

UNMARRIED FATHERS AND ADOPTION: “PERFECTING” OR “ABANDONING” AN OPPORTUNITY INTEREST

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In recent years, the problem of the unmarried or putative father increasingly has taken center stage in constitutional and statutory debates about adoption. Three converging trends have contributed to this development. One of these has been demographic and cultural: An increasing number of American women are bearing children without entering into marriage first. In 2004, the rate of births to unmarried women was 46 per 1000, or 36% of all births.¹ This represented a sharp rise since 1980 when the comparable figure was 18%.² Over 1.47 million children were born to unmarried women in 2004.³ Consequently, there are many more unmarried fathers as well.⁴

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¹ Childstats.gov, Forum on Child and Family Statistics, America’s Children in Brief: Key National Indicators of Well-Being, 2006: Population and Family Characteristics, <http://childstats.gov/americaschildren06/pop.asp> (last visited May 29, 2008); Childstats.gov, Forum on Child and Family Statistics, POP7.A: Births to unmarried women: Birth rates for unmarried women by age of mother, 1980–2004, <http://childstats.gov/americaschildren06/tables/pop7a.asp?popup=true> (last visited May 29, 2008).

² FEDERAL INTERAGENCY FORUM ON CHILD AND FAMILY STATISTICS, AMERICA’S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING 2005 11 (2005), *available at* http://childstats.gov/pdf/ac2005/ac_05.pdf.

³ Joyce A. Martin, et al., *Births: Final Data for 2004*, NAT’L VITAL STATISTICS REPORTS, Sept. 29, 2006 at 2., *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr55/nvsr55_01.pdf.

⁴ The rise in non-marital births together with other factors has changed the shape of American households. The 2005 American Community Survey of the Census Bureau reported that for the first time the “traditional” family of married parents living together with their children now represents a bare minority of American households. The United States Census Bureau report on household and families from the 2005 American Community Survey Data Set indicated that only 55.2 million of the 111.1 million households consisted of a married couple with children family household. United States—

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The other two trends have been in public policy and judicial doctrine. Since the 1974 Amendment to the Social Security Act, government has become increasingly active in finding putative fathers to pay child support and in promoting paternity establishment toward that end.⁵ In addition, in a series of important decisions the United States Supreme Court transformed the jurisprudence of what had been called “illegitimacy.”⁶ Non-marital children gained constitutional rights,⁷ and so did their

General Demographic Characteristics: 2005, <http://factfinder.census.gov/home/saff/main.html> (follow “Data Sets”; then follow “American Community Survey” hyperlink; then select “2005 American Community Survey” hyperlink; then follow “Data Profiles” hyperlink; then follow “Show Result” hyperlink) (last visited May 29, 2008).

⁵ See *infra* notes 18–29 and accompanying text. The stated purpose of Title IV-D of the 1974 Amendment, entitled “Child Support and Establishment of Paternity,” is to enforce “the support obligations owed by absent parents to their children, locating absent parents, *establishing paternity*, and obtaining child support” Social Services Amendments of 1974, Pub. L. No. 93-647, § 451, 88 Stat. 2337, 2351 (1975) (emphasis added). See also Mary Fisher Bernet, *The Child Support Provisions: Comments on the New Federal Law*, 9 FAM. L.Q. 491, 491–92 (1975); Laura Oren, *Thwarted Fathers or Pop-Ups?: How to Determine When Putative Fathers Can Block the Adoption of Their Newborn Children*, 40 FAM. L.Q. 153, 156 (2006) [hereinafter Oren, *Thwarted Fathers*] (“Since 1974, under the federal government’s ‘carrot-and-stick’ approach to ‘cooperative federalism,’ Congress has required any state receiving federal assistance for AFDC, Medicaid, or food stamps to push the paternity and support agenda ever more aggressively.”); Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology ‘Plus’ Defines Relationships; Biology Alone Safeguards The Public Fisc*, 11 WM. & MARY J. WOMEN & L. 47, 72 (2004) [hereinafter Oren, *Paradox*] (“After the Social Security Amendments of 1974, pursuant to ‘cooperative federalism,’ states had to require that mothers receiving AFDC cooperate in establishing the paternity of putative fathers.”).

⁶ See *infra* notes 7 & 8; see also Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 112 n.64 (1996) (“noting evolution of statutory language from ‘child born out of wedlock’ to ‘non-marital child,’ representing another link in the chain of linguistic tolerance that has caused the terminology to evolve from ‘bastard’ to ‘illegitimate’ to ‘out of wedlock’ to the eminently nonjudgmental ‘non-marital.’”).

⁷ See, e.g., *Levy v. Louisiana*, 391 U.S. 68 (1968) (finding a violation of equal protection in the creation of a cause of action for wrongful death of a parent on behalf of marital children but not on behalf of nonmarital children); *Weber v. Aetna*, 406 U.S. 164 (1972) (violating equal protection to exclude nonmarital children from sharing equally with marital children in recovery of workers’ compensation benefits upon death of parent); *Gomez v. Perez*, 409 U.S. 535 (1973) (denying right of paternal support to nonmarital children while granting it to marital children violates the Equal Protection Clause). This Article frames the issues primarily in terms of the legal claims of and against fathers.

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biological fathers.⁸ One aspect of this transformation relied on mere biology alone. Children, or the State allegedly acting on their behalf, could establish paternity upon a simple showing of the biological tie, especially when it came to child support claims.⁹ Paradoxically, however, in a different line of cases, culminating in *Lehr v. Robertson*,¹⁰ the Court recognized the relationship rights of unmarried fathers, but only if they met a “biology plus” standard.¹¹ In the Court’s view, a putative father who wished to protect his relationship with his child and prevent her adoption by another man needed to do something extra to grasp the opportunity presented by the biological tie.¹² If he satisfied this criterion by stepping forward, he secured constitutional protection.¹³ If not, the State enjoyed wide latitude to dispense with his inchoate opportunity interest.¹⁴

The “biology plus” cases have not answered all the questions that they raised about how an unmarried father may perfect, or conversely abandon, his constitutionally protected opportunity interest. With very little direct

Children’s interests, however, clearly are at the heart of the concerns involving the adoption triad (children, birth parents, adoptive parents).

⁸ *E.g.*, *Stanley v. Illinois*, 405 U.S. 645, 649 (1972) (ruling that unwed father was entitled to parental fitness hearing before being denied custody of his children); *Quillon v. Walcott*, 434 U.S. 246, 247 (1978) (addressing the issue of stepfather adoption); *Caban v. Mohammed*, 441 U.S. 380, 380–81 (1979) (holding unconstitutional a state law distinction requiring unwed mother’s, but not unwed father’s, consent before allowing adoption of non-marital child by stepparent); *Little v. Streater*, 452 U.S. 1, 16–17 (1981) (holding that state must provide blood tests to indigent putative father where denial would operate to foreclose his opportunity to be heard); *Lehr v. Robertson*, 463 U.S. 248, 251–52 (1983) (acknowledging that a biological father who has come forward to participate in raising his child would receive Due Process protection).

⁹ *Oren, Paradox, supra* note 5, at 48 (“[T]he Court held that a biological connection alone established the requisite link in benefits cases . . .”).

¹⁰ 463 U.S. 248, 250–51 (1983) (addressing the issue of stepfather adoption).

¹¹ *Id.* at 261 (“When an unwed father demonstrates a full commitment to . . . parenthood by ‘com[ing] forward to participate in the rearing of his child,’ his interest . . . acquires substantial [constitutional] protection But the mere existence of a biological link does not merit equivalent constitutional protection.”) (quoting *Caban*, 441 U.S. at 392).

¹² *Id.* at 262 (“The . . . biological connection . . . offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child’s future, he may enjoy the blessings of the parent-child relationship . . .”).

¹³ *Id.*

¹⁴ *Id.*

guidance from the United States Supreme Court, the different jurisdictions of our legal system have embraced a bewildering array of procedures designed to balance the interests of putative fathers with the needs of others involved in the adoption process (children, biological mothers, adoptive parents). Compared to what is required to terminate the rights of constitutionally-deemed “parents,” these measures are much less rigorous. Moreover, these approaches have not been tested by the post-*Lehr* Supreme Court, especially insofar as they apply to newborn or very young infants.

Part I of this Article traces the familiar story of the development of the “biology plus” constitutional standard for putative fathers seeking to block adoption, and contrasts it to the mere biology approach of paternity establishment for support. Part II examines summary procedures for notice and consent in the post-*Lehr* era. Part III examines the special case of Florida, where a recent decision by its high court on actual notice to known fathers has loosened apparently stringent procedural controls. In Part IV, this Article shifts to the substantive parenting behavior that states require for the perfection of an unmarried father’s opportunity interest. In order to highlight the significance of the distinction between constitutionally protected versus unprotected fathers, Part V discusses termination of parental rights cases, some of which rely on the grounds of “abandonment,” a terminology sometimes used, albeit in a different way, in the putative father situation. After summing up the constitutional differences in Part VI, the Article concludes by asking what we *should* do about the putative father, even if he lacks explicit constitutional protection.

I. THE CONSTITUTION AND UNMARRIED FATHERS: THE PARADOX OF MERE BIOLOGY VERSUS “BIOLOGY PLUS”

As we have changed the way that we live in families, there have been corresponding legal transformations, especially since the 1970s.¹⁵ Indeed,

¹⁵ See generally, Oren, *Paradox*, *supra* note 5, at 47. This trend continues today as other members of non-traditional (i.e. not “married with children”) families seek recognition of their relationships. See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 959 (Mass. 2003) (Massachusetts Constitution guarantees right of marriage to same sex couples); *In re Marriage Cases*, 43 Cal. 4th 757, 781–82 (holding that the California state constitution requires recognition of same-sex “marriages”); *In re Jacob*, 660 N.E.2d 397, 398 (N.Y. 1995) (deciding that under New York state law, “the unmarried partner of a child’s biological mother, whether heterosexual or homosexual, who is raising the child together with the biological parent, can become the child’s second parent by means of adoption”). *But see* *Lofton v. Sec’y of the Dep’t of Children and Fam. Servs.*, 358 F.3d (continued)

there has been much progress in removing the stigma of non-marital birth and ensuring that children, whether born into a marriage or not, are entitled to equal support from and benefits derived through their parents, including their fathers.¹⁶ For example, statutes modeled on the Uniform Parentage Acts (“UPA”) of 1973 or 2000 have replaced the constitutionally suspect categories of “legitimate” versus “illegitimate” children with the much less stigmatizing classifications of a child “with a presumed father” versus a child “without a presumed father.”¹⁷

At the same time, because of a concern with poverty rates and the control of public assistance spending, state and federal welfare policies increasingly have facilitated and emphasized paternity establishment.¹⁸ Based on mere biology, paternity establishment also renders the father a full-fledged “parent” for all purposes (duties and rights).¹⁹ A chief

804, 806–07 (11th Cir. 2004) (ruling that Florida statute which “prevents adoption by practicing homosexuals” is not unconstitutional despite the fact that the same sex fathers had been successfully caring for four HIV-positive foster children).

¹⁶ See Oren, *Paradox*, *supra* note 5, at 71–77 (discussing *Gomez v. Perez*, 409 U.S. 535 (1973), *Mills v. Habluetzel*, 456 U.S. 91 (1982), *Pickett v. Brown*, 462 U.S. 1 (1983), and *Clark v. Jeter*, 486 U.S. 456 (1988)).

¹⁷ See UNIF. PARENTAGE ACT Prefatory Note (1973), 9B U.L.A. 378–80 (2001), available at <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/upa7390.pdf> (explaining the new principle of “substantive legal equality of children regardless of the marital status of their parents”). By 2000, 19 states had explicitly adopted the 1973 Uniform Parentage Act, with many other states following it in significant portion. UNIF. PARENTAGE ACT Prefatory Note (2000), 9B U.L.A. 296 (2001). The philosophy behind the presumed father/no presumed father distinction is continued in the Uniform Parentage Act of 2000. *Id.*

¹⁸ See Oren, *Paradox*, *supra* note 5, at 94–99.

¹⁹ See, e.g., TEX. FAM. CODE ANN. § 160.203 (Vernon 2001) (“Unless parental rights are terminated, a parent-child relationship established under this chapter applies for all purposes, except as otherwise provided by another law of this state.”). This was not true at common law, where an order of affiliation under “bastardy” laws did not fully establish the parent-child relationship for all purposes nor did it even entitle the child to the same right of child support enjoyed by a marital child. Debi McRae, *Evaluating the Effectiveness of the Best Interests Marital Presumption of Paternity: It is Actually in the Best Interests of Children to Divorce the Current Application of Best Interests Marital Presumption of Paternity*, 5 WHITTIER J. CHILD & FAM. ADVOC. 345, 360 (2006); Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 332 (2005). In England, bastardy laws since the Elizabethan era were concerned with avoiding a charge on the parish or public purse. See U.R.Q. Henriques, *Bastardy and the New Poor Law*, 37 PAST & PRESENT 103, 103–04 (continued)

advantage of paternity establishment from this perspective is that the state may seek to recover child support payments to offset its expenditures on assistance.²⁰ The 1974 Amendment to the Social Security Act required mothers who received AFDC assistance for their families to “cooperate” in establishing paternity (and child support obligations) for their non-marital children.²¹ The interest in paternity establishment grew apace in the 1980s under Republican administrations, in a mixture of carrot and stick provisions.²² This agenda burgeoned even further under President Clinton with the passage of welfare “reform” and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).²³ In order to promote male responsibility and alleviate child poverty, PRWORA required all states to have an in-hospital voluntary paternity establishment procedure that would have the same force of law as a formal adjudication.²⁴ This was based on the belief, confirmed by research, that most unmarried couples are romantically involved at the time of the birth of their children.²⁵ Fathers who come to the hospital are likely to continue

(1967). The parish could seek recompense from the father of a non-marital child whose support otherwise would fall on the public purse by obtaining a fixed weekly maintenance order. *Id.* Parishes typically served as go-betweens, passing on what they collected to the mother of the child. *Id.*

²⁰ See Oren, *Paradox*, *supra* note 5, at 94–101, 118.

²¹ Social Security Amendments of 1974, Pub. L. No. 93-647, § 402, 88 Stat. 2337, 2359 (1975); see also Senate Report on Social Security Amendments of 1974, S. Rep. No. 93-1356 (1974), reprinted in 1974 U.S.C.C.A.N. 8133, 8154–55; 45 C.F.R. § 232.12(a)(2) (1975); 45 C.F.R. § 233.10(a)(1)(B) (1974); 42 U.S.C. § 608(a)(2) (2000) (cooperation requirement for AFDC); 42 U.S.C. § 1396k(a)(1)(B) (2000) (cooperation requirement for Medicaid); 7 U.S.C. § 2015(l)(1)(A) (2000) (cooperation requirement for food stamps); but see 7 U.S.C. § 2015(l)(2) (2000) (waiver of cooperation requirement for good cause); 42 U.S.C. § 602(a)(7)(A) (iii) (2000) (domestic violence waiver of cooperation requirement).

²² See, e.g., Family Support Act of 1988, Pub. L. No. 100-485, § 111, 102 Stat. 2343, 2348–50 (1988) (requiring states to establish paternity in percentage of cases of AFDC-eligible children).

²³ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended at 42 U.S.C. § 1305 (2000)).

²⁴ 42 U.S.C. § 666(a)(5)(C)(ii) (2000). See Oren, *Paradox*, *supra* note 5, at 97–101.

²⁵ Laura M. Argys & H. Elizabeth Peters, *Interactions Between Unmarried Fathers and Their Children: The Role of Paternity Establishment and Child-Support Policies*, 91 AM. ECON. REV. 125 (2001) (using data from National Longitudinal Survey of Youth 1997 Cohort and concluding that “results suggest that welfare, child-support and paternity policies do alter the probability of establishing paternity, and that exogenous increases in paternity can affect father-child interactions”); see also Sara McLanahan, *Dispelling Myths* (continued)

participating in the lives of their children.²⁶ Thus the in-hospital procedure was designed to capitalize on a magic moment.²⁷ The Office of Child Support Enforcement reported that for FY 2004, 1.6 million paternities were established or acknowledged, a figure in line with each of those of the preceding five years.²⁸ Of these, almost 915,000 were in-hospital paternity

About Unwed Fathers (2003), <http://www.contemporaryfamilies.org/familyarticles.php> (follow "Fact Sheets" hyperlink; then follow "Dispelling Myths About Unwed Fathers" hyperlink). The Fragile Families and Child Well being Study decries myths about unmarried parents that they are not involved with each other, while the truth is at the time of birth 82% of unmarried mothers and fathers are romantically involved with each other; 44% are living together; and over 70% of the mothers believe that the chances of their marrying the father over 50% or more. *Id.* Even if they were not romantically involved, about one-half of the mothers said that they were friends with the fathers; and most of the parents think marriage is good for their children. *Id.* It is also not accurate to say that unmarried fathers do not care about their children. 81% of the mothers indicated that the fathers provided financial help during pregnancy and all the fathers interviewed within 48 hours of birth reported that they wanted to be involved in raising their children in future. *Id.* The best indicators of future intent were fathers coming to the hospital. *Id.* Three-quarters of the mothers reported that fathers did so. For those couples living together, the figure rose to 91%. *Id.* However, for those not romantically involved it fell to 37%. *Id.* Some 93% of the mothers reported that they wanted the fathers to be involved in raised their children; for those who were not romantically involved, however, that fell to two-thirds. *Id.* The study concluded that achieving the involvement of fathers at the right time could make a difference. *See generally* Waldo E. Johnson, *Paternal Involvement Among Unwed Fathers*, 4 POVERTY RES. NEWS 513, 513-14 (2000), available at http://harrisschool.uchicago.edu/centers/chppp/pdfs/johnson_unwedfathers.pdf (reporting recent findings that unwed fathers are more involved than is thought, especially during the first two years of the child's life); SARAH McLANAHAN ET AL., FRAGILE FAMILIES ONE YEAR LATER: OAKLAND, CALIFORNIA, PUBLIC POLICY INSTITUTE OF CALIFORNIA 2 (2002), http://www.ppic.org/content/pubs/op/op_1002smop.pdf; Father & FamilyLink, Research Reports and News Posted May 2000, <http://fatherfamilylink.gse.upenn.edu/research/recent/2005.htm> (last visited May 29, 2008); Catherine S.Tamis-LeMonda & Natasha Cabrera, *Perspectives on father involvement: Research and Policy*, XIII SOCIAL POLICY REPORT 1, 1-26 (1999) (reviewing current state of father involvement similar to a literature review).

²⁶ McLanahan, *Dispelling Myths*, *supra* note 25.

²⁷ *See* Oren, *Paradox*, *supra* note 5, at 98.

²⁸ U.S. DEP'T OF HEALTH & HUMAN SERV., OFFICE OF CHILD SUPPORT ENFORCEMENT, CHILD SUPPORT ENFORCEMENT, FY 2004 PRELIMINARY REPORT (2005), http://www.acf.hhs.gov/programs/cse/pubs/2005/reports/preliminary_report/. This information was summarized from required state-submitted reports under the Child Support Performance and Incentive Act of 1998.

establishments.²⁹ Consequently, by definition they involved unmarried fathers of newborns.

The drive for paternity establishment to save money has been based nearly exclusively on proving biological ties.³⁰ The Supreme Court approved these measures easily.³¹ In a seeming paradox, however, the Supreme Court demanded a different basis for personal relationship claims.³² Unmarried fathers who sought to protect personal relationships with their children were required to prove “biology plus” in order to be treated as constitutionally-protected parents.³³ Only those who qualified came within the same circle of constitutional protection that was occupied by married fathers.³⁴ The Court’s progress along this path mostly involved

²⁹ *Id.*

³⁰ See Oren, *Paradox*, *supra* note 5, at 50–70. Professor Barbara Atwood has reminded me that at the state level paternity determination might countenance still another apparent paradox—the doctrine of paternity by estoppel. In *Shondel J. v. Mark D.*, 853 N.E.2d 610 (N.Y. 2006), an appeals court ruled that a man who was neither the spouse of the mother, her live-in companion, *nor* the biological father of her child was estopped from denying paternity. *Id.* at 611. The majority reached this conclusion “based on the best interests of the child as set forth by the Legislature.” *Id.* Even though Mark D. severed his personal relationship with the child after he found out that there was no biological tie, he could not deny paternity or escape child support obligations. *Id.* at 616–17. Having previously accepted financial and emotional responsibility in good faith, Mark D. remained liable for support even after he learned the truth about the biological ties. It did not matter that he made no knowingly false representations. All that mattered was the balance of equities with respect to the child’s best interests. *Id.* at 616. The onus was on him to seek scientific verification of his paternity before he initiated the parental relationship. *Id.* at 617. This example demonstrates that sometimes support obligations can be imposed in the actual absence of biology.

³¹ See, e.g., *Rivera v. Minnich*, 483 U.S. 574, 575 (1987) (preponderance of the evidence sufficient standard of proof to establish paternity).

³² See, e.g., *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (more than mere biology necessary for unmarried man to establish personal relationship claim).

³³ See *Lehr*, 463 U.S. at 248 (addressing the issue of stepfather adoption); *Caban v. Mohammed*, 441 U.S. 380, 381–82 (1979) (addressing the issue of stepfather adoption); *Quilloin v. Walcott*, 434 U.S. 246, 247 (1978) (addressing the issue of stepfather adoption); *Stanley v. Illinois*, 405 U.S. 645, 647 (1972) (addressing the presumption of unfitness of an unmarried father); *but see Michael H. v. Gerald D.*, 491 U.S. 110, 123–24 (1989) (holding that biology plus insufficient to give standing to biological father of child with a presumed marital father).

³⁴ See, e.g., *Stanley*, 405 U.S. at 646 (holding father protected because he lived with his children for all their lives). See also *Caban*, 441 U.S. at 397 (“Parental rights do not spring
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disputes by stepfathers seeking to adopt older children and was not entirely consistent.³⁵ Married fathers clearly were entitled to notice and an opportunity to deny their consent before adoption by a stepfather.³⁶ The unmarried father in *Stanley v. Illinois*³⁷ had a different problem. When the mother of his three children died, the State of Illinois sought to remove them from his custody without a hearing to show his parental unfitness.³⁸ The Court noted that Mr. Stanley had both “sired” and “reared” his children, living with them on and off for 18 years.³⁹ Although the State could not have done this to a married father or to an unmarried mother, it claimed that it had the right to presume the unfitness of an unmarried man.⁴⁰ The Supreme Court, however, demurred. It invalidated the use of an irrebuttable presumption and held that due process entitled him to a hearing.⁴¹ Four Justices also elaborated on his claim that he was denied equal protection because married fathers received the hearing and he did not.⁴²

The *Stanley* decision became the basis for much of the succeeding opinions on the rights of unmarried fathers. That did not always mean that unmarried fathers prevailed. In *Quillion v. Walcott*,⁴³ the putative father had done very little to develop a relationship until the child was eleven years old and his stepfather sought to adopt him.⁴⁴ The biological father received notice and an opportunity to be heard in opposition to the adoption, but he could not withhold his consent under state law.⁴⁵ Instead, the state court decided that it was in “the best interests of the child” to let the adoption proceed, whether or not he was an unfit father.⁴⁶ The Court held that Mr. Quilloin’s “substantive rights were not violated by

full-blown from the biological connection between parent and child. They require relationships more enduring. . . .”); *but see Quilloin*, 434 U.S. at 256 (holding no protection for father who has never assumed any significant responsibility in caring for child).

³⁵ See *supra* note 33.

³⁶ *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965).

³⁷ 405 U.S. 645 (1972).

³⁸ *Id.* at 646.

³⁹ *Id.* at 651.

⁴⁰ *Id.* at 647.

⁴¹ *Id.* at 657–58.

⁴² *Id.* at 658–59 (plurality opinion).

⁴³ 434 U.S. 246 (1978).

⁴⁴ *Id.* at 256.

⁴⁵ *Id.* at 249, 250 n.7.

⁴⁶ *Id.* at 251.

application of a ‘best interest of the child’ standard.”⁴⁷ In *dictum* immediately following this statement, the Court further remarked that there was little doubt, on the other hand, that it *would* violate due process if a State tried to break up a “natural family” without a showing of unfitness.⁴⁸ This situation was entirely different. The biological father had never had “actual” or “legal” custody of the child; he was not going to be adopted into a family with whom he had never lived before and the court was merely recognizing an existing family unit.⁴⁹ Therefore “we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the ‘best interest of the child.’”⁵⁰

In *Caban v. Mohammed*⁵¹ the unmarried father who sought to block adoption by the stepfather had a more developed relationship with his child.⁵² The Court addressed a facial challenge to the statute based on violation of equal protection on the grounds of gender, an issue that had not been ruled upon before.⁵³ A much more sympathetic Court found that “the distinction [the law] invariably makes between the rights of unmarried mothers and the rights of unmarried fathers has not been shown to be substantially related to an important state interest.”⁵⁴

The biological father had received notice and a chance to participate in a hearing, thereby satisfying procedural due process.⁵⁵ However, while the mother could withhold her consent and stop her husband from adopting the children, he enjoyed no such right to withhold his consent from her husband’s adoption of his children.⁵⁶ The *Caban* court opined that even granting that mothers are closer to their newborns than unmarried fathers as a class, “this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased.”⁵⁷ Where a developed relationship exists, this

⁴⁷ *Id.* at 254.

⁴⁸ *Id.* at 255.

⁴⁹ *Id.*

⁵⁰ *Id.* The Court also rejected an Equal Protection claim based on the distinction between married and unmarried classes of fathers. *Id.* at 256.

⁵¹ 441 U.S. 380 (1979).

⁵² *Id.* at 389.

⁵³ *Id.* at 388.

⁵⁴ *Id.* at 382.

⁵⁵ *Id.* at 385 n.3.

⁵⁶ *Id.* at 385–87.

⁵⁷ *Id.* at 389.

rationale ceases to be substantially related to an important government purpose: “[w]e reject, therefore, the claim that the broad, gender-based distinction of the [statute] is required by any universal difference between maternal and paternal relations at *every phase* of a child’s development.”⁵⁸ This case was different than the newborn circumstance, which the Court expressly reserved for future consideration.⁵⁹ The reserved question included the issue of whether a State could impose more stringent requirements “concerning the acknowledgment of paternity or a stricter definition of abandonment” when adoption of a newborn was at issue.⁶⁰ In this situation; however, the statute improperly permitted even a man whose “identity [was] known and who [had] manifested a significant paternal interest in the child” to be denied the ability to withhold consent.⁶¹

Interestingly, the last building block in the right-to-consent-to-adoption cases was penned by Justice Stevens, who had dissented in *Caban*.⁶² In *Lehr v. Robertson*⁶³ the unmarried father fared even worse under New York’s statutory scheme than the men in the last two cases. Because he had failed to enter his name in the putative father registry, Mr. Lehr was not even entitled to notice or an opportunity to be heard about the stepfather adoption.⁶⁴ The Court, however, was unconcerned. It noted that he had not registered, he had not lived with his child, and had not legitimated her (even though a legitimization suit was pending at the time the adoption went through).⁶⁵ In the absence of any developed relationship with his child, Lehr’s Due Process claim against New York’s registration statute failed.⁶⁶ In order to analyze his right to notice, the Court first asked about the nature of the interest at stake.⁶⁷ That depended entirely on what kind of responsibility he had assumed for his child.⁶⁸ The *Lehr* test came down to this:

⁵⁸ *Id.* (emphasis added).

⁵⁹ *Id.* at 392 n.11.

⁶⁰ *Id.*

⁶¹ *Id.* at 394.

⁶² *Id.* at 401 (Stevens, J., dissenting).

⁶³ 463 U.S. 248 (1983).

⁶⁴ *Id.* at 251.

⁶⁵ *Id.* at 251–52.

⁶⁶ *Id.* at 267.

⁶⁷ *Id.* at 256.

⁶⁸ *Id.*

When an unwed father demonstrates a full commitment to the responsibilities of parenthood by “com[ing] forward to participate in the rearing of his child,” his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he “act[s] as a father toward his children.” But the mere existence of a biological link does not merit equivalent constitutional protection The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child’s future, he may enjoy the blessings of the parent-child relationship If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child’s best interests lie.⁶⁹

The Court rejected out of hand the Equal Protection claim that the majority found so persuasive in *Caban*. Justice Stevens, who wrote *Lehr*, had dissented in the former case, arguing that men and women are different throughout pregnancy, during the birth, and immediately thereafter.⁷⁰ He emphasized that it was mothers who had to make timely decisions about adoption.⁷¹ He was also concerned about subjecting “millions” of adoption decrees to uncertainties about their validity.⁷²

Lehr is the Court’s last word on consent to adoption so far, albeit not on biological fathers and the rights of “natural” parents in other contexts.⁷³ *Lehr* and its predecessors carefully reserved any rulings about newborns.⁷⁴

⁶⁹ *Id.* at 261–62 (citations omitted). The dissent, on the other hand felt that the majority distorted the facts and indulged in a crabbed sense of due process. *Id.* at 274–75 (White, J., dissenting).

⁷⁰ *Caban v. Mohammed*, 441 U.S. 380, 404–05 (1979) (Stevens, J., dissenting).

⁷¹ *Id.* at 404.

⁷² *Id.* at 414.

⁷³ *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (holding that California may deny biological father standing to challenge paternity of mother’s husband); *Nguyen v. I.N.S.*, 533 U.S. 53 (2001) (holding that citizen biological father may be treated differently than citizen mother for purposes of derivative citizenship). *Cf. Troxel v. Granville*, 530 U.S. 57 (2000) (comparing rights of grandparents and parent in custody dispute).

⁷⁴ *See Lehr v. Robertson*, 463 U.S. 248, 392 n.11 (1983).

Taken together, however, the consent to adoption cases created a constitutional framework (due process and equal protection) for the rights of unmarried men who are presumed, adjudicated, or *Lehr*-qualified fathers. Just as courts may not approve a stepfather adoption with no notice to the divorced father, depriving him of his due process right to be heard,⁷⁵ unmarried men who act like fathers must be treated like fathers. If they have sired and reared their children, the State cannot presume them unfit because of their unmarried status and remove their children without a determination on parental fitness.⁷⁶ If unmarried men do not sufficiently assume their parental rights over time, they forfeit any veto over the adoption of their children by another man.⁷⁷ If they display more substantial commitment to those children, however, then they acquire the constitutional right to withhold consent.⁷⁸ If they have not sufficiently grasped the opportunity presented them by biology and stepped forward to develop some kind of a relationship, and they do not enter their names on time in a state's required putative father registry, their rights with respect to older children are subject to extinguishment without so much as notice.⁷⁹

II. ADVANCED *LEHR* LINE-DRAWING: SUMMARY PROCEDURES FOR NOTICE AND CONSENT

The line of consent to adoption constitutional decisions left the states without adequate guidance on how to handle unmarried men who have not had time to either meet or fail to meet *Lehr*'s criteria about stepping forward and grasping the unique opportunity of biology.⁸⁰ Thus, post-*Lehr* state courts and legislatures are required to make their own decisions about putative fathers who claim that they have been denied their opportunity interest and prevented from developing the kind of relationship that would

⁷⁵ *Armstrong v. Manzo*, 380 U.S. 545, 549–50 (1965).

⁷⁶ *Stanley v. Illinois*, 405 U.S. 645, 649 (1972).

⁷⁷ *Quilloin v. Walcott*, 434 U.S. 246, 253–55 (1978).

⁷⁸ *Caban v. Mohammed*, 441 U.S. 380, 394 (1979).

⁷⁹ *Lehr*, 463 U.S. at 263–65 (1983). When unmarried fathers who are seemingly *Lehr*-qualified are pitted against married men, however, the State does not have to pay any attention to their “rights” at all. In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), a divided Court ruled that states are free to safeguard the “unitary family” by denying standing to a biological father who wants to displace the mother’s husband as the “parent” of his child. They can treat him more generously if they wish. *Id.* at 129.

⁸⁰ The number of putative fathers affected by this uncertainty is not clear. Voluntary in-hospital paternity establishment accounted for over 62% of all non-marital births in 2004. See *supra* notes 24–29 and accompanying text.

clearly put them over the constitutional line. The question left open is how does one engage in advanced *Lehr* line drawing that can distinguish the wheat from the chaff among the fathers of newborn and very young children?

This section of the Article examines various procedural choices made by state legislatures and courts in distinguishing between fathers who have the right to receive notice of a proposed adoption and to give or withhold their consent, and those fathers who lack one or both of those rights. The putative father registry is the chief procedural mechanism the states have enacted to make summary distinctions.⁸¹ After the decision in *Lehr* approving New York's registry under the circumstances of that case, registries became increasingly popular.⁸² By 2007, at least thirty-four states had adopted one form or another of putative father registry.⁸³ Of course, registries do not all function alike.⁸⁴ Typically, they permit

⁸¹ See *infra* note 83.

⁸² *Id.*

⁸³ See ALA. CODE § 26-10C-1(2006), ARIZ. REV. STAT. ANN. § 8-106.01 (2007), ARK. CODE ANN. § 20-18-702 (2005), COLO. REV. STAT. § 19-5-105 (2007); CONN. GEN. STAT. § 45a-716(b) (2007); DEL. CODE ANN. tit. 13 § 8-402 (2006); FLA. STAT. ANN. § 63.054(1) (West 2005 & Supp. 2007); GA. CODE ANN. § 19-11-9 (2004); HAW. REV. STAT. § 578-2(d)(5) (2006); IDAHO CODE ANN. § 16-1513 (2007 & Supp. 2007); 750 ILL. COMP. STAT. 50/12.1 (2001 & Supp. 2007); IND. CODE ANN. § 31-19-5-12 (West 1999); IOWA CODE ANN. § 144.12A (West 2005); LA. REV. STAT. ANN. § 9:400 (2007 & Supp. 2007); MASS GEN. LAWS., ch. 210, § 4A (2007); MICH. COMP. LAWS § 710.33 (2002); MINN. STAT. § 259.52 (2007); MO. REV. STAT. § 192.016 (2007); MONT. CODE ANN. § 42-2-202 (2007); NEB. REV. STAT. § 43-104.01 (2001 & Supp. 2002); N.H. REV. STAT. ANN. § 170-B:5-a(I)(c) (2001); N.M. STAT. ANN. § 32A-5-20 (LexisNexis 1999); N.Y. SOC. SERV. LAW. § 372-c (McKinney 2003); OHIO REV. CODE ANN. § 3107.062 (LexisNexis 2003); OKLA. STAT. ANN. tit. 10, § 7506-1.1 (West 2007); OR. REV. STAT. § 109.096 (2005); 23 PA. CONS. STAT. ANN. § 5103(B) (2001); TENN. CODE ANN. § 36-2-318 (2005); TEX. FAM. CODE ANN. § 160.402 (Vernon 2002); UTAH CODE ANN. § 78-45g-402; (2002 & Supp. 2007); VT. STAT. ANN. tit. 15A, § 1-110 (2002); VA. CODE ANN. § 63.2-1250 (2007); WIS. STAT. § 48.025(2) (2006); WYO. STAT. ANN. § 1-22-117 (2007). See also Oren, *Thwarted Fathers*, *supra* note 5, at 170–71; Mary Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y 1031, 1080 (2002); Rebeca Aizpuru, Note, *Protecting the Unwed Father's Opportunity to Parent: A Survey of Paternity Registry Statutes*, 18 REV. LITIG. 703, 716 nn.50–54 (1999).

⁸⁴ See Aizpuru, *supra* note 83, at 716–26 (describing types of paternity registry schemes).

registration before the birth of the child and no later than thirty days after.⁸⁵ Some states, however, permit registration at any time prior to the filing of a petition for adoption.⁸⁶ The consequences of not registering can be strikingly different from one state to another.⁸⁷ In some states, any putative father who wants to be notified about a possible adoption proceeding must register or lose the opportunity for notice and objection.⁸⁸ In others, the statute requires due diligence to identify and notify putative fathers, including those who have failed to register.⁸⁹

Although registries have been around for a while, the Uniform Adoption Act of 1994⁹⁰ (hereinafter “UAA”) did not include this provision.⁹¹ The new Uniform Parentage Act of 2000 (revised 2002) (hereinafter “UPA (2000)”), however, included registry for notification in Section 402.⁹² While only seven states have adopted the UPA(2000) and most of those omitted Article Four’s registry requirement,⁹³ Section 402

⁸⁵ *Id.* at 716. However, some state schemes incorporate a different time limit, such as the mere five business days after the birth of the child allotted by Nebraska for a putative father to file with the registry his notice of intent to claim paternity and obtain custody. NEB. REV. STAT. § 43-104.02 (2004).

⁸⁶ *See, e.g.*, ARK. CODE ANN. § 20-18-702 (2005).

⁸⁷ Aizpuru, *supra* note 83, at 716–26 (describing consequences of failure to register); *See also* Laurence C. Nolan, *Preventing Fatherlessness Through Adoption While Protecting the Parental Rights of Unwed Fathers: How Effective are Paternity Registries?*, 4 WHITTIER J. CHILD & FAM. ADVOC. 289, 308–09 (2005).

⁸⁸ *See, e.g.*, *In re Adoption of Reeves*, 831 S.W. 2d 607 (Ark. 1992) (ruling that by failing to register, putative father was not entitled to notice of adoption proceedings regardless of relationship to child or actions of mother) (citing ARK. CODE ANN. §§ 9-9-207, 9-9-210, 9-9-212, 9-9-224, 20-18-701 to -705 (1991)).

⁸⁹ In Oklahoma, courts are obligated to inquire about unregistered fathers who may not have received notice. If the putative father is identifiable, he must receive notice. OKLA. STAT. ANN. tit. 10, § 7505-4.3 (West 2007). Notice by publication is authorized if the identity or whereabouts of the putative father are unknown. *Id.* at § 7505-4.1.

⁹⁰ UNIF. ADOPTION ACT (1994), 9 U.L.A. 20 (1999).

⁹¹ *See id.*

⁹² UNIF. PARENTAGE ACT § 402 (2002), 9B U.L.A. 322 (2001 & Supp. 2007).

⁹³ The UPA (2000) has been adopted by the following jurisdictions: Delaware, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming. UNIF. PARENTAGE ACT, 9B U.L.A. 4 (Supp. 2007). Delaware and Texas incorporate section 402, with slight variations in language in Texas. *See* UNIF. PARENTAGE ACT § 402; DEL. CODE ANN. tit. 13, § 8-402 (Supp. 2006); TEX. FAM. CODE ANN. § 160.402 (Vernon 2002). Utah’s registry provision is similar to Section 402, albeit even tougher. *See* UTAH CODE ANN. § 78-45g-402 (Supp. 2007). In order to receive notice in Utah, the putative father must file a notice of the

(continued)

exemplifies an important procedural approach to regulating the rights of putative fathers that has been followed by other jurisdictions even outside of the Uniform Act.⁹⁴ Pursuant to Section 402, a man who fails to put his name in the registry before the birth or within 30 days after the birth of his possible child, forfeits the right to notification.⁹⁵ The registration for notice requirement is excused only if “a father-child relationship between the man and the child has been established under this Act or other law” or “the man commences a proceeding to adjudicate his paternity before the court has terminated his parental rights.”⁹⁶ In the absence of registration, or one of the exceptions, any parental rights that a putative father may have

initiation of paternity proceedings in the registry either before or after the child’s birth, but in any case before the mother executes her consent to adoption of the child or her relinquishment of the child for adoption. *Id.* § 78-30-4.13(3)(a)–(d). Wyoming has a registry which pre-dates its enactment of the UPA (2000) and lies outside of it. *See* WYO. STAT. ANN. § 1-22-117 (1996). In Wyoming, a putative father who wants to preserve his rights must file a notice of intent to claim paternity. *Id.*; *see also id.* § 1-22-110. If the putative father is known, he must consent in writing for an adoption to go forward. *Id.* § 1-22-109. If he is unknown, the court determines whether or not he has registered. *Id.* If he has registered, he receives notice and an opportunity to appear and to withhold his consent to the adoption; if not, he apparently is out of luck. *Id.*; *see also id.* § 1-22-110. Oklahoma’s registry is now part of a revised Adoption Code enacted to be effective September 1, 2007. OKLA. STAT. ANN. tit. 10 § 7506-1.1 (West 2007). In Oklahoma, the paternity registry may be used, *inter alia*, by putative fathers who wish to receive notification of an adoption proceeding or who intend to claim paternity of a child. *Id.* Oklahoma law provides that a Notice of a Plan for Adoption, which also will inform him of his various options, may be served on a putative father who has placed his name in the registry. *Id.* § 7503-3.1 A.1. His failure to respond to that form within 30 days waives any further notice or opportunity to assert his parental rights. *Id.* § 7503-3.1 3. Unlike the UPA (2000), however, the registry is not the final word on notification under Oklahoma law. Courts are obligated to inquire about unknown or putative fathers who may not have received notice. *Id.* § 7505-4.3. If any such alleged father is identifiable, notice must be given. For putative fathers whose identity or whereabouts are unknown, notice by publication is permissible. *Id.* § 7505-4.1. North Dakota and Washington do not have registries.

⁹⁴ *See, e.g.*, ALA. CODE § 26-10C-1 (LexisNexis 2006); FLA. STAT. ANN. § 63.054 (West 2007).

⁹⁵ UNIF. PARENTAGE ACT § 402 (2002), 9B U.L.A. 322 (2001 & Supp. 2007).

⁹⁶ *Id.*

with respect to a child under one year of age may be terminated without notification to him and without his consent.⁹⁷

A stringent notice registry provision is one way to deal with the unknown father. It puts the burden on him to act within specified and relatively short time limits. If he engages in sex, he is put on a kind of constructive notice.⁹⁸ He has to keep track so that he knows whether a pregnancy results in time for him to either register or file for paternity. In the Section 402 version, if the putative father fails to take the affirmative step of registration there is no duty on anyone else to identify him or seek him out for notification.⁹⁹ The failure to register resolves the issue procedurally, without directly determining the substantive content of a putative father's rights.

Some of the states enacted strict registry laws after traumatic cases of late-appearing putative fathers who upset adoptions.¹⁰⁰ Illinois, for example, embraced stringent registry controls after the *Baby Richard* case,¹⁰¹ which involved a failed adoption and the surrender of a toddler to his biological father after a bruising and public battle that went on for

⁹⁷ *Id.* § 404, 9B U.L.A. 323–24 (2001 & Supp. 2007). (If the child is over 1 year, then notice is required to every alleged father regardless of registration. *Id.* § 405, 9B U.L.A. 323 (2001 & Supp. 2007).

⁹⁸ Virginia law provides that “Any man who has engaged in sexual intercourse with a woman is deemed to be on legal notice that a child may be conceived and the man is entitled to all legal rights and obligations resulting therefrom. Lack of knowledge of the pregnancy does not excuse failure to timely register except when the identity of such man is reasonable ascertainable.” VA. CODE ANN. § 6.3-2-1250(E) (2007). In that instance, he is notified at his last known address of his chance to register within 10 days of the mailing to him of notice that a written adoption plan is in existence. *Id.* Utah law also explicitly puts putative fathers on constructive notice arising from engaging in intercourse of the obligations necessary to protect their rights. UT. CODE ANN. § 78-30-4.13(1)(a) (2005). The unmarried father must initiate a paternity proceeding and file notice of that action in the registry prior to the mother's execution of consent to adoption or relinquishment of the child for adoption. *Id.* §§ 78-30-4.13(3)(a)–(d) (2005).

⁹⁹ UNIF. PARENTAGE ACT § 402 (2002), 9B U.L.A. 322 (2001 & Supp. 2007).

¹⁰⁰ See, e.g., *In re Adoption of Baby E.A.W. (Baby Emily)*, 658 So. 2d 961, 965 (Fla. 1995); *In re Petition of Doe (Baby Richard)*, 638 N.E.2d 181 (Ill. 1994). For a discussion of the proceedings and outcomes in these cases, see Oren, *Thwarted Fathers*, *supra* note 5, at 163–69.

¹⁰¹ *Baby Richard*, 638 N.E.2d at 182–83. (holding that there was insufficient evidence that father had had not shown degree of interest in child within thirty days of the birth of the baby). See also *Petition of Kirchner*, 649 N.E.2d 324, 328, 340 (Ill. 1995) (ruling that biological father could obtain release of son through habeas).

several years.¹⁰² The legislature immediately moved to amend its laws.¹⁰³ Thereafter, Illinois law provided that a putative father must register his name and other identifying information no later than 30 days after the birth of his child in order to receive notice of his child's proposed adoption.¹⁰⁴ Failing that, he is barred from asserting any interest in the child unless he can prove by clear and convincing evidence that it was not possible for him to register through no fault of his own, and that once he could, he did so within 10 days.¹⁰⁵ The statute warns putative fathers that ignorance is no excuse: "A lack of knowledge of the pregnancy or birth is not an acceptable reason for failure to register."¹⁰⁶ Indeed, failure to register or to be excused constitutes both a waiver of rights and an "abandonment" of the child.¹⁰⁷ A putative father who receives notice of an intended adoption plan and neither files a declaration of paternity nor a request for notice of additional proceedings within 30 days, is also out of the game.¹⁰⁸ He need receive no further notice.¹⁰⁹

III. SUMMARY PROCEDURES FOR NOTICE AND CONSENT—FLORIDA AND THE KNOWN PUTATIVE FATHER

Like Illinois, Florida also had an infamous case in the 1990s.¹¹⁰ Thereafter, Florida also enacted summary procedures as part of its statutory scheme for adoption.¹¹¹ After judicially-prompted changes in 2003, the Florida Supreme Court has once again revisited the procedures governing unmarried fathers and adoption.¹¹² In the interests of finality, the Adoption Act of 2001 had required an unmarried mother to notify a missing or

¹⁰² See Oren, *Thwarted Fathers*, *supra* note 5, at 165–67.

¹⁰³ *Id.* at 166.

¹⁰⁴ 750 ILL. COMP. STAT. 50/12.1 (2007).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* 50/12a.

¹⁰⁹ *Id.*

¹¹⁰ *In re Adoption of Baby E.A.W. (Baby Emily)*, 658 So. 2d 961, 963–66 (Fla. 1995) (interpreting "abandonment" in Section 63.032 (14) in the adoption context to include lack of emotional support to the mother prior to birth).

¹¹¹ Andrew T. Binstock, Note, *Not If, But When?: Dismantling the Florida Adoption Act of 2001*, 10 CARDOZO WOMEN'S L. J. 625, 627 (2004).

¹¹² *Heart of Adoptions v. J.A., Inc.* 963 So. 2d 189 (Fla. 2007).

unidentified unmarried father through public notices.¹¹³ In short order, however, Florida courts called into question the publication procedure on the grounds of the mother's state constitutional privacy rights,¹¹⁴ and the legislature repealed the offending statute.¹¹⁵ According to one commentator, lawmakers then "implement[ed] a solution advocated by the Florida community of adoption professionals: a voluntary, statewide putative father registry."¹¹⁶

The language of the 2003 statute appeared to put Florida on the stringent side of the debate over the rights of unmarried fathers. According to a legislative staff analysis, the bill that was enacted

[m]akes a legislative finding that the interests of the state, the mother, the child, and the adoptive parents outweigh the interests of an unwed biological father who does not take action in a timely manner to establish and demonstrate a relationship with his child; and that the unwed father has the primary responsibility to protect his rights, and is presumed to know that his child may be adopted without his consent unless he complies with the provisions of this legislation and demonstrates a prompt and full commitment to parental responsibilities.¹¹⁷

In specific words, the act declared the legislature's strong belief that the biological father has to step up to his obligations in a prompt and

¹¹³ FLA. STAT. § 63.088(5) (2001), *invalidated by* G.P. v. State, 842 So. 2d 1059 (Fla. Dist. Ct. App. 2003). For the short unhappy history of the 2001 statute, *see generally* Binstock, *supra* note 111. Binstock reports that the offending notice provision had been introduced repeatedly over a period of years after the *Baby Emily* case, with the intention of clarifying the rights of putative fathers who might not even know that a child had been conceived. *Id.* at 627; *see also* Jeffrey A. Parness, *Adoption Notices to Genetic Fathers: No to Scarlet Letters, Yes to Good-Faith Cooperation*, 36 CUMB. L. REV. 63 (2006) (arguing that while the intrusiveness of Florida's 2001 notice by publication law was properly invalidated, mothers should have some duty for good faith cooperation in identifying and locating putative fathers).

¹¹⁴ G.P., 842 So. 2d at 1062–63.

¹¹⁵ 2003 Fla. Laws 58; H.B. 835, 2003 Leg., 105th Reg. Sess. (Fla. 2003).

¹¹⁶ Binstock, *supra* note 111, at 654 (citing H.B. 835, 2003 Leg., 105th Reg. Sess. (Fla. 2003)). The Staff Analysis for House Bill 835 summarized the legislative intent as follows: the statute "[d]eletes extensive notice requirements in exchange for requiring registration with the Putative Father Registry." H.R. STAFF ANALYSIS, H.B. 835, 1 (Fla. 2003).

¹¹⁷ H.R. STAFF ANALYSIS, H.B. 835, 1.

substantial fashion in order to grasp his rights.¹¹⁸ A putative father in Florida is required to file in a registry not just his identifying information but also a “confirmation of his willingness and intent to support the child for whom paternity is claimed in accordance with state law.”¹¹⁹ Registration must occur prior to the filing of any petition for termination of parental rights.¹²⁰ The putative father’s consent to the adoption is required (for a child under six months) only if he demonstrates a full commitment through doing every one of a list of acts (*including* registration) before the mother consents to the adoption.¹²¹ Otherwise, he is deemed to have waived his objections and his consent is not required.¹²² The legislature further warned fathers that another person’s statement or omission does not relieve them of their own responsibility to act.¹²³

One would think, therefore, that Florida was firmly in the Illinois camp of summary procedures. In a recent decision, however, the Florida Supreme Court significantly limited the reach of the statute. *Heart of Adoptions, Inc v. J.A.*¹²⁴ held that although a known and locatable unmarried father’s failure to file with the Putative Father Registry on time could form the basis for termination of his rights, the adoption entity seeking termination must first give him adequate notice pursuant to Section 63.062(3)(a), Florida Statutes (2005) of the specifics of *everything* that he must do in order to preserve those rights.¹²⁵ The father then has the opportunity to act within a 30-day period after notice.¹²⁶ The Court noted that “by construing the statute in this manner, we avoid ruling on any potential constitutional implications of the statutory scheme either facially

¹¹⁸ FLA. STAT. ANN. § 63.053 (West 2005).

¹¹⁹ FLA. STAT. ANN. § 63.054 (West 2005 & Supp. 2007). Registration also constitutes permission for DNA testing. *Id.* § 63.054(2). Registration may be revoked before the birth of the child. *Id.* § 63.054(5). The putative father is obligated to keep his address up to date in the registry. *Id.* § 63.054(6).

¹²⁰ *Id.* § 63.054(1).

¹²¹ *Id.* § 63.062(2)(b). These acts are filing in the registry, timely responding to notice by seeking full responsibility for the child, agreeing to pay child support; and paying pregnancy related expenses to the best of his ability; if he had knowledge of the pregnancy and birth and was not prevented from doing so by the mother or others. *Id.*

¹²² *Id.* § 63.062(2)(d).

¹²³ *Id.* § 63.063.

¹²⁴ 963 So. 2d 189 (Fla. 2007).

¹²⁵ *Id.* at 200.

¹²⁶ *Id.*

or as applied under these circumstances.”¹²⁷ (The circumstances were that the unmarried father did not know about the pregnancy until three months before the child’s birth; he failed to file in the Putative Father Registry, but he filed a paternity action *pro se* on the very day of the birth of the child; and the letter that the adoption entity sent the unmarried father that was received three weeks prior to the child’s birth did not advise him of the necessity of timely filing in the Putative Father Registry.)¹²⁸

The tone of the oral argument in the *J.A.* case strongly signaled how the Court subsequently ruled: the Justices clearly were discomfited by summary procedures which cut off forever an unmarried father’s opportunity to be a parent without prior notice of what he risked and of what he needed to do to avoid that result.¹²⁹ An argument about “constructive notice” and the father’s duty to be aware of the law failed to persuade them.¹³⁰ The case was before the Court on a certified question, with stipulated bare bones facts.¹³¹ But the apparent injustice of precluding the fatherhood of a man who filed a lawsuit for paternity in a court on the very day of his child’s birth, albeit without taking the technical step of registering, clearly disturbed the Justices’ sense of fairness.¹³²

As a result of such concerns about fairness, the majority opinion construed the following statutory language as mandatory:

[A]n adoption entity *may* serve upon any unmarried biological father identified by the mother or identified by a diligent search of the Florida Putative Father Registry . . . a notice of intended adoption plan at any time prior to the placement of the child in the adoptive home, including prior to the birth of the child.¹³³

¹²⁷ *Id.* at 191. In an opinion concurring in the result only, Chief Justice Lewis reached the constitutional arguments, which he believed dictated the majority’s statutory result. *Id.* at 204 (Lewis, C.J., concurring).

¹²⁸ *Id.* at 191–92 (majority opinion). Registration is timely under the statute only if filed before *both* the date of a petition to terminate parental rights and the date that the mother executes a consent to adoption. FLA. STAT. ANN. § 63.062(2)(b)(1) (West 2005).

¹²⁹ Video of Oral Argument of *Heart of Adoptions*, 963 So. 2d 189, (No. SC07-738), <http://www.wfsu.org/gavel2gavel/archives/07-06.html>.

¹³⁰ *Id.*

¹³¹ *Heart of Adoptions*, 963 So. 2d at 191.

¹³² *Id.* at 198; Video of Oral Argument in *Heart of Adoptions*, *supra* note 129.

¹³³ *Id.* at 196 (citing FLA. STA. ANN. § 63.062(3)(a) (West 2005)).

The “notice of the intended adoption plan” referred to in this provision, *inter alia*, must notify the unmarried father of his obligation to file in the registry within 30 days.¹³⁴ The Court rejected an argument that the filing of this notice was discretionary with the adoption entity.¹³⁵ Instead, it held that this provision could only be reconciled with other parts of the statute by finding it to be mandatory.¹³⁶ The effect of this ruling is two-fold: it places an affirmative duty on an adoption entity to give a known and locatable father actual notice; and it also gives him a 30 day period to register after receiving that notice. Given the other requirements of the statute, the Court’s interpretation is not a free pass for the unmarried father.¹³⁷ Under certain circumstances, it requires him to demonstrate his commitment *prior* to the birth of the child.¹³⁸ However, the affirmative duty to notify a father who can be identified of everything that he must do to protect his rights represents a significant procedural departure from the pure “putative father beware” approach.

IV. ADVANCED *LEHR* LINE-DRAWING: PARENTING BEHAVIOR AND THE RIGHT TO CONSENT

The procedural device of the registry seems like a clear-cut answer to the question of what to do with putative fathers. However, it is entwined with, but also begs the question of the substantive content of the putative father’s opportunity interest in establishing a parental relationship with his child. What happens when a putative father properly preserves his rights under a registry system? Alternatively, what if a state has no registry, or

¹³⁴ *Id.*

¹³⁵ *Id.* at 196.

¹³⁶ *Id.* at 199. Moreover, the Court found that J.A.’s filing of a paternity petition in this case was the “legal and functional equivalent” of a timely Registry filing. *Id.* at 201. However, he still had to establish on remand his compliance with the other, more substantive, requirements of the statute. *Id.* at 202.

¹³⁷ J.A. also must “execute and file an affidavit stating that he is personally able to care for the child, setting forth his plans for care of the child, and agreeing to court-ordered child support or contribution to the mother’s expenses for the pregnancy and birth of the child depending on his ability to pay.” *Id.* He has to demonstrate factually that if he had knowledge of the pregnancy, that he “provided the mother with financial assistance based on his ability to pay.” *Id.* The Court noted that the unmarried father claimed to have an income of only \$1300 a month. *Id.*

¹³⁸ FLA. STAT. ANN. § 63.062(2)(b)(3) (West 2005) (placing duty on biological father who had knowledge of the pregnancy to pay a fair and reasonable amount of pre-birth expenses, subject to his ability to pay, and his not being prevented from doing so).

does not make failure to register dispositive of the right to withhold consent to an adoption? California, for example, does not rely on a registry. Instead, it has embraced a different approach, driven by the California Court's conclusion that it is unconstitutional to allow a biological mother to control whether or not a biological father becomes a "presumed father" under the code.¹³⁹ That is an important distinction because while presumed fathers have the right to withhold consent to their child's adoption,¹⁴⁰ "the child's best interest is the sole criterion where there is no presumed father."¹⁴¹ Under California's version of the 1973 Uniform Parentage Act, a man can become a presumed father of his non-marital child if he does any of a number of things, including marrying the mother, being named with her consent on the child's birth certificate, or receiving the child into his home and holding him out as his natural child.¹⁴² All of those acts, however, obviously require the cooperation of the mother. If she refuses, the putative father cannot become a presumed father under the statute. That is why the California Supreme Court held in the *In re Adoption Kelsey S.* case that there was a constitutional flaw in the system.¹⁴³

The California court ruled that a father who was thwarted by the mother's non-cooperation had to have some other way of establishing his presumed status.¹⁴⁴ Despite the absence of any explicit United States Supreme Court ruling, the California Court interpreted the line of due process and gender-based equal protection cases as requiring this result.¹⁴⁵ After this case, putative fathers in California are entitled to contest their status at a *Kelsey S.* hearing.¹⁴⁶ Any such father who promptly demonstrates a willingness to assume "a full commitment to . . . parental responsibilities—emotional, financial, and otherwise," is to be treated no differently than the biological mother, i.e. his parental rights can be

¹³⁹ *In re Adoption of Kelsey S.*, 823 P.2d 1216, 1236 (Cal. 1992).

¹⁴⁰ CAL. FAM. CODE § 8604 (West 2004).

¹⁴¹ *In re Adoption of Kelsey S.*, 823 P.2d at 1219.

¹⁴² CAL. FAM. CODE § 7611 (West 2004).

¹⁴³ *In re Adoption of Kelsey S.*, 823 P.2d at 1236. *See also In re Jerry P.*, 116 Cal. Rptr. 2d 123, 141 (Cal. Ct. App. 2002) (extending *Kelsey* reasoning to equitable father who was not biological but who had acted as social father and who wanted reunification services under the dependency provisions of the code).

¹⁴⁴ *In re Adoption of Kelsey S.*, 823 P.2d at 1236–37.

¹⁴⁵ *Id.* at 1223–28.

¹⁴⁶ *Id.* at 1236. *See also* CAL. FAM. CODE § 7664 (West 2004).

terminated involuntarily only upon a showing of unfitness.¹⁴⁷ The conduct of the father both prior to and after the birth of the child enters into the calculation.¹⁴⁸ He should have attempted to pay pregnancy expenses to the extent that he could and after the birth of the child he must seek full custody for himself, and not just be a disruptive force in the child's life.¹⁴⁹ By contrast, a man not found to be thwarted of his presumed father status can only block an adoption planned by the mother if the court finds that the refusal to consent is in the best interest of the child.¹⁵⁰

Unlike California, Iowa has a registry provision requiring putative fathers to register "no later than the date of the filing of the petition for termination of parental rights."¹⁵¹ Consonant with its strict procedural standards, Iowa state law also is very exacting about the kind of parenting behavior required from a man who files on time and wishes to withhold his consent. A parent who "abandons" his child forfeits any right to withhold consent.¹⁵² For a child under six months old, a man will be found to have abandoned his child *unless* he has done *all* of the following: demonstrated a willingness to assume custody himself; taken prompt action to establish a parental relationship; demonstrated through actions a commitment to the child.¹⁵³ A number of circumstances may be taken into account to reach these determinations, including whether or not a putative father had paid a fair sum toward pregnancy and birth expenses or evinced emotional support for the mother during the pregnancy.¹⁵⁴

Contrast Iowa's termination of the putative father's rights for "abandonment" in the consent-to-adoption context, to the grounds for termination of parental rights set forth in the Human Services Act.¹⁵⁵ "Abandonment of a child" as defined in the latter means "the relinquishment or surrender, without reference to any particular person, of the parental rights, duties, or privileges inherent in the parent-child relationship."¹⁵⁶ Acts and intent taken together constitute proof and no

¹⁴⁷ *In re Adoption of Kelsey S.*, 823 P.2d at 1236.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1237.

¹⁵⁰ CAL. FAM. CODE § 7664 (West 2004).

¹⁵¹ IOWA CODE ANN. § 144.12A (West 2005).

¹⁵² IOWA CODE ANN. § 600A.8(3) (West 2005 & Supp. 2007).

¹⁵³ *Id.* § 600A.8(3)(a)(1).

¹⁵⁴ *Id.* § 600A.8(3)(a)(2).

¹⁵⁵ *See* IOWA CODE ANN. § 232.116 (West 2005).

¹⁵⁶ IOWA CODE ANN. § 232.2(1) (West 2005).

particular period of time is mandated.¹⁵⁷ A parent must affirmatively “relinquish” or “surrender” his parental rights in order to abandon his child.¹⁵⁸ By contrast, a putative father must affirmatively take a number of steps in order to *avoid* abandoning his opportunity interest in developing a legally protected relationship with his child.¹⁵⁹

V. TERMINATING THE RIGHTS OF CONSTITUTIONALLY RECOGNIZED PARENTS: PROCEDURES AND GROUNDS

Constitutionally, a state may not deny the right to withhold consent to adoption to those who qualify as “parents.”¹⁶⁰ That does not necessarily mean that the adoption will not go through—even parents who enjoy fundamental rights may lose them in a properly conducted termination hearing.¹⁶¹ No consent to adoption is required from a parent whose rights have been properly terminated, for example on the grounds of “abandonment.”¹⁶² Despite the coincidence of terminology, there are constitutionally significant procedural and substantive differences between “abandonment” leading to termination of recognized parental rights and the implied “abandonment” provisions applicable to putative fathers. The United States Supreme Court has decreed that termination of recognized parental rights must be accompanied by procedural safeguards with respect to counsel, burden of proof, and appeals by indigents.¹⁶³ While the Court

¹⁵⁷ *Id.*

¹⁵⁸ Compare *id.* (defining a parental abandonment of a child as their relinquishment and surrender of the child), with *In re D.M.*, 516 N.W.2d 888, 891 (Iowa 1994) (stating that maintaining parental rights includes more than a subjective interest in the child; it requires affirmative parenting).

¹⁵⁹ See IOWA CODE ANN. § 600A.8(3).

¹⁶⁰ See *supra* notes 43–72 and accompanying text.

¹⁶¹ See *Lassiter v. Dep’t of Soc. Servs. of Durham County*, 452 U.S. 18, 21–22 (1981) (affirming the termination of a mother’s parental rights because her termination hearing was properly conducted).

¹⁶² See, e.g., MO. REV. STAT. § 453.040(7) (2005) (consent to adoption not required from parent who has “willfully abandoned” child).

¹⁶³ See, e.g., *Lassiter*, 452 U.S. at 31–32 (ruling that appointed counsel for indigents may be required under certain circumstances); *Santosky v. Kramer*, 455 U.S. 745, 766–70 (1982) (requiring proof of grounds for termination of parental rights by “clear and convincing” evidence standard); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (holding that the state must pay for the cost of a trial transcript necessary for a meaningful appeal in a termination of parental rights initiated by a father against an indigent mother).

has not had occasion to address substantive objections to any particular ground, other courts have reached the due process issue.¹⁶⁴

As Justice O'Connor said about a different matter, context matters.¹⁶⁵ Termination of parental rights often occurs in the context of the child welfare abuse and neglect system.¹⁶⁶ The constitutional mandates of procedural due process can only be appreciated as the end result of struggles over class, race, and more recently, the drug wars.¹⁶⁷ Children are freed for adoption in the abuse and neglect system only after a long and tortuous path that starts with a state agency removing them from their parents, taking them into custody, and placing them in foster care.¹⁶⁸ Federal statutory and constitutional mandates significantly shape the state law of the child welfare system. Because of perceived problems of "foster care drift" during the 1970s, Congress passed the Adoption Assistance and Child Welfare Act of 1980 ("AACWA").¹⁶⁹ The AACWA has been called the beginning of "pivotal" federal legislation in the child welfare area and it was the first effort to provide federal funds to reduce foster care limbo.¹⁷⁰ The funds were provided to states that made "reasonable efforts" to reunify families whose children were in foster care, and encouraged placement of children with kin.¹⁷¹ The law discouraged permanent termination of

¹⁶⁴ Patricia Fletcher Schroeder, Note, *New Mexico Expands Due Process Rights of Parents in Termination of Parental Rights: In Re Ruth Anne E.*, 31 N.M. L. REV. 439 (2001). See also *In re Ruth Anne E.*, 974 P.2d 164 (N.M. Ct. App. 1999).

¹⁶⁵ *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (context matters in reviewing racially based classifications).

¹⁶⁶ Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 649–650 (2006).

¹⁶⁷ See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970) (germinal case recognizing property interest in welfare benefits and requiring procedural due process before the state may withdraw benefits from recipients).

¹⁶⁸ See, e.g., Deborah Paruch, *The Orphaning of Underprivileged Children: America's Failed Child Welfare Law and Policy*, 8 J. L. & FAM. STUD. 119, 122–33 (2006) (discussing stages in termination law suit); SARAH H. RAMSEY & DOUGLAS E. ABRAMS, *CHILDREN AND THE LAW: DOCTRINE, POLICY, AND PRACTICE* 305–08 (2d ed. 2000) (presenting the stages of a case in the child protection system).

¹⁶⁹ Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified as amended at 42 U.S.C. § 675 (1997)).

¹⁷⁰ Christina White, Comment, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act*, 1 NW. J. L. & SOC. POL'Y 303, 306 n.12 (2006).

¹⁷¹ See, e.g., *Miller v. Youakim*, 440 U.S. 125 (1979) (ruling that kin were entitled to foster care payments).

parental rights and subsequent adoption, reserving it as a last option.¹⁷² Between 1980 and 1982 the AACWA achieved significant gains, reducing the figure of 500,000 children in foster care nearly in half.¹⁷³ But the numbers began to rise again as early as 1983 (along with other social indicators of poverty and distress) and had doubled by 1988.¹⁷⁴ Congress therefore accounted the Act a failure and replaced it with the Adoption and Safe Families Act of 1997 (“ASFA”).¹⁷⁵

Commentators have criticized ASFA as being less oriented toward family reunification and more aggressive about pushing for a final resolution (“permanence”) that might entail termination of parental rights and adoption by others.¹⁷⁶ AFSA creates time lines which require permanency hearings after fifteen months in foster care (subject to certain exceptions).¹⁷⁷ Even with safeguards in place, a mother or father caught in the foster care web is not in a good position practically to defend her or his

¹⁷² See Huntington, *supra* note 166, at 645 n.36 (stating that primary purpose of AACWA was to reunify families, adoption only secondary).

¹⁷³ White, *supra* note 170, at 308 n.31.

¹⁷⁴ Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 135 (2001).

¹⁷⁵ *Id.* See Adoption and Safe Families Act of 1997, Pub. L. No. 108-89, 111 Stat. 2115 (amending 42 U.S.C. 671, 675, 473A, 1320a-9, and 629a (1997)).

¹⁷⁶ See White, *supra* note 170, at 311 nn.49–51; Jane C. Murphy, *Protecting Children by Preserving Parenthood*, 14 WM. & MARY BILL RTS. J. 969, 980 n.57 (2006); Paruch, *supra* note 168, at 138 (criticizing the statute for failing to adequately define “reasonable efforts” toward reunification).

Courts have emphasized the importance under AFSA of moving toward permanence in a manner that reflects a child’s sense of time. See, e.g., *In re Termination of Parental Rights to Daniel R.S.*, 706 N.W.2d 269, 273–74 (Wis. 2005). See also National Council of Juvenile and Family Court Judges, *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases*, 5, 26–27, 34–35 (2000) (on the child’s sense of time and the preference for timely resolution in AFSA); but see, Thomas J. Walsh, *The Clock is Ticking: Do the Time Limits in Wisconsin’s Termination of Parental Rights Cases Serve the Best Interests of Children?*, 83 MARQ. L. REV. 743, 763 (2000) (criticizing Wisconsin’s strict time limitations); Madelyn Freundlich, *Expediting Termination of Parental Rights: Solving a Problem or Sowing the Seeds of a New Predicament?*, 28 CAP. U. L. REV. 97, 110 (1999) (questioning the merits of ASFA for terminating parental rights in favor of adoption); Stephanie Jill Gendell, *In Search of Permanency: A Reflection on the First 3 Years of the Adoption and Safe Families Act Implementation*, 39 FAM. CT. REV. 25 (2001) (criticizing ASFA for further burdening “an already resource-deprived system”).

¹⁷⁷ 42 U.S.C. § 675(5)(E) (2000).

parentage.¹⁷⁸ Reunification services frequently are available more in theory than in practice.¹⁷⁹ Yet without those services, families often cannot be mended. Fifteen months, or even twenty-two months, may not be long enough to resolve significant problems to the satisfaction of caseworkers.¹⁸⁰ State agencies may fail to utilize long-term options as alternatives to achieving permanency through termination of parental rights and adoption.¹⁸¹

When the ultimate plan calls for termination of parental rights (with an eye toward placement for adoption), the State petitions based on one or more unfitness grounds, often including “abandonment.”¹⁸² The State must prevail on at least one of the grounds charged.¹⁸³ In addition, the court must also determine whether or not “termination is in the best interest of the child.”¹⁸⁴ It may be easier for the State to win termination based on a ground like “persistence of conditions” or “failure to comply” with the reunification plan than it is to prevail on the grounds of “abandonment,”

¹⁷⁸ Kimberly Carpenter Emery, *Family Ties Dismissed: The Unintended Consequences of ASFA*, 12 VA. J. SOC. POL'Y & L. 400, 406–08 (2005).

¹⁷⁹ Some state laws even incorporate an explicit “reunification bypass” for certain categories of parents. See, e.g., CAL. WELF. & INST. CODE § 361.5 (West 1998 & Supp. 2007); Nina Wasow, *Planned Failure: California's Denial of Reunification Services to Parents with Mental Disabilities*, 31 N.Y.U. REV. L. & SOC. CHANGE 183, 183 (2006).

¹⁸⁰ Paul Anthony Wilhelm, Note, *Permanency at What Cost? Five Years of Imprudence Under the Adoption and Safe Families Act of 1997*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 617, 630 (2002).

¹⁸¹ Susan L. Brooks, *The Case for Adoption Alternatives*, 39 FAM. CT. REV. 43, 51–52 (2001) (criticizing the ASFA's emphasis on adoption while not promoting other permanency alternatives).

¹⁸² See, e.g., *In re Audrey S.*, 182 S.W.3d 838 (Tenn. Ct. App. 2005); *In re Adoption of a Minor Child*, 931 So. 2d 566 (Miss. 2006).

¹⁸³ See, e.g., *In re Audrey S.*, 182 S.W.3d at 862 (ruling that any one of the grounds is sufficient to support the order terminating parental rights).

¹⁸⁴ See, e.g., TEX. FAM. CODE ANN. § 161.001(2) (Vernon 2002 & Supp. 2006–2007). In most jurisdictions the best interest prong also must be established by clear and convincing evidence, but it is not clear that *Santosky* requires this result. See, e.g., *Kent K. v. Bobby M.*, 110 P.3d 1013, 1017–18 (Ariz. 2005) (en banc) (holding that Arizona termination statute does not require clear and convincing proof of best interests prong). See generally, Brian C. Hill, Comment, *The State's Burden of Proof at the Best Interests Stage of a Termination of Parental Rights*, 2004 U. CHI. LEGAL F. 557 (2004).

particularly if the parent's incarceration provides much of the basis for the charges.¹⁸⁵

In three significant cases, the Supreme Court required procedural safeguards before termination of parental rights.¹⁸⁶ These opinions contain some of the Court's strongest language about the fundamental nature of the parent-child relationship. As the Court said in *Lassiter v. Department of Social Services*,¹⁸⁷ "[the] Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'¹⁸⁸

In the *Lassiter* case the Court concluded that appointed counsel is *sometimes* required before terminating an indigent parent's rights.¹⁸⁹ The majority noted that the right to appointed counsel for an indigent litigant had traditionally been recognized "only when, if the [litigant] loses, he may be deprived of his physical liberty."¹⁹⁰ In light of a parent's "commanding" interest in "the accuracy and justice of the decision to terminate his or parental status," however, the due process calculus of *Mathews v. Eldridge* sometimes outweighs the presumption that only the loss of liberty triggers the right to counsel.¹⁹¹ The Court concluded that the right to counsel must be decided by the trial court on a case to case basis, bearing in mind, however, that "child-custody litigation must be concluded as rapidly as is consistent with fairness."¹⁹² In this instance, a mother was not entitled to appointed counsel, as she had not demonstrated enough

¹⁸⁵ See, e.g., *In re A.D.A.*, 84 S.W.3d 592, 598–99 (Tenn. Ct. App. 2002) (reversing on abandonment but upholding on failure to comply with permanency plan). Cf. *In re E.D.*, 884 So. 2d 291, 295–96 (Fla. Ct. App. 2004) (reversing abandonment finding due to incarceration of mother but affirming termination on the basis that children's welfare would be threatened by continued interaction with the parent, regardless of the provision of services). But see *In re Audrey S.*, 182 S.W.3d at 862 (affirming all three grounds: abandonment, persistence of conditions, and long-term incarceration).

¹⁸⁶ See, e.g., *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18 (1981); *Santosky v. Kramer*, 455 U.S. 745 (1982); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

¹⁸⁷ 452 U.S. 18 (1981).

¹⁸⁸ *Id.* at 27 (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

¹⁸⁹ *Id.* at 31–34.

¹⁹⁰ *Id.* at 27.

¹⁹¹ *Lassiter*, 452 U.S. at 27 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

¹⁹² *Id.* at 32.

effort or interest in obtaining counsel or even attending prior child custody hearings.¹⁹³

Less than one year later, the Court revisited terminations and fundamental fairness and adopted a bright-line rule in *Santosky v. Kramer*.¹⁹⁴ It ruled that New York State could not terminate parental rights on a mere preponderance of the evidence standard.¹⁹⁵ Instead, “[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.”¹⁹⁶ Even those who failed to be “model parents or [who] ha[d] lost temporary custody of their child to the State,” merited this due process protection.¹⁹⁷ “Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.”¹⁹⁸ Indeed, there was more rather than less reason to afford procedural protection when the intervention in the family was compelled by the State and was based on allegations of unfitness and fault.¹⁹⁹

The Court erected a final procedural safeguard in *M.L.B. v. S.L.J.*²⁰⁰ Unlike the first two cases, which grew out of state-initiated abuse and neglect cases, this was a private dispute.²⁰¹ An ex-husband sought termination of the mother’s parental rights so that his new wife could adopt the children.²⁰² After the mother lost at the trial level, she was too poor to pay for a transcript to pursue an appeal.²⁰³ The Court proclaimed the “unanimous view” that “few consequences of judicial action are so grave as the severance of natural family ties.”²⁰⁴ The state’s desire to save money could not outweigh the mother’s need for a transcript to prosecute her appeal.²⁰⁵

¹⁹³ *Id.* at 33.

¹⁹⁴ 455 U.S. 745 (1982).

¹⁹⁵ *Id.* at 747–48.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 753.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 753–54.

²⁰⁰ 519 U.S. 102 (1996).

²⁰¹ *Id.* at 107.

²⁰² *Id.*

²⁰³ *Id.* at 108–09.

²⁰⁴ *M.L.B.*, 519 U.S. at 119 (citing *Santosky v. Kramer*, 455 U.S. 745, 787 (1982)).

²⁰⁵ *Id.* at 121–22.

There was *dictum* in the *Santosky* case that went beyond procedural issues to touch on the substantive due process rights of parents. In a footnote, the Court observed, “Nor is it clear that the State constitutionally could terminate a parent’s rights *without* showing parental unfitness.”²⁰⁶ The Court’s most recent consideration of the uniqueness of parental rights supports the conclusion that the State could not do so. In *Troxel v. Granville*,²⁰⁷ grandparents were pitted against the mother of their son’s child.²⁰⁸ The deceased man was an unmarried but resident father who committed suicide.²⁰⁹ The Washington visitation statute allowed any person to seek visitation rights at any time, so long as it would be in the “best interests of the child.”²¹⁰ In a plurality decision, Justice O’Connor wrote that the Court had long recognized the “fundamental right of parents to make decisions concerning the care, custody, and control of their children.”²¹¹ Justice O’Connor concluded that “so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”²¹² If the state cannot intrude enough to make visitation orders on the basis of the “best interests of the child,” arguably it cannot extinguish parental rights entirely on that ground and without a showing of unfitness either.

Courts are sometimes troubled by particular grounds for termination of parental rights. The Wisconsin Supreme Court, for example, ruled in favor of a mother who could not meet the conditions for improvement placed upon her because of her incarceration.²¹³ It also rejected on due process grounds the idea that incarceration *per se* demonstrates parental unfitness.²¹⁴ Similarly, some courts have held that the mere fact of a

²⁰⁶ *Santosky*, 455 U.S. at 760 n.11.

²⁰⁷ 530 U.S. 57 (2000).

²⁰⁸ *Id.* at 60–61.

²⁰⁹ *Id.* at 61.

²¹⁰ *Id.* at 60–61.

²¹¹ *Id.* at 66.

²¹² *Id.* at 68–69.

²¹³ *In re Max G.W.*, 716 N.W.2d 845, 861 (Wis. 2006).

²¹⁴ *Id.* at 859–60. See also *In re Zachary B.*, 678 N.W.2d 831, 836 (Wis. 2004)

(concluding that incestuous parenthood ground as applied to a woman who was a victim of her father’s incest as a minor and bore three children to him violated her fundamental liberty interest in parenting her children; not narrowly tailored enough as applied to victims like her). But see *In re Diana P.*, 694 N.W.2d 344, 351–52 (Wis. 2005) (rejecting facial
(continued)

parent's limited intelligence level is not a sufficiently compelling justification to deprive her of a fundamental right:

While critical thinking and reasoning skills are undoubtedly relevant, at some level, to the ability of a parent to raise her child, the State must make a specific and tangible showing, not a presumptive one, on the precise nature of the links between these capacities and a particular child's needs. . . . While [the mother's] eloquence may not rival Winston Churchill, and the breadth of her vocabulary may not challenge Oliver Wendell Holmes, her constitutional right to parent her child may not be abrogated on these tenuous grounds.²¹⁵

On the other hand, other grounds for termination of parental rights, such as "persistence of conditions," "failure to comply" with a reunification plan, and "abandonment," are commonly upheld against parents who are tangled in the child welfare system.²¹⁶ Reading the cases certainly does not suggest that being a "parent" whose rights must be "terminated" provides a guarantee. But being a recognized "parent" matters, both procedurally and substantively. The safeguards of *Lassiter* and *MLB*, and most especially, of *Santosky* apply.²¹⁷ There is even more lip service, and sometimes real service, to the weight of the parent's fundamental interest in the relationship with her or his child. Perhaps there should be more constitutional questions about how the problems of the child welfare system have been resolved through creating grounds for termination that rely on "failure to comply" with a reunification plan, or "persistence of conditions." Whatever the limitations of constitutional analysis may be for "parents," however, putative fathers who only aspire to become parents have significantly fewer rights.

substantive challenge to statute that step by step led to termination of parental rights based on unfitness due to "continuing denial of periods of physical placement or visitation" as sufficiently narrowly tailored to survive strict scrutiny).

²¹⁵ *Bartell v. Lohiser*, 215 F.3d 550, 558–59 (6th Cir. 2000). *But see In re R.C.*, 745 N.E.2d 1233, 1242–46 (Ill. 2001) (upholding, against a facial challenge, a statute which allowed prospective adoptive parents to bypass the necessity for obtaining consent from a biological mother who was allegedly unfit due to psychiatric illness; neither the fact that actual or imminent harm was not required, nor that less intrusive alternatives did not have to be considered, rendered the statute unconstitutional).

²¹⁶ See *supra* notes 162–87 and accompanying text.

²¹⁷ See *supra* notes 188–214 and accompanying text.

VI. PUTATIVE FATHERS AND REAL PARENTS: THE CONSTITUTIONAL DIFFERENCE

In Illinois, a putative father's failure to register timely constitutes "abandonment" *per se* and waives his right to contest the adoption.²¹⁸ By contrast, Illinois courts require clear and convincing proof of a divorced father's intent before finding "abandonment."²¹⁹ Iowa requires a putative father to prove that he has engaged in sufficient parenting behavior to avoid the charge of abandoning his child.²²⁰ The burden of proof falls on the putative father, rather than on those seeking termination of his rights and adoption by another man. The distinction implicitly rests on the construction of unmarried fatherhood in the cases from *Stanley* to *Lehr* as requiring "biology plus." How then does this standard apply to the putative father of the very young child?

²¹⁸ 750 ILL. COMP. STAT. 50/2.1(g), (h) (2007).

²¹⁹ See, e.g., *In re C.A.P.*, 869 N.E.2d 214, 219–22 (Ill. App. Ct. 2007). In Illinois, the divorced father's consent to adoption by the stepfather is required unless he can be shown to be an unfit parent by clear and convincing evidence. *Id.* at 219. The grounds of unfitness alleged in the *C.A.P.* case were that father had abandoned his child and failed to maintain a reasonable degree of interest, concern, or responsibility for his child's welfare. *Id.* Despite the appellate court's stated reluctance to disturb fact findings from the trial court, it reversed the finding of unfitness, the termination, and the adoption without consent. *Id.* at 222.

The father had been separated from the child within a few months of the birth, due to military incarceration. *Id.* at 219. He kept in touch with the mother during his confinement, but when he was released, she filed for divorce. *Id.* at 220. Thereafter, he had very little contact with the child. *Id.* at 221–22. Many of the subsequent facts about how hard the father tried to maintain contact with child, and about the degree to which mother and paternal grandfather thwarted those efforts, were hotly disputed. *Id.* at 221. The appellate court noted, however, that mother failed to deny that she moved around and did not provide contact information, thereby making visitation difficult. *Id.* Moreover, "we find nothing in the record which suggests that respondent intended to abandon C.A.P." *Id.* The court also denied that mother and stepfather had "proven that respondent had a lack of interest or concern about C.A.P." *Id.* at 222. Finally, "there was nothing in the record to show that the mother desired or would have accepted any contribution from respondent for support of C.A.P."; to the contrary there was evidence of rejection of some gifts. *Id.* The appellate court concluded "in sum, the record does not support the trial court's conclusion that respondent was unfit based on abandonment or failure to maintain a reasonable degree of interest, concern, or responsibility, and we find that such a conclusion was against the manifest weight of the evidence." *Id.*

²²⁰ IOWA CODE ANN. § 600A.8(3) (West 2005 & Supp. 2007).

It may be argued that a putative father is unlikely to prevail against most summary registration procedures on constitutional grounds. As unrealistic as it may be to expect many men to use the paternity registry, perhaps when they do not even know about the pregnancy, *Lehr* apparently approved constructive notice under its facts and circumstances.²²¹ Many personal jurisdiction statutes rely on a similar underlying assumption.²²² Men who have intercourse in a State are presumed to have satisfied the *International Shoe Machine Co. v. Washington*²²³ standard for personal jurisdiction for a cause of action to support a resulting child.²²⁴ Intercourse leads to pregnancy, and men are presumed to know that and to have voluntarily submitted themselves to the jurisdiction of the court. It therefore may be constitutionally defensible that they also submit themselves to the laws of the State wherein they engaged in that intercourse, including statutes which require them to register in order to be notified of a consequent pregnancy. On a practical level, moreover, the increasing prevalence of in-hospital paternity establishment makes the constitutional objection harder to establish. Most men are romantically involved with their partner at the time of the birth of their child.²²⁵ Thus they have an easy opportunity to regularize the parent-child relationship in a manner which should give them protection from the putative father statutes and summary disposition of parental rights.

On the other hand, all putative fathers are not similarly situated. The recent results in the Florida Supreme Court indicate how distasteful it is to insist that constructive notice of the law's registry requirements is enough,

²²¹ *Lehr v. Robertson*, 463 U.S. 248, 263–64 (1983).

²²² *See e.g.*, DEL. CODE ANN. tit. 10 § 3104 (2007); IDAHO CODE ANN. § 5-514 (2007).

²²³ 326 U.S. 310, 316 (1945) (ruling that in personam jurisdiction requires minimum contacts such as to satisfy traditional notions of substantial justice and fair play).

²²⁴ *See e.g.*, TEX. FAM. CODE ANN. § 159.201(a)(6) (Vernon 2007) (listing as a basis for jurisdiction over a nonresident that an individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse.) *See, e.g., In re T.M.Y.*, 725 N.E.2d 997, 1001 (Ind. Ct. App. 2000) (coming into state to visit a woman every day for two weeks with evidence of having intercourse therein, triggered personal jurisdiction under UIFSA and satisfied constitutional minimum contacts test); *County of Humboldt v. Harris*, 254 Cal. Rptr. 49, 50–51 (Cal. Ct. App. 1988) (finding personal jurisdiction constitutionally satisfactory under California law where man had intercourse within the state and the child was born and raised there).

²²⁵ *See supra* note 25 and accompanying text.

even where there is an identifiable father who can easily be located.²²⁶ Adoption entities easily can give such a man actual notice of what he must do to protect and ripen his opportunity interest in a relationship with his newborn or very young child.²²⁷ The majority of the Florida Court deliberately evaded any constitutional issue, but they clearly had severe doubts about what would happen if they were forced to construe the statute in a manner that called its constitutionality into question.²²⁸ The due process calculus dictates that what process is due depends on a balance of the private interest at stake, the public interest at stake, and the impact on the risk of error of any additional safeguards.²²⁹ It is the last element of this balancing test that may distinguish unmarried fathers who can be located from those who are unknown. The private interest at stake is the same. It is an opportunity interest which is less than the full-blown parental interest that the Court tells us is one of our most precious rights.²³⁰ The public interest at stake also is the same for each category of unmarried father—the state has a strong interest in promoting the welfare of the child through protecting the finality of adoptions and the rights of biological parents.²³¹ The risk of error and the cost of additional procedural

²²⁶ *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189 (Fla. 2007). *See supra* notes 124–38.

²²⁷ *Heart of Adoptions*, 963 So. 2d at 197. This argument only applies to the father of a newborn or very young child. The father of an older child should not be excused from taking affirmative steps to develop a relationship with his child because he has not received explicit notice of what he must do. *See, e.g., In the Matter of the Adoption of A.M.B.*, No. 21973, 2007-Ohio-2584; 2007 Ohio App. LEXIS 2407 (Ohio Ct. App. 2007) (holding, *inter alia*, that the fact that the biological father was not aware that by acquiescing and not insisting on his visitation rights, his consent would not be required for stepfather adoption, was not a justifiable excuse for the lack of visitation).

²²⁸ *Heart of Adoptions, Inc.*, 963 So. 2d at 200.

²²⁹ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (listing—not in this particular order—private interest, the government interest, and “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional substitute procedural safeguards”).

²³⁰ *See Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (distinguishing a “developed parent-child relationship” and the “mere existence of a biological link”). *See also* *Michael H. v. Gerald D.*, 491 U.S. 110, 127–30 (1989) (contrasting weaker liberty interest of unmarried father of child who was the product of his adulterous relationship with her mother to conflicting interest of mother’s husband).

²³¹ *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (explaining that the two State interests at stake are a “*parens patriae* interest in preserving and promoting the welfare
(*continued*)

safeguards, however, are different with respect to known and unknown unmarried fathers. While the costs are considerable (both financial and in terms of the desired finality of adoptions) in giving notice to unidentified fathers, they are relatively small where the name and location of the putative biological father are known. Even after known fathers receive notice, moreover, courts still may judge their substantive parenting behavior and find it wanting.

There is an argument, however, against this proposed distinction between known and unknown unmarried fathers for purposes of *constitutionally mandated* notice requirements. This differentiation may create unfortunate incentives for mothers to say that they cannot identify fathers. If a father who was in fact knowable emerges after the fact, then the deprivation of his rights would undermine the important goal of finality of adoptions. This possibility suggests that the Court might be well advised to refuse to intervene and to leave the calculus of relative costs to the States, as it did in *Lehr*.

I am doubtful that an equal protection objection to the lack of actual notice to known unmarried fathers will prevail in the Supreme Court. Except for *Caban*, which was followed by *Lehr*, an opinion written by the dissenters in the preceding decision, the whole consent to adoption line of cases carefully avoided ruling on a gender-based equal protection claim.²³² Is the mother of a newborn similarly situated to the unmarried father of that same newborn (without his doing something more to establish his interest)? I do not believe the Court that decided *Nguyen v. INS*,²³³ citing *United States v. Virginia*²³⁴ to do so, would rule that way.²³⁵ Granting that the decision was by a narrowly divided Court, Justice Kennedy's majority opinion painted a very different picture of mothers and fathers at the moment of birth.²³⁶ Here was the mother, present at the birth.²³⁷ There was the unmarried father, out sowing the seeds of potential citizens all over the world without any necessary connection to his children.²³⁸ The Court argued this even in the face of the reality of a mother who dropped out

of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings").

²³² See *supra* notes 15–79 and accompanying text.

²³³ 533 U.S. 53 (2001).

²³⁴ 518 U.S. 515 (1996).

²³⁵ For a discussion of the *Nguyen* case, see Oren, *Paradox*, *supra* note 5, at 85–92.

²³⁶ *Nguyen*, 533 U.S. at 64.

²³⁷ *Id.*

²³⁸ *Id.* at 92.

from her child's life and a father who stood by him through his entire childhood and troubled adulthood.²³⁹ The Court even borrowed Justice Ginsburg's stirring words in celebration of the "enduring differences" between men and women, which she no doubt meant in quite a different way.²⁴⁰ Thus, an equal protection approach seems much less likely to succeed than the due process argument made above.

CONCLUSION: WHAT *SHOULD* WE DO ABOUT PUTATIVE FATHERS?

Even if the putative father measures currently in use survive constitutional scrutiny,²⁴¹ however, that does not settle the issues entirely. Are there some that are preferable to others? Who should be entitled to notice and an opportunity to be heard? Do we prefer strong registry gatekeepers or will we also allow due diligence in locating potential putative fathers to trigger the notice provision? What is enough to show that a putative father abandoned his opportunity interest by contrast to what is enough to show that a recognized parent has abandoned his child? How should pre-birth conduct count? What do we do about the truly thwarted fathers? Finally, are there enough putative fathers in this situation for the answers to matter?

As a former practicing due process lawyer and an adoptive mother as well, it is hard to sort out my instincts in answering these questions. While

²³⁹ *Id.*

²⁴⁰ *Id.* at 68. The Court, citing *Virginia*, stated "[t]he heightened review standard our precedent establishes does not make sex a proscribed classification. . . . Physical differences between men and women . . . are enduring." *Id.* However, the Court in *Virginia* stated that

'[i]nherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women 'for particular economic disabilities [they have] suffered,' to 'promot[e] equal employment opportunity,' [citation omitted], to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were to create or perpetuate the legal, social, and economic inferiority of women.

United States v. *Virginia*, 518 U.S. 515, 533–34 (1996).

²⁴¹ The Baby Moses statutes, addressed elsewhere in this conference and by me in a previous article, however, are constitutionally suspect. Certain irrationalities in the interaction of putative father registries across state lines are also problematic. See Beck, *supra* note 83, at 1071.

the extreme gate keeping forms of paternity registries have some appeal based on efficiency, they also have the effect of pretermittting the rights of putative fathers who meet every other criteria.²⁴² In light of the many different ways that we live in families today, it seems unduly harsh to rely on a single legal standard that is alien to the lives of many people, is based on an *in terrorem* philosophy of fatherhood, and is generally hostile to hearings. Thus, even at the not inconsiderable cost to adoptive families of delay in forming or forming under “at-risk” conditions, due diligence should be required in identifying and locating putative fathers who have not registered in order to afford them actual notice of the adoption proceedings and what they must do to preserve and develop their rights.²⁴³ Subject to some reasonably expeditious cut-off in time, it seems only fair to look for reasonably identifiable putative fathers and not just to cross your fingers and hope that they do not register before they lose their opportunity interest forever. Interestingly, a Nebraska statute provides that if a court finds that the petitioner fails to show due diligence to locate a missing putative father, the court may appoint a guardian ad litem to represent his interests.²⁴⁴

What does a putative father have to do beyond registration to preserve his opportunity interest and ripen it into a right to withhold consent to adoption by another man? The indifferent man who receives notice but

²⁴² See discussion *supra* Part II.

²⁴³ See, e.g., TEX. FAM. CODE ANN. § 161.002 (Vernon 2002 & Supp. 2006) (requiring due diligence to identify and locate a putative father if he is not registered or cannot be found under the address in the registry). The drafters of this provision deliberately departed from the registry provision of the UPA 2000 in requiring due diligence. They did so in light of decisions under the Texas Equal Rights Amendment. See *In re J.W.T.*, 872 S.W.2d 189, 198 (Tex. 1994) (man who alleges himself to be a biological father and moves quickly enough to initiate a paternity suit must be permitted to become parent).

For the meaning of “due diligence” with respect to cognate issues, see, e.g., *In re Sheltanya S.*, 723 N.E.2d 744, 754 (Ill. App. Ct. 1999) (holding even though they did not check the prisons, caseworkers’ efforts to locate father through public aid search and telephone directory search was “diligent” within meaning of probate statute allowing appointment of guardian to consent to adoption of child whose father could not be located but was found unfit in absentia). See also *In re D.C.*, 128 S.W.3d 707, 713 (Tex. App. 2004) (due diligence before service by publication in termination of parental rights case). But see *In re K.W.*, 138 S.W.3d 420, 431 (Tex. App. 2004) (holding no due diligence found in termination of parental rights abandonment case in which father in jail was not served, even though the Texas Department of Protective and Regulatory Services knew exactly where he was).

²⁴⁴ NEB. REV. STAT. § 43-104.18 (2004).

fails to respond with specified affirmative acts quite properly forfeits his interests.²⁴⁵ The trend is to consider pre-birth conduct too, i.e. whether the putative father paid or attempted to pay pregnancy (or birth) related expenses or even offered emotional support to the mother of his child. I think that is the right approach because otherwise the law introduces an inequality of self-determination between women and men. As Justice Blackmun observed in his concurring and dissenting opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,²⁴⁶ motherhood has a dramatic impact on all spheres of a woman's life, "educational prospects, employment opportunities, and self-determination."²⁴⁷ During the critical time of pregnancy and the immediate aftermath of birth, however, fatherhood does not have the same impact on the lives of men as does motherhood on the lives of women. Therefore it is not unreasonable to inquire what commitment alleged fathers have made during that period.

At the same time, respect for the mother's autonomy may inhibit the alleged father's ability to provide support during the pregnancy. This is where the registry has a useful second function. A man who *knows* about a pregnancy and who is "thwarted" from helping because of the woman's choices still has another option—he can register. That step becomes part of the conduct that is assessed by a court in determining whether he stepped forward to grasp his opportunity interest. If he had no other choice, registration might suffice in lieu of other pre-birth actions. But if he failed to even do that, then the question is was he truly thwarted?

On the other hand, what of the man who did not know about the pregnancy? Where is the burden of action here? One consideration is that an alleged father who is so far detached from the life of the mother that he is unaware that she is pregnant and is not even curious about it, has not displayed much interest in grasping the opportunities of biology. Thus, there is not even a nontraditional "family" worthy of protection here. This

²⁴⁵ See, e.g., 750 ILL. COMP. STAT. 50/12a (putative father has 30 days after receiving a notice of intended adoption to file a paternity petition or a request for notice of additional proceedings). The UAA gives a man who receives notice 20 days after service to respond by filing a claim of paternity. UNIF. ADOPTION ACT § 3-503 (1994), 9 U.L.A. 85 (1999). The Texas Family Code, based mostly on the Uniform Parentage Act of 2000, provides that the "rights of alleged father may be terminated if: (1) after being served with citation, he does not respond by timely filing an admission of paternity or a counterclaim for paternity under Chapter 160." TEX. FAM. CODE ANN. § 161.002 (Vernon 2002).

²⁴⁶ 505 U.S. 833, 922 (1992) (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part).

²⁴⁷ *Id.* at 928.

is less disturbing than the situation in which a known or identifiable father was entitled to notice by the exercise of due diligence, but an agency has lied about his existence. Such a man is the purest domestic example of a “thwarted” father. Surely, the passage of time becomes highly relevant here. The Uniform Adoption Act proposes that some thwarted fathers will prevail, but not all.²⁴⁸ If there is a finding of real “detriment” to the child whose adoption is faulty, the drafters contemplated the possibility that the genuinely thwarted father may have no remedy.²⁴⁹

One comforting thought is that the residue of truly hard cases could be quite small. The Department of Health and Human Services, Administration for Children and Families Office of Child Support Enforcement reports that in FY 2004, there were almost 915,000 in hospital paternities established.²⁵⁰ Presumably, these all involve newborn children. That figure represents over 62% of the births to unmarried women in 2005.²⁵¹ While the other births each represent a potentially thwarted unmarried father, the number of proposed adoptions narrows the applicable group considerably. Of the more than 127,000 annual adoptions, over 40% are publicly funded through child welfare, thus raising different issues.²⁵² The 15% of annual adoptions that are intercountry involve the laws of places that frequently, and unfortunately, offer unmarried fathers far less protection than does any United States jurisdiction.²⁵³ Hopefully, in the overwhelming majority of the remaining newborn adoption cases, petitioning agencies and prospective parents will do the right thing and exercise due diligence to give notice to identifiable putative fathers. Finally, the distinctions that I have made above between categories of fathers claiming to be thwarted, should reduce the affected men to even smaller numbers.²⁵⁴

²⁴⁸ UNIF. PARENTAGE ACT § 401 cmt. (2002), 9B U.L.A. 321 (2001 & Supp. 2007).

²⁴⁹ UNIF. PARENTAGE ACT § 404 (2002), 9B U.L.A. 323–24 (2001 & Supp. 2007).

²⁵⁰ U.S. DEP’T OF HEALTH & HUMAN SERV., OFFICE OF CHILD SUPPORT ENFORCEMENT, CHILD SUPPORT ENFORCEMENT, FY 2004 PRELIMINARY REPORT (2005), http://www.acf.hhs.gov/programs/cse/pubs/2005/reports/preliminary_report/.

²⁵¹ *Id.*

²⁵² U.S. DEP’T OF HEALTH & HUMAN SERV., CHILD WELFARE INFORMATION GATEWAY, HOW MANY CHILDREN WERE ADOPTED IN 2000 AND 2001? (2004), http://www.childwelfare.gov/pubs/s_adopted/s_adopted.pdf.

²⁵³ *Id.* See also Kathleen L. Manley, Comment, *Birth Parents: The Forgotten Members of the International Adoption Triad*, 35 Cap. U.L. Rev. 627, 627–629 (2006) (describing the lack of protections offered to birth parents during intercountry adoptions).

²⁵⁴ See discussion *supra* Part VI.

I conclude by admitting that there are no easy answers to the dilemmas unmarried fathers face. There is a lurking due process problem with the summary notice and consent procedures adopted by many of the states. Putative fathers who have not had much time to meet or fail the *Lehr* standard arguably should at least get notice of what they need to do to perfect their opportunity interests. As a result, the scale may well tip toward actual notice for unmarried fathers who are known and can be located in the exercise of reasonable diligence. We can anticipate continued litigation arising out of the array of procedural approaches embraced by the states. On the other hand, the substantive standards for parenting behaviors should be less susceptible to constitutional or practical doubts. An “opportunity interest” based on mere biology is not as weighty on the constitutional scale as a fully recognized parent-child relationship, nor should it be. Understandably, it is much easier for a court to conclude that an unmarried father “abandoned” his opportunity interest, than for it to find that the higher constitutional standards for “termination of parental rights” due to “abandonment” (or some other ground) have been met.²⁵⁵ When the dust settles and the United States Supreme Court rules in a newborn case, no doubt the unmarried father of a newborn or very young infant will continue to bear the burden of perfecting his opportunity interest to develop a constitutionally protected relationship with his child. If he receives reasonable notice and fails to take affirmative steps in response, he will have impliedly waived or abandoned his claim and the Constitution will not dictate a different result.

²⁵⁵ See discussion *supra* Part V.

