.25 (citing *E. CRELLIN ET AL., BORN ILLEGITIMATE: SOCIAL AND EDUCATIONAL IMPLICATIONS* 96–112 (1971)).

Protection Clause does not prevent a state from according the two parents different legal rights.”¹⁶⁵

The dissent’s recitation of the facts in *Lehr* illustrates why basing a fundamental right to due process and equal protection with respect to parental rights on a “developed relationship” is fraught with peril:

According to Lehr, Lorraine acknowledged to friends and relatives that Lehr was Jessica’s father. Lorraine told Lehr that she had reported to the New York Department of Social Services that he was the father. Lehr visited Lorraine and Jessica every day during Lorraine’s confinement. According to Lehr, from the time Lorraine was discharged from the hospital until August, 1978, she concealed her whereabouts from him. During this time Lehr never ceased his efforts to locate Lorraine and Jessica and achieved sporadic success until August, 1977, after which time he was unable to locate them at all. On those occasions when he did determine Lorraine’s location, he visited with her and her children to the extent she was willing to permit it. When Lehr, with the aid of a detective agency, located Lorraine and Jessica in August 1978, Lorraine was already married to Mr. Robertson, Lehr asserts that at this time he offered to provide financial assistance and to set up a trust fund for Jessica, but that Lorraine refused. Lorraine threatened Lehr with arrest unless he stayed away and refused to permit him to see Jessica. Thereafter Lehr retained counsel who wrote to Lorraine in early December 1978, requesting she permit Lehr to visit Jessica and threatening legal action on Lehr’s behalf. On December 21, 1978, perhaps as a response to Lehr’s threatened legal action, appellees commenced the adoption action at issue here.¹⁶⁶

165. *Id.* at 267–68. The problem, of course, is that a biological mother is presumed to have a custodial relationship or at a minimum an established relationship with a child by virtue of gestation. In that sense, she is treated differently by the State in that she is given rights that are not afforded to biological fathers, offending notions of equal protection. Additionally, while the Court talks about “different” legal rights for mothers and fathers, the stark reality is that the difference is between having any legal rights with regard to one’s children or none at all.

166. *Id.* at 268–69.

The appropriate starting point for recognizing a fundamental right to due process in the first place should not be the weight of the facts in the relevant circumstance, but rather the “*nature* of the interest at stake . . . to see if the interest is within the Fourteenth Amendment’s protection.”¹⁶⁷ “The ‘biological connection’ is itself a relationship that creates a protected interest” because “the usual understanding of ‘family’ implies biological relationships.”¹⁶⁸ Thus, the dissent properly frames the interest as that of a natural parent, not of a married father.¹⁶⁹

3. *Michael H. v. Gerald D.*—Unmarried Biological Father of a Child Born of a Marriage—In Case You Didn’t Hear It the First Few Times, Marriages, Not Individuals, Have Rights So Biology Is Irrelevant¹⁷⁰

When *Michael H.* came before the Supreme Court, the Court was finally required to deal with competing claims of two fathers who both had developed relationships with a child and who would otherwise satisfy the Court’s “biology plus” test.¹⁷¹ The child, Victoria, was born to Carole while she was married to Gerald, but from the beginning Carole suspected Michael might be the father as

167. *Id.* at 270 (White, J., dissenting) (citing *Foster Families*, 431 U.S. at 839–42).

168. *Id.* at 272 (White, J., dissenting) (quoting *Foster Families*, 431 U.S. at 848).

169. *Id.* at 270.

170. Brief For Amici Curiae Scholars of the Constitutional Rights of Children, *supra* note 5. In another circumstance, however, biology’s relevance has been put forth as a reason to deny legal protection to those who seek to marry. In *United States v. Windsor*, BLAG asserted DOMA should be upheld because it advanced child welfare by: “(1) providing a stable structure to raise unintended and unplanned offspring; (2) encouraging the rearing of children by their biological parents; and (3) promoting childrearing by both a mother and father.” *Id.* (citation omitted). Amici argued that each of these justifications expressed and enforced a “bare preference for the children of opposite-sex couples as the only children entitled to permanency, stability and so-called ‘ideal’ parenting arrangements.” *Id.* Amici further argued that these justifications drew “invidious distinctions between families headed by opposite-sex parents and families headed by same-sex parents” in violation of equal protection. *Id.*

171. *Michael H. v. Gerald D.*, 491 U.S. 110, 113–14 (1989).

she and Michael had been having an affair at the time Victoria was conceived.¹⁷²

After her birth, both fathers held Victoria out as their daughter.¹⁷³ Both fathers resided with Victoria at different times during the first two years of her life.¹⁷⁴ In November 1982, Michael filed a filiation action in California Superior Court to establish paternity and visitation after Carole denied him access to Victoria.¹⁷⁵ Victoria also filed a claim, asserting she had more than one “psychological or *de facto* father” and that she was entitled to maintain her relationships with both.¹⁷⁶

In May 1983, Carole filed a motion for summary judgment in the action but removed it from the calendar in August of the same year when she and Michael reconciled.¹⁷⁷ In June 1984, Carole once again reconciled with Gerald and moved to New York, where they lived together and had two additional children.¹⁷⁸ However, in May 1984, Michael was awarded court-approved visitation with Victoria.¹⁷⁹

In October 1984, Gerald filed a motion for summary judgment claiming there were no triable issues of fact because, under California law, he was “conclusively presumed” to be Victoria’s father.¹⁸⁰ At the time, under California law, a child born to a married woman living with her husband was presumed to be a child of the

172. *Id.* The affair began in the summer of 1978 and Victoria was born in May 1981. *Id.* at 113.

173. *Id.* at 113–14. Gerald was listed as Victoria’s father on her birth certificate. *Id.* at 113. A paternity test confirmed Michael was Victoria’s biological father in October 1981. *Id.* at 114.

174. *Id.* Gerald moved to New York in October 1981, leaving Carole and Victoria in California. Victoria lived with Michael from January 1982 to March 1982, until Carole took her back to California where she began living with another man. *Id.* Later that year, Carole and Victoria stayed with Gerald again, and then Carole took Victoria back to live with Scott in California. *Id.*

175. *Id.*

176. *Id.*

177. During the intervening months, Carole had been residing with Gerald in New York. In August, she returned to California where Michael resided with she and Victoria for the next eight months. *Id.*

178. *Id.* at 115.

179. *Id.*

180. *Id.*

marriage.¹⁸¹ The presumption could only be challenged by the husband or wife under limited circumstances.¹⁸²

The California court found in Gerald's favor and cut off Michael's visitation rights in order to protect the "integrity of the family unit."¹⁸³ Michael appealed, claiming that the application of section 621 violated his procedural and due process rights.¹⁸⁴ The superior court's ruling was affirmed.¹⁸⁵

Michael did not raise an equal protection challenge until he came before the Supreme Court.¹⁸⁶ Because he failed to raise the issue in the courts below, the Supreme Court declined to address his equal protection claim.¹⁸⁷

Justice Scalia framed the issue of deciding who had a right to be recognized as Victoria's father as an all-or-nothing proposition observing that "California law, like nature itself, makes no provision for dual fatherhood."¹⁸⁸ Thus, Michael either received all the rights, or Gerald received all the rights.

The Court skipped over procedural due process concerns because either way Michael, who was an "adulterous natural father," was not entitled to a hearing. Instead, the majority focused on substantive due process and the adequacy of the fit between the classification and the policy it served.¹⁸⁹ Turning to Michael's substantive due process claims, Justice Scalia addressed whether Michael had a "constitutionally protected liberty interest" in his

181. *Id.* at 113 (citing CAL. EVID. CODE § 621 (West 1989)).

182. The Code provided that the presumption could be rebutted by blood tests within two years from the child's birth, either by the husband or the wife. *Id.* at 115 (citing EVID. § 621(c)-(d)). A natural father had no statutory right to bring a claim independent of the husband or wife. *Id.*

183. *Id.* at 115-16.

184. *Id.* at 116. Victoria claimed, in part, that her inability to rebut the presumption violated her equal protection rights. *Id.*

185. *Id.* The California Supreme Court denied discretionary review. *Id.*

186. *Id.* at 116-117. However, both Michael and Victoria raised due process challenges and Victoria raised an equal protection claim of her own. *Id.* at 116.

187. *Id.* at 116-17. "We do not reach Michael's equal protection claim . . . as it was neither raised nor passed upon below." *Id.* (citing *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988)).

188. *Id.* at 118. As noted earlier, apparently California has surpassed nature and found a way to recognize more than two parents in a child's life. Not to be outdone, Louisiana actually beat California to it. *See State ex rel. Dep't of Soc. Servs. v. Howard*, 898 So. 2d 443, 444 (La. 2004) (recognizing the concept of "dual paternity" for support purposes).

189. *Michael H.*, 491 U.S. at 120-21 (citing *Cleveland Bd. of Educ. v. LeFleur*, 414 U.S. 632, 652 (1974); *Vlandis v. Kline*, 412 U.S. 441, 456-59 (1973)).

relationship with Victoria that trumped the state's interest in protecting Carole and Gerald's marital union.¹⁹⁰

The majority narrowly framed the contours of the "lock" into which Michael's "key" would have to fit. After laying the groundwork by noting the "treacherous field" the Court had to navigate in addressing claims like Michael's, the Court held that the mechanism for unlocking Michael's parental rights must be based on a liberty interest that was fundamental and that it also be an interest "traditionally" protected by society.¹⁹¹

Having been required to demonstrate the asserted right was properly rooted in tradition, Michael cited to *Stanley*, *Quilloin*, *Caban*, and *Lehr* as opinions establishing that he had a liberty interest recognized by the Supreme Court, because both biological fatherhood and an established parental relationship were present.¹⁹² The majority took issue with Michael's reading of those cases, explaining that they instead rested upon the "historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family."¹⁹³ "The family unit accorded traditional respect in our society, which we have referred to as the 'unitary family,' is typified, of course, by the marital family, but also includes the household of unmarried parents and their children."¹⁹⁴ Thus, that "unitary family" could not include Michael and Victoria, or Michael and Victoria and Carole, because they were neither unmarried nor married to each other.¹⁹⁵

The Supreme Court conceded that the concept could be expanded perhaps, but could not be stretched so far as to "include the relationship established between a married woman, her lover, and

190. *Id.* at 121.

191. *Id.* at 122–23. "As we have put it, the Due Process Clause affords only those protections 'so rooted in the traditions and conscience of our people as to be ranked fundamental.'" *Id.* (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). Our cases reflect "continual insistence upon respect for the teaching of our history" and "solid recognition of the basic values that underlie our society . . ." *Id.* (citing *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965)).

192. *Id.* at 123.

193. *Id.*

194. *Id.* at 123 n.3. While the Court notes that unmarried parents and their children may constitute a "unitary family" entitled to protection, it appears that the Court has declined to extend that protection to unmarried fathers when a married stepfather is available as a replacement. *See, e.g., Lehr v. Robertson*, 463 U.S. 248 (1983); *Quilloin v. Walcott*, 434 U.S. 246 (1978).

195. *Michael H.*, 491 U.S. at 124. It also means the Court declined to recognize single parent families as family units entitled to similar protections.

their child, during a 3-month sojourn in St. Thomas, or during a subsequent 8-month period when, if he happened to be in Los Angeles, he stayed with her and the child.”¹⁹⁶ What the Court failed to acknowledge, however, was that during these sojourns and reconciliations, the unitary family it ultimately chose to protect did not exist in the “traditional” sense.¹⁹⁷ Gerald resided in New York, and when Carole was not residing with Gerald, she was either living with Michael or another man.¹⁹⁸

In *Michael H.*, once again, the “traditional” marital unit was favored at the expense of individual parental rights, rendering any biological connection, or even a developed relationship, with a child moot when put up against a marriage.¹⁹⁹ In taking the majority to task for its rigid and narrow construction of “tradition” in this context, Justice Brennan noted that even if such an analysis might be otherwise appropriate, adherence to any one view of tradition should not be so static and rigid.²⁰⁰

Further, the majority chose to focus on the legal presumption tied to marriage when, often, that presumption was used because no other determinant was available to establish lineage and to protect individuals within a marriage.²⁰¹ What happened, as in the cases before, is that the *marriage* received constitutional protection, not the

196. *Id.* at 123 n.3.

197. *Id.* at 113–14 (1989). Again, in part, the Court seemed to be preoccupied with the behavior of the parties, focusing on the adulterous nature of Carole and Michael’s relationship and ignoring the reality of Carole and Gerald’s legally preferred relationship.

198. *Id.* The reality is that had Carole been unmarried, or even married Gerald after Victoria’s birth, Michael would have had constitutionally protected rights that he did not have because Carole was married to someone else when Victoria was born.

199. *Id.* at 115. Again, there is a push and pull between recognizing the sanctity of the “family” in relation to the exercise of parental rights, but then crafting such a narrow vision of what a family can be that entire classes of parents, specifically fathers, are left with little or no constitutional protection. As Justice Brennan rightly observed, only a “pinched conception of ‘the family’” would exclude Michael, Carole, and Victoria from protection. *Id.* at 144–45 (Brennan, J., dissenting).

200. *Id.* at 138. Even if everyone could agree on “the content and significance of particular traditions, we would still be forced to identify the point at which a tradition becomes firm enough to be relevant to our definition of liberty and the moment at which it becomes too obsolete to be relevant any longer.” *Id.* Traditions, by their very nature, evolve and change. At one time, ownership of persons in the form of slavery, indentured servitude, and even “ownership” of children were traditions as well.

201. *Id.* at 125–26 (plurality opinion). Part of the tradition of the presumption, however, was that it was intended to protect the biological parents in the marriage and their offspring and to make assumptions in the absence of any other evidence to the contrary. The fact that the presumption itself has evolved over time is evidence of its purpose not being solely to protect marriage itself.

individuals who had an individual liberty interest in being a parent, regardless of marital status.²⁰² Instead, underlying prejudices about “adulterous natural fathers” served to sever the constitutionally protected connection between parent and child. Thus, the Court framed the parameters of parental rights in such a tortuous way as to sever Michael’s connection with Victoria in favor of the “correct” form of family.

C. Paternity and Equal Protection—The Disconnect Between Natural Fathers’ Individual Rights and the Rights of a Marriage

For the purposes of equal protection, “[t]he sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective.”²⁰³ It may not treat men and women differently when “there is no substantial relationship between the disparity and an important state purpose.”²⁰⁴ “Sex-based generalizations both reflect and reinforce ‘fixed notions concerning the roles and abilities of males and females.’”²⁰⁵ “Such generalizations must be viewed not in isolation, but in the context of our Nation’s ‘long and unfortunate history of sex discrimination.’”²⁰⁶

202. *Id.* at 124. (“Thus, the legal issue . . . reduces to whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection. We think it impossible to find it has. In fact, quite to the contrary, our traditions have protected the marital family against the sort of claim Michael asserts.”). While this is true in some sense, framing the “family” Michael and Victoria are part of as “adulterous father and legitimately born child into traditional marital unit of mother and father,” certainly skews the lens in a way that did a significant injustice to Michael and Victoria. It also is at odds with Justice Scalia’s more recent observation that an unmarried biological father who may have unintentionally relinquished his rights to parent had a right to raise his biological child where a loving “traditional family” sought to adopt her. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2572 (2013) (Scalia, J., dissenting). Clearly, the father in that case was not part of a “traditional family unit” contemplated by the majority in *Michael H.*

203. *Lehr v. Robertson*, 463 U.S. 248, 265 (1983) (citing *Reed v. Reed*, 404 U.S. 71, 76 (1971)).

204. *Id.* at 265–66; *see also* *Craig v. Boren*, 429 U.S. 190, 197–99 (1976) (“[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

205. *Nguyen v. INS*, 533 U.S. 53, 74 (2001) (quoting *Miss. Univ. For Women v. Hogan*, 458 U.S. 718, 725 (1982)).

206. *Id.* (quoting *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127, 136 (1994) (quoting *Frontiero v. Richardson*, 411 US 677, 684 (1973))).

A parent's relationship with his child is constitutionally protected.²⁰⁷ "[A] natural parent's 'desire for and right to the 'companionship, care, custody, and management of his or her children'" is an interest far more precious than any property right."²⁰⁸ This liberty interest does not disappear when the parents cannot satisfy the legal requirements of parenthood, and "[e]ven when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life."²⁰⁹ The guarantees of the Bill of Rights protect "individual decisions in matters of childbearing from unjustified intrusion by the State."²¹⁰

The problem with much of the Supreme Court's jurisprudence on fathers' rights is that of perspective and focus. First, the Court favors the rights of a marriage more than those of the individuals who may or may not be married.²¹¹ This means that instead of protecting individuals' rights to bear and parent their children, the Court is protecting a marital unit and offering more protection to those fathers who assert their parental rights from within the marital unit than those fathers who choose not to marry, or are unable to marry, in the first place.²¹² This creates a secondary problem because if there is a right to marry, it logically follows that there is a right *not*

207. *Wisconsin v. Yoder*, 406 U.S. 205, 231–33 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (affirming an individual's right to bring up children under Fourteenth Amendment as one of many rights an individual enjoys).

208. *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982) (quoting *Lassiter v. Dep't of Social Serv.*, 452 U.S. 18, 27 (1981) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972))).

209. *Id.* at 753.

210. *Soos v. Superior Court*, 897 P.2d 1356, 1360 (Ariz. Ct. App. 1994) (quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 687 (1977)).

211. Justice Stevens suggests that such impositions are acceptable because they give "loving" fathers an incentive to marry the mother. *See Caban v. Mohammed*, 441 U.S. 380, 407 (1979). No other biological parent is required to make any such showing; indeed, the only other people who are required to do so are non-biological parents who seek to adopt, who intend to procreate via surrogacy, or those who are otherwise not biological parents but are intimately connected to a child's familial unit. Arguably, the very act of pursuing adoption or surrogacy triggers the same type of treatment from the court that is normally reserved for biological mothers and married biological fathers. For instance, in an Arizona surrogacy case, the court noted that an intended non-gestational biological mother had to be given the *opportunity* to develop a relationship with the children she sought to parent. *Soos*, 897 P.2d at 1360–61. The court found the developed relationship test of *Lehr* inapplicable in the surrogacy context, focusing instead on the mother's biological connection to protect her fundamental liberty interest. *Id.*

212. Martha Fineman has explored the tension and distinctions drawn between marital or familial privacy and individual privacy, noting that the latter is a much newer concept and the former a more generalized protection. Martha Fineman, *What Place for Family Privacy?*, 67 WASH. L. REV. 1207, 1212, 1216 (1999) [hereinafter *Family Privacy*].

to marry.²¹³ The result is that the Court bestows constitutional rights upon a legal relationship in lieu of protecting individuals' rights upon which the constitutional protection is based.²¹⁴

Second, in terms of equal protection, the law has evolved to protect similarly situated parents differently. While the underlying right is inchoate, that right is fully vested in a biological mother when she gives birth, in the form of custody. Custody at birth affords the biological mother legal recognition of her unrealized relationship with her child and does not require a developed relationship to assert her rights as a parent. She need not marry to gain these rights. Married men are also afforded protection at the time of birth, regardless of genetic relation, in the form of custody as well. The law confers parenthood on them to the exclusion of all others, without demonstration of anything further. However, unwed biological fathers receive less protection when their biological child is born, and in order to receive that protection they must affirmatively demonstrate they intend to parent and that they have been intimately involved both before and after their child is born.

Biological fathers who father a child that is born to someone else's intact marriage have even less protection. To the extent they are permitted to assert their rights at all, they are limited by time and by their affirmative acts. But they are also at the mercy of the actions and the desires of the two other "parents" that are involved. Nothing contemplates the dynamics of the relationships between the various adults involved in the child's life at birth when requiring such affirmative acts.

A biological father is imbued with no legally cognizable rights without affirmative action on his part, and if he does not act

213. See generally *Boddie v. Connecticut*, 401 U.S. 371 (1971) (unconstitutional to require indigent to pay court fees to get a divorce).

214. In another context, the Court found that the distinction between married persons and individuals was unconstitutional with respect to fundamental rights. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (addressing an individual's right to contraception). "[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453. In citing *Eisenstadt* in her examination of family privacy, Fineman notes parenthetically that *Eisenstadt* confirmed an individual right of access to contraception, finding that a distinction between married and single persons with respect to that right was unconstitutional. *Family Privacy*, *supra* note 212, at 1212 n.36 (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1423 (2d ed. 1988)).

appropriately or quickly enough, his constitutional right to parent can be terminated—sometimes without his knowledge. This gender-based distinction is based in large part on a stereotypical view of unmarried biological fathers as unintentional and unwilling parents.

It offends notions of equal protection to require unwed biological fathers to affirmatively avow their connection to their child in a prescribed socially acceptable way, which may include resorting to the court system, in order to have their relationship legally recognized, when married fathers and all mothers have no comparable requirement.²¹⁵ To permit an unwed biological father's parental rights to be terminated without notice or after the passage of time also violates equal protection. Affording a biological father no cognizable parental rights or limiting those rights when the child is born to an intact marriage of the biological mother and another man is even worse. While these relationships between a married couple and someone outside the marriage can be complicated, the relationship between natural parent and child should be recognized. It may be necessary for the law to acknowledge a "legal" father by presumption for ease of identifying a "father" for a child, but it should not be able to do so at the expense of that child's biological father's constitutional right to parent.

This illuminates another, yet different, misstep in the protection of natural fathers' individual rights. The presumption continues to be that children can only have two parents although, in recent years, the traditional nuclear family has been supplanted by the blended, stepparent, and even multigenerational families. To continue to place this limitation on the courts no longer makes sense. It is all the more difficult given the context in which these decisions are made, as the courts attempt to balance and award competing parties a right to be a part of child's life and there are, quite literally, winners and losers.

For example, in *Michael H.*, the Supreme Court felt that it had to choose between the families created by Michael H. and Gerald D.

215. This is at odds with the Supreme Court's position, taken in other instances, recognizing the right of individuals to be independent and nonconforming. See *Papachristou v. Jacksonville*, 405 U.S. 156, 164 (1972). In addressing a law prohibiting loitering and living off the earnings of a wife, Justice Douglas noted that the Court has "honored the right to be nonconformists and the right to defy submissiveness." *Id.*; see also *Michael H. v. Gerard D.*, 491 U.S. 110, 141 (1989) (Brennan, J., dissenting) ("We are not an assimilative, homogenous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellant practice because the same tolerant impulse protects our own idiosyncrasies.").

Why? Because the default built into our legal system is that children can only have two “legal” parents.²¹⁶ It was framed by the Court as an all-or-nothing proposition for each father, and the Court sided not with Gerald so much as with his marriage. Imagine instead if the Court had recognized both Michael H. as the biological father and given him a seat at the table, and recognized Gerald D. as the legal father and given him a seat at the table as well. Then, after all three parents had been identified, the lower court could have fashioned a visitation and custody arrangement that allowed Victoria to have a meaningful relationship with every parent in her life and that could have included a consideration of her best interests.²¹⁷ Making a shift such as this would bring more caregivers, socially, legally, and financially, into Victoria’s life.

It is at that point that Michael H.’s actions, or Quilloin’s actions, or Caban’s actions, would become relevant in fashioning a custody or visitation schedule. Each father’s affirmative acts, his attempts to develop a relationship, would be protected by the court just as every other parental relationship is protected in every divorce or paternity proceeding there is. To do otherwise is to continue to perpetuate the one thing the Court has said it should not do—choose “better” parents for a child instead of recognizing the parents of the child.²¹⁸ Compounding the problem is that “married” is deemed “better.”²¹⁹ If we cannot choose “better” parents, then that logic must extend to not choosing married parents for a child over an unmarried biological

216. See, e.g., *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005) (recognizing child could have two legal mothers, but not more than two parents); *In re M.C.*, 195 Cal. App. 4th 197 (2011) (holding child could not have more than two legal parents); see also *Johnson v. Calvert*, 851 P.2d 776, 781 (Cal. 1993) (recognizing only one natural mother for a child). But see 2013 Cal. Legis. Serv. Ch. 564 (SB 274) (West) (recognizing instances where a child may have more than two legal parents).

217. See, e.g., CAL. FAM. CODE § 3040(a)(3)(d) (West 2004) (“In cases where a child has more than two parents, the court shall allocate custody and visitation among the parents based on the best interest of the child, including, but not limited to, addressing the child’s need for continuity and stability by preserving established patterns of care and emotional bonds. The court may order that not all parents share legal or physical custody of the child if the court finds that it would not be in the best interest of the child as provided in Sections 3011 and 3020.”).

218. See, e.g., *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2572 (2013) (Scalia, J., dissenting). Similar threads appear in the debate over same-sex marriage. For example, the argument children are better off raised by their married biological parents.

219. See Judith Koons, *Motherhood, Marriage and Morality: The Pro-Marriage Moral Discourse of American Welfare Policy*, 19 WIS. WOMEN’S L.J. 1 (2004). Koons notes that in the “family values agenda” “marriage is lauded as the bulwark of the social order and the seedbed of virtue upon which the Republic rests.” *Id.* at 23 (citation and internal quotation marks omitted).

father. Otherwise, it would be just as easy to remove any child from any single parent, mother or father, in favor of married parents who want to raise the child.

At the end of the day, where the Supreme Court gets it wrong, and where it does not properly address the equal protection concerns raised, is that it fails to protect the inchoate relationship. It does not recognize the difference the difference makes. The difference between the genders is not that women are natural caregivers and men natural breadwinners, or that women are naturally better parents than men with better instincts, or that married fathers are better fathers than unmarried fathers, or that unmarried fathers are not real parents. Instead, the difference is that women carry a conceived pregnancy to term and give birth, and men do not; as such, their inchoate relationship is the most easily protected of the two.

The difference that difference makes is that how the law recognizes that inchoate relationship between parent and child, and how the law protects both men's and women's parental rights, must necessarily be accomplished in different ways. The problem is that the Court has seen fit to treat unmarried biological fathers outside of a marital relationship differently simply because they are not married to the biological mother at the time of the child's birth. The law does not protect an unmarried biological father's inchoate right to a relationship with his child in the same way it does for both mothers and married fathers, but it should. In fact, it should all the more because a father does not give birth and cannot rely on a legal relationship with the child's mother to protect his rights.

The law should affirmatively protect a biological father's right to parent to the same extent any other biological parent's right is protected. Only then will an unmarried biological father receive equal protection. It does not mean a natural father receives custody at birth, but that he is entitled to the care, custody, and companionship of his child until he voluntarily relinquishes that right or he is otherwise deemed unfit, just like any other parent.

IV. ADOPTING A NEW APPROACH—WHY DO WE NEED TO CHANGE?

In addition to the equal protection problems raised by the presumption and the preference of marital rights versus individual rights, the reality is that the "traditions" that have served as the basis

for the presumption no longer reflect societal realities. Stereotypical understandings of fathers, parents, and marriage can no longer stand in the fact of these realities. Reflecting on these changes demonstrates that there is an urgent need to move away from presumptions tied to paternity as legal determinants.

*A. Fathers Have Changed, But the Stereotypes
Attached to Them Have Not*

While on the one hand society has recognized that a father's interest in having a child is a fundamental right, society still imposes outdated stereotypes on what a father wants, or is willing to do, based upon his legal relationship with the mother when the child is born.²²⁰ This is fundamentally unfair. "With each passing year, researchers have documented how fathers are more involved in their children's lives than fathers of previous generations."²²¹

Approximately 85 percent of fathers are present at the birth of their child.²²² About 80 percent have a relationship with the child and the child's mother at birth, and by the time the child is five years of age, approximately 51 percent remain.²²³ The number of single-father homes has also increased exponentially, even though the overall number is still small compared to family units headed by

220. Kisthardt notes that in penning *Michael H.*, the plurality also repeatedly refers to Michael H. as the "adulterous father" and, while not overtly pointing to marriage as the protected relationship, clearly sets the outer limit of an unwed father's constitutionally protected liberty interest at the threshold of the marital family unit. Kisthardt, *supra* note 4, at 621. Thus, the reality is, had Carole, the mother in *Michael H.*, been unmarried, or had later married Gerald, Michael H. would have had a constitutionally protected liberty interest based solely on his genetic connection to Victoria and his efforts to establish a relationship. Instead, a third party's behavior determined his rights, and that person is no less culpable for the adulterous behavior, but does not suffer any of the same consequences. Further, if the legal father does not want the honor of being that child's father, he may challenge paternity and have his status changed. It is hard to understand why the court would limit what had clearly been recognized as a constitutionally protected right by leaving the ability to enforce that right to the whim and caprice of others.

221. Andrea Doucet, *Dad and Baby in the First Year: Gendered Responsibilities and Embodiment*, 624 ANNALS AM. ACAD. POL. & SOC. SCI. 78, 79 (2009). In advocating for a shift in caregiving, Doucet focuses on what moves fathers to feel responsible and to be responsible for the caregiving duties of domestic life and parenthood. *Id.*

222. See FRAGILE FAMILIES AND CHILD WELLBEING STUDY FACT SHEET 1 [hereinafter FRAGILE FAMILIES], available at <http://www.fragilefamilies.princeton.edu/documents/FragileFamiliesandChildWellbeingStudyFactSheet.pdf>.

223. Sara McLanahan & Audrey N. Beck, *Parental Relationships in Fragile Families*, FUTURE OF CHILD., Fall 2010 at 17, 22.

a single mother.²²⁴ The number of stay-at-home fathers has increased as well, challenging the notion that only mothers can act as primary caregivers in a child's life.²²⁵

Advocates for social fatherhood have begun to focus on the importance of fathers in their children's lives.²²⁶ Unfortunately, when men express an interest in becoming caregivers, and in taking active roles in caregiving, they face a significant social bias as fathers. It is not that men do not want to parent but that often society treats them as incapable of caregiving.²²⁷

The other reality is that biologically a father experiences pregnancy differently than a mother. However, just because he is not carrying the child does not mean he does not experience significant changes or that he does not develop an emotional level of responsibility for a child.²²⁸ Because these are not visible changes, very often they are discounted, but studies indicate that expectant fathers experience a panoply of emotions with respect to impending parenthood no different than a woman. Men simply are not able to experience the "embodied world of pregnancy."²²⁹

Fathers who experience the loss of a child via miscarriage, however, experience a higher degree of difficulty coping than

224. GRETCHEN LIVINGSTON, PEW RESEARCH CENTER, THE RISE OF SINGLE FATHERS, 1–2 (2013), available at <http://www.pewsocialtrends.org/files/2013/07/single-fathers-07-2013.pdf>.

225. See Doucet, *supra* note 221, at 80. In Canada the number of stay-at-home fathers had increased 25 percent over a recent ten-year period and there had been a "sixfold increase in the proportion of single-earner families with a stay-at-home father between 1976 . . . and 2005." *Id.* Most of these increases were based on women's entry into the paid labor market and reflected the fact that women had not only moved into the workforce but have also become primary breadwinners. *Id.*

226. Nancy Dowd connects caregiving and the concept of nurture with social fatherhood, looking not only to economic support or recognition of a child but to the loving, caregiving, connection a father builds with his child. Nancy Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood*, 14 WM. & MARY BILL RTS. J. 909 (2006) [hereinafter *Parentage at Birth*]. She proposes that parentage be conferred on a birthfather, as one who is the social father or "nurturer," presuming most times that a birthfather is also the child's biological father. *Id.*

227. See Doucet, *supra* note 221, at 89. As one father put it, "Even in a society where people believe that men and women are equal and can do just about everything, they don't really believe that men can [care for] a baby, especially a really tiny baby." *Id.*

228. Doucet speaks of three different types of embodiment a father can experience—emotional responsibility, community responsibility and moral responsibility. Doucet, *supra* note 221, at 84. Emotional responsibility is defined as "attentiveness and responsiveness" or thinking about the baby and parental consciousness. *Id.* I would argue the connection with a child begins when a father considers his impending parenthood. While it may be a largely undocumented process, intentional parenthood may be no less powerful when conceived in this context.

229. Doucet, *supra* note 221, at 84.

women.²³⁰ Research indicates that men suffer from the same post-abortion psychological issues that women do.²³¹ Men report feeling depression, anxiety, helplessness, and guilt.²³² While it is true that a woman carrying a child will physically bond with that child, the reality is that, for a man, the loss is just as palpable as the one suffered by the mother.²³³

Thus, fathers' shifting roles within caregiving units, as well as the less obvious connections a biological father may have with his unborn child, must be taken into account when considering how to best protect a man's parental rights.

B. Marriage and the Notion of a "Formal Family" Has Changed

The most obvious reason to shift away from the legal presumption of paternity as a determining factor in who is a parent, and more importantly who is not, is the availability of testing.²³⁴ Clearly, we no longer need the presumption to establish lineage as we did in feudal England, nor to decide between competing claims of paternity when no other way is available. But, as Carbone notes, continued adherence to the presumption, particularly as practiced by the Supreme Court, involves the "moral force" underlying the

230. See Marya Burgess, *How Miscarriage Can Hit Very Hard*, BBC NEWS (Jun. 19, 2006), <http://news.bbc.co.uk/2/hi/5082442.stm> (noting that the impact on men goes unrecognized and that men are stuck between a rock and hard place, socially not permitted to be too emotional or too stoic). Men's grief can also take a different form, with a man trying to problem-solve, take action, gather facts, or simply avoid the grief by working. *After a Miscarriage: Surviving Emotionally*, AM. PREGNANCY ASS'N, <http://www.americanpregnancy.org/pregnancyloss/mcsurvivingemotionally.html> (last updated Jan. 2014) [hereinafter AM. PREGNANCY ASS'N].

231. See Catherine T. Coyle, *Men and Abortion: A Review of Empirical Reports Concerning the Impact of Abortion on Men*, 3 INTERNET J. MENTAL HEALTH (2007), <http://www.ispub.com/ostia/index.php?xmlFilePath=journals/ijmh/vol3n2/abortion.xml>.

232. *Id.*

233. AM. PREGNANCY ASS'N, *supra* note 230 (explaining "[a] woman can begin bonding [with a baby] from the moment she has a positive pregnancy test"); Coyle, *supra* note 231 (describing the feelings of "worthlessness," "voicelessness," and "emasculat[i]on" a man experiences after learning that his girlfriend had an abortion without informing him).

234. "DNA testing now makes it possible to identify the biological parents of every child" thereby "[erasing] the historic distinction between fathers and mothers" because, in theory, all can be known at birth. *Parentage at Birth*, *supra* note 226, at 912.

presumption.²³⁵ Indeed, a normative marital unit (a married mother and father) is the preferred child-rearing package.²³⁶

However, society does not reflect this presumption anymore. Children are raised in multiple familial units with single parents, unmarried cohabitating parents, open-adoption relationships involving both adoptive parents and biological parents, stepfamilies and blended families, and they are raised by heterosexual, lesbian, gay, cisgender, intersex, and transgender parents.²³⁷ Perhaps no other field highlights this reality more than assisted reproductive technology, which can separate “the genetic, gestational, and social components of motherhood successfully.”²³⁸

235. Carbone, *supra* note 27, at 1315; *see also* Hirczy, *supra* note 45, at 1644–46 (arguing that the presumption’s preference for married fathers serves legitimate policy purposes even in the face of biological reality).

236. Even as an institution, understanding what constitutes a marriage can vary from person to person and can offer a different face depending upon context. “Marriage can be experienced as: a legal tie, a symbol of commitment, a privileged sexual affiliation, a relationship of hierarchy and subordination, a means of self-fulfillment, a societal construct, a cultural phenomenon, a religious mandate, an economic relationship, a preferred reproductive unit, a way to ensure against poverty and dependency, a romantic ideal, a natural or divined connection, a stand-in for morality, a status, or a contractual relationship.” Fineman, *supra* note 6, at 242.

237. Traditional marriage is statistically in the minority of family units. *Id.* at 246. Fineman notes that the latest census figures show that traditional arrangements account for less than a quarter of households. *Id.* at 246 n.16. The numbers are actually higher in single person households, cohabitating adults, and childless couples. *Id.* (citing Eric Schmitt, *For the First Time, Nuclear Families Drop Below 25% of Households*, N.Y. TIMES, May 15, 2001, at A1 (reporting on the 2000 U.S. Census data)). *See also* Alison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER & L. 505, 515–18 (1998) (discussing a broader concept of family beyond the traditional nuclear family).

238. SCOTT B. RAE, *THE ETHICS OF COMMERCIAL SURROGATE MOTHERHOOD: BRAVE NEW FAMILIES?* 77 (1994). The Center for Disease Control estimates that there were 61,610 live born infants in 2011 as a result of the use of Assisted Reproductive Technology (ART). CTR. FOR DISEASE CONTROL & PREVENTION, *ASSISTED REPRODUCTIVE TECHNOLOGY FERTILITY CLINIC SUCCESS RATES REPORT* (2011), available at www.cdc.gov/art/ART2011?index.htm. “ART includes all fertility treatments in which both eggs and sperm are handled.” *What is Assisted Reproductive Technology?*, CTR. FOR DISEASE CONTROL & PREVENTION (2011), <http://www.cdc.gov/art/whatis.html>. This does not include intrauterine or artificial insemination or “procedures in which a woman takes medicine only to stimulate egg production without the intention of having eggs retrieved.” *Id.* This inadequacy is more palpable in the field of gestational surrogacy than arguably anywhere else. Gestational surrogacy involves three distinct parties—the mother who donates the egg, the father who donates the sperm and the carrier who provides the womb. Or—conversely donated sperm and egg of others, or one or the other with the result that the child is not genetically related to any of the intimately involved parties. The number of births from gestational surrogacy has grown exponentially in the last decade. One report indicates that there was an eighty-nine percent increase in the number of babies born to gestational surrogates from 2004 to 2008. Magdalena Gugucheva, *Surrogacy in America*, COUNCIL FOR RESPONSIBLE GENETICS (2010), <http://www.councilforresponsiblegenetics.org/pagedocuments/kaevej0a1m.pdf>.

Courts have had to address non-gestational biological mothers seeking to assert their maternal rights²³⁹ and gestational non-biological surrogates trying to avoid legal parent responsibilities.²⁴⁰ While paternity and custody statutes have been used as frameworks to resolve these problems, courts have struggled with newer conceptions of who is a “parent.”²⁴¹ Thus, even the “simplest” determination of who is the father or mother of a child has become a much more challenging question not easily resolved by traditional legal presumptions alone.

With respect to a father outside of an intact marriage, there is also a stigma that remains. The formalism with which a marriage is treated in this circumstance fails to reflect reality as well.²⁴² Clearly, protecting something that is already broken makes less sense than protecting an attack from a party completely outside an otherwise-intact marriage, such as in the case where a person outside the marriage believes he would be a better parent. The fault in this is more obvious when carried through to a different conclusion. Consider for a moment what happens when a marriage is broken and parties divorce; if marriage confers rights on a father, then why give a legal father any rights to his child at all when the marriage ends? If the marriage holds the parental rights, then why does not remarriage bestow parental rights, versus *in loco parentis* rights, on a stepfather?

239. *See Soos v. Superior Court*, 897 P.2d 1356, 1357 (Ariz. Ct. App. 1994).

240. *In re Roberto d.B.*, 923 A.2d 115 (Md. 2002).

241. As the court in *Roberto d.B.* noted, “[w]hat ha[s] not been fathomed exists today.” *Id.* at 122. Even sperm donation can create unforeseen problems if performed improperly. Recently, a man who served as a sperm donor was found to be the legal father of the child born of that donation, even though the parties had no intention of him being the father and he had signed away his parental rights. Heather Saul, *U.S. Court Rules Sperm Donor to Lesbian Couple Is Legal Father and Must Pay Child Support*, INTERNATIONAL, <http://www.independent.co.uk/news/world/americas/us-court-rules-sperm-donor-william-marotta-is-legal-father-and-must-pay-child-support-9079296.html> (last visited Aug. 25, 2014). Under Kansas law, a sperm donor is deemed a legal father if the insemination procedure is not performed by a licensed physician. *Id.* In that case, because the state did not recognize same-sex marriage or adoption, and because the biological mother was on public assistance, the state sought reimbursement from the sperm donor. *Id.*

242. As more than one author has noted, where a child is born of an intact marriage to a biological father outside of that marriage, chances are the marital unit is not as stable as one might presume. *See, e.g., In re Michael H. v. Gerald D.*, 491 U.S. 110 (1989); J.W.T., 872 S.W.2d 189 (Tex. 1994).

*C. Viewing Relationships in a New Way—
Changing the Message,
Resolving the Equal Protection Issue*

When the Supreme Court denied Michael H. his fundamental right to parent, it did so by failing to focus on the nature of his right and equal protection.²⁴³ Instead of conferring a fundamental right to parent on an individual, it conferred it on a “marriage” or a “marital unit.”²⁴⁴ The problem is that the Constitution was not designed to protect marriages; it was designed to protect an individual’s right to marry.²⁴⁵ The Constitution has been interpreted to protect an individual’s right to procreate, not a marriage’s right to procreate.²⁴⁶ The Constitution did not define individual rights so that they might only be exercised in the legally defined context of marriage. By virtue of preferring a marital connection to a child over a biological connection to a child, the Supreme Court has imbued an institution with an individual right. Not only has the right been tied to a legal status but also the underlying reason for such a presumption no longer exists, so the state lacks a rational basis to exclude biological fathers on that basis.²⁴⁷ Instead, the presumption perpetuates gender-based distinctions that harm fathers. The only way to shake this paradigm is to challenge the notions that are the basis for these decisions and demonstrate why a broader vision of gender and parenthood is important.

While there is value in allowing the presumption to remain as an administrative convenience for both parents and the state, there is

243. *Michael H.*, 491 U.S. at 110.

244. *Id.* at 129.

245. *Loving v. Virginia*, 388 U.S. 1 (1967) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”); *Zablocki v. Redhail*, 434 U.S. 378 (1978) (invalidating condition of marriage license on proof that child support payments have been made and that child will not become a public charge).

246. *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (invalidating forced sterilization of a habitual offender).

247. “[T]here is a world of difference between noting that men and women often fill different roles in society and using these different roles as the justification for imposing inflexible legal restrictions on one sex and not the other. To do the latter is to govern on the basis of stereotyping assumptions, an approach that has been repeatedly criticized by the Supreme Court.” *Miller v. Christopher*, 96 F.3d 1467, 1475 (D.C. Cir. 1996) (Wald, J., dissenting) (challenging constitutionality of statute governing citizenship of illegitimate child born abroad to American father and alien mother) (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982); *Duren v. Missouri*, 439 U.S. 357, 369 (1979)); *see also* *United States v. Virginia*, 518 U.S. 515 (1996) (holding military college excluding women applicants violated the Equal Protection Clause of the Fourteenth Amendment).

arguably no value in allowing it to be imbued with the right to prevent a biological parent from asserting his fundamental rights guaranteed by the Constitution. The presumption, indeed the absolute preference, favoring “formal families” based upon one mother, one father, and child to the exclusion of all other formations of a caregiving unit has outlived its usefulness.²⁴⁸

V. HOW COULD IT WORK?

The power given the presumption needs to be restrained so that it functions as an administrative default and not a legally defining default. In order to truly protect a biological father’s rights, however, particularly where there are conflicting claims of paternity, abandoning the notion that more than two people can be legally recognized as a child’s parent is paramount.²⁴⁹ Thus, in this instance, where there are competing interests—for example, a biological father and a married biological mother, the biological father would be able to challenge the presumption at any time. To some extent, it would still fulfill the Court’s desire that an unmarried biological father take some affirmative action to assert his rights, but it would not be based on when he chose to assert his rights. As a practical matter, the legal father is often heard on the issue of paternity upon the failure of the marriage, so why not extend the same right to the biological father during the marriage.

A court must still consider the best interests of the child and the behavior of all the parties involved when making custody, visitation, and support decisions.²⁵⁰ This would allow courts to consider

248. Fineman argues that for all “relevant and . . . societal purposes” we do not need marriage at all. Fineman, *supra* note 6, at 245. While Fineman correctly notes that it may be a preferable mode of protecting certain rights, in the context of parenting children, a marriage is not required anymore than, arguably, a limit of only two recognized parents in that marriage. What is necessary is a caretaking unit or units that undertake the care, support, and education of children, no matter what form it takes.

249. See Laura Althouse, *Three’s Company? How American Law Can Recognize a Third Social Parent in Same-Sex Headed Families*, 19 HASTINGS WOMEN’S L.J. 171, 172 (2008) (discussing in part a Canadian appellate court decision recognizing that the biological mother’s same sex partner was the child’s legal mother, in addition to the biological mother and father who retained their parental rights and advocated for a three parent structure for same-sex families); *Parentage at Birth*, *supra* note 226, at 913 (constructing a definition of parentage that would permit more than one father).

250. See, e.g., CAL. FAM. CODE § 3040(a)(3)(d) (West 2013) (“In cases where a child has more than two parents, the court shall allocate custody and visitation among the parents based on the best interest of the child, including, but not limited to, addressing the child’s need for

collateral matters, such as fraud on the part of the mother and relationships that have been in place, and not to presume if all a biological father wants is visitation that his failure to seek full custody is an indication that he does not really want to parent. If it is not an all-or-nothing proposition, then all parties are on notice that their choices and conduct are relevant.²⁵¹

As a practical matter, adopting either dual paternity like Louisiana, or using a statute like the one recently passed in California would be a place to start.²⁵² Considering different relationships and the impact of ART will also be critical. However, it is not that the presumption itself needs to be abolished,²⁵³ but it should be properly relegated to the status of administrative convenience for states and married couples alike, not the ultimate determiner of rights when there is a conflict.

Given the fluid nature of families and domestic relationships, the timing of a biological father's assertion of rights should not be a determinative factor because the biological father may be hesitant to

continuity and stability by preserving established patterns of care and emotional bonds. The court may order that not all parents share legal or physical custody of the child if the court finds that it would not be in the best interest of the child as provided in Sections 3011 and 3020.”).

251. This may alleviate another concern that in recognizing rights for one group of individuals, unmarried putative fathers, the courts and states necessarily impact the rights of another group “marital family units.” See *Hirczy, supra* note 45, at 1641. Hirczy discusses the concerns raised by Justice Cornyn’s dissent that the court was doing nothing more than creating rights for putative fathers at the expense of marital family units that were entitled to protection from state action. *Id.* I would suggest that it is not so much creating rights at the expense of other rights, but balancing rights between private parties that may have concurrent cognizable constitutional rights to parent.

252. See *State ex rel. Dep’t of Soc. Servs. v. Howard*, 898 So. 2d 443, 444 (La. 2004) (recognizing the concept of “dual paternity” for support purposes); see also *Warren v. Richard*, 296 So. 2d 813, 817 (La. 1974) (“[I]t is the biological relationship and dependency which is determinative of the child’s rights . . . and not the classification into which the child is placed by the statutory law of the State.”); *Smith v. Cole*, 553 So. 2d 847, 854 (La. 1989) (“The biological father does not escape his support obligations merely because others may share with him the responsibility”); LA. REV. STAT. ANN. § 46:236.1.2 (2012) (“The department is hereby authorized to develop and implement a program of access and visitation designed to support and facilitate noncustodial parent’s access to and visitation of their children.”).

253. Dowd’s proposal to abolish or redefine the presumption to recognize social fatherhood is an excellent one, particularly in the sense that marriage would merely demonstrate a positive relationship with the other parent. *Parentage at Birth, supra* note 226, at 929. However, I would be concerned it would not necessarily extend far enough to protect biological fathers outside of those marital relationships when there are competing parental interests because the social fatherhood she imagines may not exist through no fault of a biological father outside of a married family. That is where recognition of more than two legal fathers would become critical to protect the right of the biological father to develop such a relationship. *Id.* at 934–35 (proposing revisions to the Uniform Parentage Act to accommodate multiple fatherhood with maternal consent).

assert legal rights at first or perhaps the access he has been given to his child is enough. The presumption that the biological father's failure to take affirmative legal action within the first two years evinces a desire to not be a part of a child's life, or that such a desire should not be recognized is offensive to fathers, particularly those outside of a marital relationship.²⁵⁴ An unmarried biological father whose child is born of a marriage is always an outsider looking in.

To the extent further burdening the courts might be a concern, the reality is the courts are well equipped to resolve custody issues and are well acquainted with the best-interests-of-the-child test. Additionally, as with all things, courts will only be required to address these issues when the parties cannot agree on their own visitation and custody arrangements. In fact, it may actually encourage parties to resolve their differences instead of resorting to the courts where it is clear that a biological father, whether married or unmarried, will never lose his parental rights unless he voluntarily relinquishes them or the state demonstrates he is unfit.²⁵⁵ The very real problem of domestic violence and abuse would need to be considered.²⁵⁶ Fashioning safeguards to protect against those who would seek to use their parental rights to control a situation in an unhealthy way is always a concern, regardless of whom that parent is.

VI. CONCLUSION

June Carbone observes that what has become one of the most contentious issues in family law is which adults should receive legal

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

255. The dynamic between married mother and unwed biological father will always be problematic, because frankly any relationship that involves this group of parties is likely to be "unhappy." Of course, such problems have been handled by families and the courts regularly as parties divorce, remarry, seek stepparent adoptions and otherwise shift in and out of the primary caregiving roles in a child's life and in and out of each other's lives. It should not prevent the protection of a father's inchoate relationship with his child.

256. See generally Dana Harrington Conner, *Back to the Drawing Board: Barriers to Joint Decision-Making in Custody Cases Involving Intimate Partner Violence*, 18 DUKE J. GENDER L. & POL'Y 223 (2011) (discussing custody in cases involving "intimate partner violence"); Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657 (2003) (discussing domestic violence and child welfare); see also Judith Koons, *Gunsmoke and Legal Mirrors: Women Surviving Intimate Battery and Deadly Legal Doctrines*, 14 J OF L. & POL'Y 617, 650-68 (2006) (discussing legal treatment of domestic violence).

recognition in children's lives.²⁵⁷ She contends that a combination of readily available means to definitively determine paternity as well as an instability in the primary mode of determining paternity account for the shift.²⁵⁸ Thus, Carbone suggests that "if parental obligation to children is independent of the adult relationship, then definition of that obligation must start with the recognition of parenthood."²⁵⁹

As our caregiving units change and evolve, expectations must shift. The courts and the states should expect that all fathers want to be part of their children's lives, and should affirmatively protect that expectation just as they do with mothers. Allowing meaningful participation in a child's life to every parent initially, providing an avenue for that inchoate relationship to develop, sends a different message and begins to recognize the emotional connection men can have to their children regardless of whether they are married to the biological mother. Additionally, including all fathers in the caregiving unit presumptively can resolve the lingering equal protection problem that has always plagued paternity challenges.

257. Carbone, *supra* note 27, at 1295–96.

258. *Id.*

259. *Id.* at 1297.