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CAUTIONARY TALES OF ADOPTION: ADDRESSING THE LITIGATION CRISIS AT THE MOMENT OF ADOPTION

ELIZABETH BRANDT*

I. CAUTIONARY TALES

A. THE TALE OF THE TEENAGE FATHER AND MOTHER¹

In early May 2003, Mike and his longtime girlfriend, Mary, went to their high school prom. Mike, age seventeen, and Mary, age sixteen, had been flirting at the edges of a sexual relationship for many months. That night, despite the best intentions, the months-long buildup of sexual tension and the romantic atmosphere of the prom combined to push them over the edge. They had unprotected sex. By August 2003, they realized that Mary was pregnant and together, Mary and Mike informed their parents. Both sets of parents were upset. Mary talked alternately about ending the pregnancy, placing the baby for adoption, and keeping the baby. Mike encouraged her to keep the baby or to allow him, with the support of his parents, to raise the baby.

As the pregnancy progressed, Mike and Mary's relationship became increasingly strained. Mary's parents, upset about the pregnancy, sought to have Mike charged with statutory rape. When

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1. This cautionary tale is based on the facts of *In re Williams*, No. CV 2004-077, Or. Vacating Or. Relating to Father's Parental Rights (Idaho Dist. Ct. 3d Dist. Mar. 31, 2004) (this order, affidavits, and other filings in this case are on file with the author).

that failed, Mary's parents threatened to have Mike arrested for harassing Mary by his constant attempts to stay in communication with her. By December 2003, Mike and Mary were not communicating with each other at all.

When their relationship deteriorated, Mike became increasingly concerned that Mary would place the baby for adoption and that he would lose the opportunity to father his child. With his parents, Mike contacted an attorney who advised him to register in Idaho's putative father registry, to offer financial support to Mary during her pregnancy, and to be prepared, upon the baby's birth, to pay child support for the child. Mike followed this advice and registered, offered in writing to provide support to Mary, cover expenses of her pregnancy, and prepared himself to pay child support. In the meantime, Mike continued his efforts to communicate with Mary. As the time for the birth drew near, Mike and his family began to regularly check with the two local hospitals to discover whether the child had been born.

Unbeknownst to Mike, in November 2003, Mary's family began efforts to place the baby out of state through a private adoption. The family, through intermediaries, made contact with a couple from a distant state and finalized arrangements for this couple to adopt the child. The child was born on February 2, 2004. The prospective adoptive parents were in the delivery room at the time of the birth. Later on the same day as the birth, the prospective adoptive parents filed a petition to terminate Mike's parental rights with the court in a nearby county. The prospective adoptive parents moved for an expedited hearing on the petition and informed the judge that they did not intend to provide notice to the father. The prospective adoptive parents led the judge to believe that the father "reconsidered" his earlier interest in parenting the child that had caused him to file in the putative father registry. In any case, the prospective adoptive parents argued that Idaho's putative father statute required that in order to be entitled to notice of a parental termination action or an adoption, an unwed father must both register and initiate a paternity action. Because Mike failed to initiate a paternity action, the prospective adoptive parents argued that Mike was not entitled to notice. Three days later, after a brief hearing, the judge entered an order terminating Mike's parental rights and sealing the record of the case. The prospective adoptive parents left the state of Idaho and, upon returning to their home state, initiated an action to adopt the child.

By February 9, 2004, Mike had grown so frustrated with his inability to discover whether Mary had delivered their baby yet that he went to her home despite earlier threats that the police would be called. When he arrived, he was told for the first time that the child was born on February 2 and had been placed for adoption “out of state.”

Mike immediately filed a paternity action in his home county and a motion to unseal the record and have the judgment terminating his parental rights set aside. The court unsealed the record and set the judgment aside based on its finding that Mike was entitled to notice of the action because of his registration. The case was transferred to Mike’s home county and combined with the paternity action. The court in that case ordered the birth mother to secure the return of the child to Idaho. After some procedural wrangling, the North Carolina court in which an adoption petition had been filed, dismissed the petition for lack of jurisdiction and the child (age three months) was returned to Idaho and placed in Mike’s custody.

B. THE TALE OF THE CONFLICTED MOTHER AND FATHER²

On December 7, 2001, Jane informed John that she was pregnant with his child.³ At the time, Jane lived in Pocatello, while John lived in Idaho Falls.⁴ They were not married, but the couple had been involved in a sexual relationship for over three years.⁵

Jane and John were conflicted about the pregnancy. At one point, John asked Jane to move in with him.⁶ Jane declined his offer.⁷ They discussed keeping the child and John purchased a baby carrier, stroller, clothes, and other items before the baby’s birth.⁸ Jane and John continued to see each other during the pregnancy and alternately discussed keeping the baby or placing the baby for adoption.⁹

Late in the pregnancy, Jane decided she would place the baby for

2. This cautionary tale is based on the facts of *Doe v. Roe Fam. Servs.*, 88 P.3d 749 (Idaho 2004).

3. *Id.* at 751.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

adoption when it was born.¹⁰ Jane sought counseling from Roe Family Services (RFS) and began steps to place the baby through the agency.¹¹ Pursuant to their service agreement, RFS covered Jane's medical expenses during the pregnancy.¹² As Jane's due date approached, John pressured Jane to keep the baby.¹³ Jane became more and more undecided.¹⁴ John also vacillated between adoption and keeping the baby; he went to RFS at Jane's request and participated in the selection of adoptive parents.¹⁵ But, by June 2002, John decided he wanted to keep the baby.¹⁶

Jane and John agreed to keep the baby when he was born on July 31, 2002.¹⁷ They notified RFS of their decision.¹⁸ On August 2, 2002, while still at the hospital, Jane and John both filled out an Acknowledgment of Paternity Application that requested the father's name be recorded as the father on the baby's birth certificate.¹⁹

Jane and John spent time together with the baby between August 2 and August 9, 2002.²⁰ However, on August 8, 2002, Jane called RFS and advised the agency that she did, in fact, want to place the baby for adoption.²¹ On the same day, Jane told John of her decision.²² When John could not convince Jane to change her mind, he retained an attorney to represent him regarding his parental rights.²³ John also repeatedly called RFS stating that his girlfriend was giving away his baby and that he wanted to know his rights.²⁴

RFS filed a Petition for Termination of Parental Rights and

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10. *Id.*
 11. *Id.*
 12. *Id.*
 13. *Id.*
 14. *Id.*
 15. *Id.*
 16. *Id.*
 17. *Id.*
 18. *Id.*
 19. *Id.*
 20. *Id.*
 21. *Id.*
 22. *Id.*
 23. *Id.*
 24. *Id.*

Temporary Custody and Guardianship on August 13, 2002.²⁵ Jane appeared before the judge and consented to the termination of parental rights and waiver of hearing.²⁶ Jane testified that John did not know she was going forward with the adoption and that he opposed placing the baby.²⁷ John did not receive notice of the hearing.²⁸ The judge granted the petition and terminated John's parental rights because he failed to register in Idaho's putative father registry.²⁹ The judge granted RFS custody and appointed RFS guardian for the adoption.³⁰ RFS placed the baby with the Roes the same day.³¹

Jane called John after the hearing to tell him she had given his baby up for adoption.³² John responded by filing a separate paternity action and moving to set aside the termination decree.³³ The judge denied John's motion to set aside the termination decree and granted the Roes custody.³⁴

On appeal, the court reversed and remanded the case.³⁵ RFS then filed a Notice of Appeal to the Supreme Court.³⁶ While the appeal was pending, the district court granted John custody of the child phased in over a three-month period until John had full custody.³⁷ When the Roes requested that the district court judge stay the custody order and consider evidence of the best interests of the child, the judge refused.³⁸ The Roes appealed this decision and refused to comply with it on the grounds that the order was stayed by their appeal.³⁹ On appeal, the Idaho Supreme Court held that John had been entitled to notice, set

25. *Id.* at 752.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 755.

38. *Id.*

39. *Id.* at 752.

aside the adoption, and affirmed the award of custody to John.⁴⁰

II. INTRODUCTION

Perhaps the most remarkable aspect of these stories is that they are not remarkable – they are repeated frequently in almost every state. Cases involving litigation of adoption by unwed fathers are increasingly becoming a staple of adoption practice.⁴¹ In both of the cautionary tales above, the adoptive placements were disrupted and the children were eventually reunited with their biological fathers because courts found that the parties failed to comply with provisions of state adoption law.⁴² In many more cases, the adoptive placement survives,

40. *Id.* at 755.

41. Not including cases arising under the federal Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1930 (2000), and cases arising in the context of state child welfare and dependency proceedings, since 2000, over eighty cases around the country have been reported involving litigation between unwed fathers and the adoptive parents. When the ICWA and child welfare cases are included, the number of cases since 2000 rises to over 200. See e.g. *S.C.W. v. C.B.*, 826 So. 2d 825, 827 (Ala. Civ. App. 2001); *In re Kyle F.*, 112 Cal. App. 4th 538, 541 (Cal. App. 5th Dist. 2004); *In re Alexander M.*, 94 Cal. App. 4th 430, 434 (Cal. App. 4th Dist. 2001); *In re Baby W.*, 796 N.E.2d 364, 368 (Ind. App. 2004); *In re Baby Girl S.*, 29 P.3d 466, 467 (Kan. App. 2001); *In re McLarrin*, 865 So. 2d 317, 319 (La. App. 2d Cir. 2004); *Heidbreder v. Carton*, 636 N.W.2d 833, 835 (Minn. App. 2002); *In re Baby Girl P.*, 802 A.2d 1192, 1193 (N.H. 2002); *In re Baby F.*, 2004 WL 771575 at *1 (Ohio App. 10th Dist. Apr. 13, 2004); *Arscott v. Bacon*, 567 S.E.2d 898, 898-899 (S.C. App. 2002); *In re D.L.B.*, 118 S.W.3d 360, 362 (Tenn. 2003); *In re B.V.*, 33 P.3d 1083, 1084 (Utah App. 2001). Other commentators, too, have recognized the strain on the adoption system of this increase in litigation. See Karen C. Wehner, Student Author, *Daddy Wants Rights Too: A Perspective on Adoption Statutes*, 31 Hous. L. Rev. 691, 713 (1994).

42. The failure to comply with state law is clearer in the case of *Doe v. Roe Family Services*. There, the father's consent to the adoption was not obtained even though the father and mother had together executed a "Voluntary Acknowledgment of Paternity." *Doe*, 88 P.3d at 751. Under Idaho Law, the consent of a father executing such an instrument is required. *Id.* at 754; Idaho Code § 16-1504(i) (1998) (requiring the consent to an adoption of an unmarried biological father who has filed a voluntary acknowledgment of paternity); § 16-1505(1)(a) (1998) (requiring that notice be provided to any person whose consent is required under § 16-1505). In *In re Williams*, the failure is not as clear but should nonetheless have been apparent to the parties. No. CV 2004-77, Or. Vacating Or. Relating to Father's Parental Rights. There, the father was not notified of the adoption although he complied with Idaho law which provided for unwed fathers to file a notice of their intent to commence a paternity action. *Id.*; Idaho Code § 16-1513(1) (1998). Idaho statutes conflict as to whether, in addition to such a filing, an unwed father must actually initiate a paternity action to be entitled to

but only after significant litigation and expense. Moreover, the reported cases are only the tip of the proverbial iceberg. In all likelihood, many cases are resolved short of appeal. In yet others, the disappointed father threatens litigation but lacks sufficient resources or access to the legal system to pursue litigation. These cases run the gamut. The cases range from situations in which the fathers' true interest in parenting his child is fleeting and ephemeral,⁴³ to cases in which he is serious about parenthood and capable of parenting.⁴⁴ They also include cases in which the father is pursuing the litigation in a misguided attempt to further a relationship with the child's mother⁴⁵ or to continue an abusive relationship the mother.⁴⁶

This type of litigation between birth and adoptive parents is unproductive and is harmful to children. One need only recall the vivid pictures of Baby Jessica screaming as she was transferred from her adoptive parents with whom she had lived for three years to her birth parents whom she had never met, to understand that instability in the placement of children for adoption can harm those children.⁴⁷ Modern

notice. Compare Idaho Code § 16-1505(1)(b) with Idaho Code § 16-1504(2)(b); Idaho Code § 16-1505(1). To the extent Idaho law requires a father to actually initiate a paternity action, the law again conflicts regarding when such an action may be timely initiated. The adoption consent provision permits a paternity action "filed pursuant to this section" to be filed prior to the birth of the child. Idaho Code § 16-1504(9). Yet the paternity statute only provides for filing an action only after the birth of the child. Idaho Code § 7-1107 (1998).

43. See e.g. *Doe v. Queen*, 535 S.E.2d 658, 660 (S.C. App. 2000) (unwed father waited three months after notification of child's birth and adoption to object to adoption, failed to file an answer to complaint seeking termination of parental rights until the day of the hearing, did not seek temporary custody and visitation, and did not pay support for child).

44. See e.g. *In re B.V.*, 33 P.3d at 1084-1085 (the father maintained contact throughout the pregnancy, signed financial responsibility documents for pregnancy costs, scored very high on psychological testing regarding parenting ability, and sought full custody of child).

45. See e.g. *Banach v. Cannon*, 812 A.2d 435, 436 (N.J. Super. Ch. Div. 2002) (where father sought to enjoin potential adoption action and an order disclosing birth mother's whereabouts).

46. See e.g. *In re Jonah C.*, 2002 WL 17336238 at *3 (Cal. App. 2d Dist. July 26, 2002).

47. The parting scene was covered in detail by the national popular press. *CNN News*, "Jessi DeBoer Returned to Biological Parents Amid Furore" [¶¶ 1-5] (CNN Aug. 3, 1992) (TV broadcast, transcr. available in LEXIS, News Library, News All file); Desda Moss, *Child's Painful Parting: Jessica Handed to Birth Parents*, USA Today

research on child development underscores this intuitive notion that the disruption of attachments formed by infants and toddlers to their adult caregivers can have serious and detrimental effects on their emotional and psychological development.⁴⁸

3A (Aug. 3, 1993) (available at 1993 WL 6715348).

48. See generally John Bowlby, *A Secure Base: Parent-Child Attachment and Healthy Human Development* 3-4 (Basic Books 1988); Susan B.G. Campbell & Paul M. Taylor, *Bonding and Attachment: Theoretical Issues*, in *Parent-Infant Relationships* 3 (Paul M. Taylor ed., Grune & Stratton 1980); Robert Karen, *Becoming Attached: First Relationships and How They Shape Our Capacity to Love* (Oxford U. Press 1994) (summarizing and synthesizing early research on attachment theory); Eleanor Willemsen & Kristen Marcel, *Attachment 101 for Attorneys: Implications for Infant Placement Decisions*, 36 Santa Clara L. Rev. 439 (1996). Attachment refers to the relationship that forms early in life between a responsive caregiver and a dependent infant that is necessary for a child's survival and appropriate development. Research on child development indicates that when such attachments are disrupted during the period in which they are forming or when children lose secure attached relationships, their emotional, intellectual, and psychological development can be negatively affected. While many factors can contribute to disruption of a child's developmental needs and the interrelationship of such factors is unclear, the consensus of researchers is that attachment and the disruption of attachment are crucial factors in intellectual, emotional, and developmental problems experienced by such children.

A related argument rooted in the psycho-social literature has been made that the mother has a special bond to the child that develops both the pre- and postnatal periods which entitles her to play a special role in making decisions regarding the child's welfare. See John Lawrence Hill, *What Does it Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. Rev. 353, 394-402 (1991). See also Diane E. Eyer, *Mother-Infant Bonding: A Scientific Fiction* 35-41 (Yale U. Press 1992). My argument does not regard the bond formed by the mother, but rather concerns the impact on the child of the loss of important relationships. Hill, who disputes the biological and, to some extent, the emotional mother-to-infant bond, concludes:

There is little doubt that the development of secure emotional ties between parent and child has fundamental and long-lasting significance. It is well-established that infants failing to form a bond with any adult are likely to lack the ability to form deep and enduring relationships later in life. One study found a strong correlation between insecurely attached infants and those who experience a higher level of nonmaternal care in the first year of life. Another study maintains that all infants who are placed for adoption after nine months of age have difficulties with a variety of 'socioemotional' matters, including establishing certain kinds of relationships with others. Still other studies indicate that the quality of attachment in infancy may affect the IQ of the child and the development of the child's sense of self-identity, thereby affecting the child's ability to cope with various environments including schools.

In addition to the impact instability in adoption placement has on the children involved, the litigation is difficult, expensive, time consuming, and unpredictable. Often what seems legally appropriate is not in the best interests of the child.⁴⁹ Despite the possibility of expedited appeals, the litigation surrounding these cases can drag on for long periods of time. The Baby Jessica case wound through the courts for almost three years.⁵⁰ The *Doe* case, discussed in the cautionary tale of the conflicted mother,⁵¹ was pending for nineteen months before a final decision from Idaho's highest Court resolved the issues in favor of the unwed father.⁵² This extended litigation occurred even though the Idaho Supreme Court had adopted an appellate rule providing for expedited appeal of cases involving children in Idaho.⁵³

Hill at 402.

49. See e.g. *In re Baby Girl M.*, 236 Cal. Rptr. 660, 661 (Cal. App. 4th Dist.1987) (holding that although unwed father's constitutional rights were violated by failure to provide adequate notice of the adoption, changing custody to the father would be detrimental to the child).

50. *DeBoer v. Schmidt*, 509 U.S. 938, 938 (1993) (denying application for stay).

51. *Supra* Section I.B.

52. 88 P.3d at 749, 755.

53. Idaho Appellate Rule 12.1(a) provides for permissive, expedited appeal to the Idaho Supreme Court whenever the best interests of a child would be served. In *Doe*, the parties do not appear to have taken advantage of this provision. Many states adopted provisions such as Idaho's as a partial response to the delay documented in cases such as the Baby Jessica case. See Jessica K. Heldman, Student Author, *Court Delay and the Waiting Child*, 40 San Diego L. Rev. 1001, 1015-1018 (2003); Jeanette Mills, Student Author, *Unwed Birthfathers and Infant Adoption: Balancing a Father's Rights with the States Need for a Timely Surrender Process*, 62 La. L. Rev. 615, 632 (2002) (discussing Louisiana's expedited adoption process). Such rules have not ensured speedy resolution of cases even where they have been used. Heldman, *supra*, at 1016-1019. For example, in a recent Idaho case involving custody by a gay father, a permissive, expedited appeal was pursued (and permitted by the court). *McGriff v. McGriff*, 99 P.3d 111, 114 (Idaho 2004). The custody trial was held in the spring of 2002. Corey Taule, *Homosexual Dad Takes Custody Case to High Court: I.F. Judge's Ruling May Send First Such Issue before Supremes*, Idaho Falls Post Register A1 [¶ 1] (July 10, 2002) (available in Westlaw, KRT-POSTREG database). The request for expedited permissive appeal was filed shortly thereafter. *McGriff*, 99 P.3d at 114. The Court's opinion was delivered two and one-half years later. *Id.* at 111. During the entire pendency of the appeal, the father's gay partner was residing in a mobile home parked in the driveway of the father's home in order to avoid violating a visitation restriction in the trial court's order. Taule, *supra*, at [¶ 7]. While the appeal was pending, the case was continually covered in the local press drawing out the parents'

The economic cost to the parties fighting these battles is huge.⁵⁴ The emotional cost to the adults in these battles cannot be underestimated.⁵⁵ Finally, and perhaps most importantly, the specter of such litigation is likely to deter parties from considering adoption.

In this Article, I will propose that states reexamine the approach they are taking to unmarried fathers in adoption, implement policies designed to notify fathers, and quickly resolve litigation regarding the placement of children for adoption while at the same time providing a reliable mechanism for resolving conflicts. Such a policy would be characterized by the following features: The central goals of all state adoption law should be the accurate identification of children who are truly “available” for adoption and the placement of children for adoption in legally stable placements. This can only be accomplished if states consistently notify birth fathers of adoption actions and swiftly resolve their objections when they arise.

III. CAUSES OF THE CURRENT CRISIS

The sources of the growing crisis in adoption litigation are complex. Certainly litigation has been spurred by a series of Supreme Court cases that upset the legal framework for notice and consent to adoption, but has failed to provide sufficient guidance on how to constitutionally approach adoption notice and consent.⁵⁶ In addition to creating confusion regarding the scope of an unwed father’s constitutional protection, the Court’s opinions also leave open key questions – in particular, under what circumstances may a court decline to recognize unmarried father’s relationship with a newborn child.

The Supreme Court jurisprudence does not, however, fully explain the growing problem of adoption litigation. Rather, the confusion left by the Supreme Court has been aggravated by a disconnect between an idealized legislative framework implemented in

public conflict, to the probable detriment of the children.

54. Although statistics are not generally available, one birth father reported that the adoptive parents in his case testified that they had incurred over \$100,000 in legal fees. Erik L. Smith, *What Birth Fathers Don’t Know Hurts Everyone* [¶ 14]; <http://www.e-magazine.adoption.com/articles/438/what-birth-fathers-dont-know-hurts-everyone/article/6358/2.html> (last accessed Mar. 29, 2005).

55. Robby DeBoer, the adoptive mother of Baby Jessica, detailed her intense emotional experience in a book. Robby De Boer, *Losing Jessica* (Doubleday 1994).

56. See *infra* Section III.A (discussing the Supreme Court jurisprudence).

many states, and the goals and desires of fathers regarding their children. Even after the Supreme Court upset prior approaches to adoption notice, states have retained a more traditional view that assumes unwed fathers are not important parties in an adoption proceeding.⁵⁷ This approach is inconsistent with the changing norms of paternal behaviors and expectations regarding children born outside marriage.⁵⁸ The combination of this uncertain legal framework, state attempts to continue dispensing with the consent of unmarried fathers, and the growing expectation by fathers that they will parent their children, has resulted in escalating litigation.

A. U.S. SUPREME COURT JURISPRUDENCE ON UNWED FATHERS

In a series of cases beginning with *Stanley v. Illinois*⁵⁹ through *Lehr v. Robertson*⁶⁰ and *Michael H. v. Gerald D.*,⁶¹ the United States Supreme Court addressed the interests of unwed fathers regarding their children. In 1972, when the first case in this line of authority was decided, the laws of most states summarily dispensed with notice to and consent of unmarried fathers in parental termination/adoption cases.⁶² This approach was consistent with the development of adoption as a solution to the birth of children outside marriage.⁶³

57. See *infra* Section III.C (discussing state legislative attempts to preserving a more traditional approach to adoption).

58. See *infra* Section III.B (discussing changing norms of parenting).

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

60. 463 U.S. 248 (1983).

61. 491 U.S. 110 (1989).

62. See Homer Clark, *The Law of Domestic Relations in the United States* § 20.2, 855 (2d ed., West Group 1988) (citing Note, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 Mich. L. Rev. 1581 (1972)) ("Until 1972 the statutes in the various states generally provided that the consent of the mother of an illegitimate child would alone be sufficient to make the child available for adoption and, as a logical consequence, that the involuntary termination of her parental rights would have the same effect. In other words the father of the illegitimate child had, under these statutes, no legally enforceable right to assert his parental rights in the child if the mother wished to place the child for adoption or if she failed in her parental duties sufficiently to warrant terminating her parental rights."). See also John R. Hamilton, *The Unwed Father and the Right to Know of His Child's Existence*, 76 Ky. L.J. 949, 949-951 (1988).

63. Often histories of adoption in the United States characterized adoption as a child-centered process intended to provide children with a safe and loving home when their birth parents could not care for them. See e.g. Ruth-Arlene W. Howe, *Adoption*

Adoption decisions were made to avoid the stigma of out-of-wedlock births under the cloak of secrecy.⁶⁴ Even the consent of the mother, while required, was (and is) often the product of general or specific coercion.⁶⁵ Many factors contributed to changing norms regarding adoption. Increased sexual freedom has led to more births outside marriage.⁶⁶ That fact and rising divorce rates helped lessen the stigma of non-marital births and single-parent homes.⁶⁷ Adoptions – both the

Practice, Issues, and Laws: 1958-1983, 17 Fam. L.Q. 173, 176-177 (1983); Sanford N. Katz, *Rewriting the Adoption Story*, 5 Fam. Advoc. 9, 9 (1998). While certainly adoption had that effect, some of the more common reasons birth parents could not care for their children were that they were single mothers of illegitimate children who would not be able to support themselves economically or to overcome the stigma to themselves or their children of an out of wedlock birth. Judith Dulberger, *Mother Don't fore the Best* (Syracuse U. Press 1996) (discussing the separation of poor women from their children in nineteenth century orphanages and asylums because of the inability of birth mothers to provide stable homes for their children); Carol Sanger, *Separating from Children*, 96 Colum. L. Rev. 375, 445-450 (1996) (discussing the stigma of illegitimacy on mothers and children during the middle twentieth century and other cultural conceptions of motherhood and adoption).

64. D. Marianne Brower Blair, *Lifting the Genealogical Veil: A Blueprint for Legislative Reform of the Disclosure of Health-Related Information in Adoption*, 70 N.C. L. Rev. 681, 695-698 (1992) (discussing the reasons for the secrecy surrounding most adoption orders).

65. See e.g. *In re Perry*, 641 P.2d 178, 181 (Wash. App. Div. 3 1982) (mother was pressured by adoption agency to place child for adoption); *In re Baby Boy L.*, 144 A.D.2d 674, 676 (N.Y. App. Div. 2d Dept. 1988) (mother's family threatened to throw her out of her home if she did not place baby for adoption); see also Mindy Schulman Roman, Student Author, *Rethinking Revocation: Adoption from a New Perspective*, 23 Hofstra L. Rev. 733, 755-757 (1995) (discussing cases decided in favor of the biological parents as a result of coercive acts by the adoptive parents, their agents, or other persons).

66. See Jane Mauldon, *Family Change and Welfare Reform*, 36 Santa Clara L. Rev. 325, 326-328 (1996) (discussing the root causes of the increase in the numbers of children born to unmarried parents). The proportion of children born to unmarried parents has risen sharply from eleven percent in 1970 to approximately thirty percent in 1991. U.S. Bureau of the Census, *Statistical Abstract of the U.S.: 1994* 80, tbl. 100 (114th ed., 1994) (available at <http://www2.census.gov/prod2/statcomp/documents/1994-02.pdf>).

67. While concerns about single-parent families are continually expressed, such families have become much more common and are not subject to the kind of isolation that might have victimized them. See generally e.g. Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 Stan. L. Rev. 225 (1997) (critiquing previous frameworks of morality in relation to single-parent families and supporting trends which recognize the complexities and benefits of single-parent families).

mother's decision to place a child for adoption and the fact that a child was an adopted child – became increasingly public.⁶⁸ With increasing public acceptance of adoption, the secrecy surrounding adoption waned. Legislatures strengthened the law ensuring the finality of the mother's adoption decision.⁶⁹ It should not be surprising that by 1972, increasing awareness of the interests of unmarried fathers had also gained attention and led to a number of cases across the country culminating in the decision in *Stanley*.⁷⁰ The problem of unmarried fathers in adoption has proved more intractable than other changes in adoption. While the Supreme Court's jurisprudence swept the old system away, it has brought little additional clarity to the role of fathers' consent in adoption.

In *Stanley*, the unwed father and mother had three children and lived together for approximately eighteen years.⁷¹ When the mother died suddenly, the State of Illinois initiated a dependency proceeding, took custody of the children as wards of the State, and declined to give Stanley an opportunity to be heard, finding that it could ignore his relationship with his children because he was not married to their mother.⁷² The State statutory scheme presumed that "an unwed father is not a 'parent' whose existing relationship with his children must be considered."⁷³

68. See E. Wayne Carp, *Family Matters: Secrecy and Disclosure in the History of Adoption* 43-44 (Harv. U. Press 1998); Katarina Wegar, *Adoption, Identity, and Kinship: The Debate over Sealed Birth Records* 18-21 (Yale U. Press 1997).

69. Ira Mark Ellman et al., *Family Law: Cases, Text, Problems* 1249 (4th ed., Lexis Nexis 2004) ("In recent years, the trend has been toward making consent irrevocable in a shorter period of time, and limiting the birth parent's opportunity to change her mind."). The Uniform Adoption Act, for example, requires parents to revoke their consent to the adoption within eight days of the child's birth. Unif. Adoption Act of 1994 § 2-404(a) (1994).

70. See Clark, *supra* n. 62, at § 20.2, 855-856.

71. 405 U.S. at 646.

72. *Id.* at 646-647.

73. *Id.* at 650. See Ellman et al., *supra* n. 69, at 981 ("Not so long ago, the law hardly considered the possibility that an unmarried father might seek to assert paternity rather than escape it, and procedures for such actions were often not available. This began to change with the decision in *Stanley v. Illinois* . . ."). Others saw the case as confirming a view of fathers that recognized their familial relationships as voluntary and created only with reference to the social relationship they formed and their economic role in the family. See e.g. Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. Rev. 1415, 1422 (1991) ("In situations

The Supreme Court rejected the implicit state presumption that all unwed fathers were unfit.⁷⁴ Rather, the Court held that a state cannot terminate the parental rights of an unwed father who has established a relationship with his children without first conducting a hearing to determine whether the father is unfit.⁷⁵ The Court was not persuaded by the State's argument that its presumption against unwed fathers facilitated efficient handling of adoption, concluding:

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child.⁷⁶

On its face, the decision in *Stanley* seems clear enough – states may not summarily dispense with an unmarried father's consent to adoption through use of a conclusive presumption of unfitness.⁷⁷ Nonetheless, the decision left many questions unanswered. Most importantly, the question of what process an unwed father was due was not answered by the decision. Moreover, the *Stanley* decision left open the question of whether all fathers were entitled to the same process in actions terminating their parental rights or whether only fathers who had established a parental relationship were entitled to protection.⁷⁸ In

involving unwed fathers, the Supreme Court has not decided cases consistently with its rhetoric: only those fathers who had shared a home with the child have been found to have cognizable due process interests in the parent-child relationship.”); Janet L. Dolgin, *Just a Gene: Judicial Assumptions about Parenthood*, 40 UCLA L. Rev. 637, 649 (1993) (“Yet, underlying all five cases and explicit in the most recent Supreme Court case, is the suggestion that legal paternity depends on the father's development of a relationship, not with his children, but with their mother.”).

74. *Stanley*, 405 U.S. at 658.

75. *Id.*

76. *Id.* at 656-657.

77. *Stanley* remains an enigmatic decision. On the one hand, commentators have hailed the decision as the watershed decision recognizing the rights of fathers vis-à-vis their children. See Hamilton, *supra* n. 62, at 950-951.

78. The confusion left by the decision in *Stanley* can be seen in the different state responses to the case. See Clark, *supra* n. 62, at §20.2, 857. At the time it decided *Stanley*, the Supreme Court remanded a case involving an unwed father with no

the late 1970s, the Supreme Court accepted review in two stepparent adoption cases, *Quilloin v. Wolcott*⁷⁹ and *Caban v. Mohammed*,⁸⁰ that raised issues created in the wake of *Stanley*.

In *Quilloin*, when the biological father of the child was notified of the stepfather's action to adopt the child, he objected, responding to the adoption action by filing a legitimization petition, an objection to the adoption, and a formal request for visitation.⁸¹ During the eleven years between the child's birth and the adoption action, the father, Quilloin, had sporadic contact with his child.⁸² He appears to have visited the child informally and occasionally gave the child gifts.⁸³ But Quilloin never established any formal visitation with the child and he did not pay child support regularly.⁸⁴ Only after the stepfather began proceedings to adopt the child did the birth father make any formal attempt to assert his parental rights.⁸⁵ In response to the father's objection, the Georgia trial court conducted a hearing on the father's legitimization petition at which the father had the opportunity to present relevant evidence.⁸⁶ After the hearing, the court rejected the father's claims finding that the adoption was in the "best interests of the child."⁸⁷ Quilloin appealed, arguing that the statute violated his substantive due process right to maintain a relationship with his child when it terminated his parental rights based on the best interests of the child standard.⁸⁸

established relationship with his child for further consideration in light of its decision in *Stanley*. *State ex rel. Lewis v. Lutheran Soc. Servs. of Wis. & Upper Mich.*, 178 N.W.2d 56 (Wis. 1970), *vacated sub nom. Rothstein v. Lutheran Soc. Servs. of Wis. & Upper Mich.*, 405 U.S. 1051 (1972). Clark points out that its handling of this case suggests that the Court thought its holding in *Stanley* applied to all unwed fathers. Clark, *supra* n. 62, at § 20.2, 856 n. 11.

79. 434 U.S. 246 (1978).

80. 441 U.S. 380 (1979).

81. 434 U.S. at 250.

82. *Id.* at 249, 251.

83. *Id.* at 251.

84. *Id.*

85. *Id.* at 250.

86. *Id.*

87. *Id.* at 251.

88. *Id.* at 252. Quilloin argued that, under *Stanley*, he was entitled to an "absolute veto" of the adoption absent a finding of unfitness. *Id.* at 253. Quilloin also argued that the statute violated the Equal Protection Clause because it treated unmarried fathers less deferentially than unmarried mothers. *Id.* The court rejected defendant's

Despite the fact that Georgia law at the time closely resembled the Illinois statutory scheme declared unconstitutional in *Stanley*,⁸⁹ the Court unanimously upheld the adoption in *Quilloin*.⁹⁰ The facts in *Quilloin* differed from *Stanley* in several important respects. In contrast to the facts in *Stanley*, the unmarried father in *Quilloin* had never lived together with his child and the child's mother in a family relationship.⁹¹ Moreover, in *Quilloin*, the father was notified of the adoption action and given an opportunity to be heard.⁹² His parental rights were terminated not based on a conclusive presumption, but rather after a hearing and judicial finding that termination was in the best interests of the child.⁹³ The Court rejected the father's argument that his parental rights could only be terminated based on a finding of unfitness holding that, under the facts presented, the State's use of the best interest of the child standard was constitutional.⁹⁴ In reaching this conclusion, the Court discounted the social relationship between Quilloin and his child,⁹⁵ treating it as virtually irrelevant because he had not lived with the child and the child's mother in a family unit.⁹⁶ In fact, the Court accorded protected status to the family unit formed between the mother, stepfather, and child.⁹⁷

equal protection claim. *Id.* at 256 (Stewart, J., concurring).

89. Georgia law, still reflecting the typical pre-*Stanley* approach to adoption, provided that an unmarried father's child could be adopted without his consent if the court found the adoption to be in the child's best interests. *Id.* at 248 (majority). The same statute allowed other categories of parents – married fathers and mothers – to veto adoption of their children unless the vetoing parent was found to be unfit or had abandoned the child. *Id.* at 248 n. 2.

90. *Id.* at 246, 256.

91. *Id.* at 253. "But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child." *Id.* at 255 (Stewart, J., concurring).

92. *Id.* at 250 n. 7 (majority).

93. *Id.* at 251.

94. *Id.* at 254.

95. *Id.* at 255-256 (Stewart, J., concurring) ("[Quilloin] has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child . . . [and] he does not even now seek custody of his child.").

96. *Id.* at 255.

97. *Id.* ("But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant.").

Quilloin answered one of the open questions left by *Stanley*. Clearly, not all unwed fathers were entitled to the same process in adoption and parental termination cases. While an unwed father's rights may not be dispensed through use of a conclusive presumption, if that father has not had legal custody of his child or lived with the child in a "family unit,"⁹⁸ a state may terminate his parental rights based on the relatively low standard of the best interests of the child.⁹⁹

In *Caban*, the father had a substantial, although sometimes indirect, relationship with his children. He had lived with them and their mother as a family unit for the first several years of the children's lives.¹⁰⁰ After the mother and the father separated, the children eventually moved to Puerto Rico with their maternal grandmother.¹⁰¹ *Caban* never formally established his paternity.¹⁰² After a period of

98. Dolgin, *supra* n. 73, at 650 (arguing that "the cases . . . [regarding] an unwed biological father's [parental rights] . . . make sense only if the apparently sufficient requirement for effecting legal paternity – that a father effect a social relationship with his biological child – is read as code for the requirement that he effect that relationship *within the context of family*") (emphasis added); Deborah L. Forman, *Unwed Fathers and Adoption: A Theoretical Analysis in Context*, 72 Tex. L. Rev. 967, 973 (1994) (noting that "biology alone did not entitle an unwed father to rights coequal with those of mothers or married fathers. Nor, apparently, did the existence of a social relationship between the father and child More likely, as Janet Dolgin argues, the Court was troubled by *Quilloin*'s failure to form a 'family unit' with the mother and child.").

99. In cases dealing with the constitutionality of state interventions in the decision making of intact families, the Court has held that the best interests of the child test does not sufficiently protect the parents' rights. See *Troxel v. Granville*, 530 U.S. 57, 69-70 (2000):

The decisional framework employed by the Superior Court [the best interests of the child test] directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child. In that respect, the court's presumption failed to provide any protection for [the mother's] fundamental constitutional right to make decisions concerning the rearing of her own daughters.

100. *Caban*, 441 U.S. at 382.

101. *Id.* at 383 (*Caban* went to Puerto Rico and, with the understanding that he would return the children in a few days, the grandmother allowed *Caban* to take the children. But, *Caban* brought the children back to New York with him. Their mother brought an action for custody and obtained an order giving her custody and the father visitation.).

102. *Id.* at 393 (*Caban* had admitted paternity, but it appears that no formal court order established his paternity.).

time in which the mother and father wrangled over the children in custody litigation, the mother and her new husband filed a petition to adopt the children and Caban and his new wife filed a cross-petition for adoption.¹⁰³ The mother's adoption petition was granted after a hearing at which Caban appeared and opposed the adoption.¹⁰⁴

The New York statutory scheme was very similar to the Georgia statute at issue in *Quilloin*. The New York statutory scheme provided that an unmarried father's parental rights could be terminated and his child placed for adoption without his consent unless the adoption was not in the best interests of the child.¹⁰⁵

The father appealed the adoption on equal protection grounds.¹⁰⁶ He argued that the New York statute impermissibly treated unmarried mothers and fathers differently.¹⁰⁷ The Court concluded that the New York statute was an impermissible gender classification that was not sufficiently related to an important state interest.¹⁰⁸ Because *Caban* was decided on equal protection grounds, the fact of Caban's relationship with his children was not directly at issue. Nonetheless, the Court made clear the central importance of Caban's familial relationship with his children and the fact that a family unit had been

103. *Id.* at 383. Under New York law at the time, the mother of an illegitimate child and her husband could together file a petition to adopt the child. *Id.* at 383 n. 1.

104. *Id.* at 384.

105. *Id.* at 385-387 (stating that "[t]he unwed father has no similar control over the fate of his child, even when his parental relationship is substantial – as in this case. He may prevent the termination of his parental rights only by showing that the best interests of the child would not permit the child's adoption by the petitioning couple."). *Id.* at 387. The New York statute at issue in *Caban* had been the subject of an earlier appeal to the U.S. Supreme Court in *In re Malpica-Orsini*, 331 N.E.2d 486 (N.Y. 1975), *appeal dismissed sub nom. Orsini v. Blasi*, 423 U.S. 1042 (1976). Although the facts of the prior case were virtually identical to those of *Caban*, it was dismissed for want of an important federal question. *Orsini*, 423 U.S. at 1042.

106. *Caban*, 441 U.S. at 385.

107. *Id.*

108. *Id.* at 394 (concluding that "Section 111 both excludes some loving fathers from full participation in the decision whether their children will be adopted and, at the same time, enables some alienated mothers arbitrarily to cut off the paternal rights of fathers. We conclude that this undifferentiated distinction between unwed mothers and unwed fathers, applicable in all circumstances where adoption of a child of theirs is at issue, does not bear a substantial relationship to the State's asserted interests." (citations omitted)).

established.¹⁰⁹ It rejected the reasoning of the State of New York “that ‘a natural mother, absent special circumstances, bears a closer relationship with her child . . . than a father does.’ ”¹¹⁰ Rather, the Court reasoned that “the present case demonstrates that an unwed father may have a relationship with his children fully comparable to that of the mother.”¹¹¹

The Court distinguished *Quilloin* on the grounds that the father in *Caban* had lived together with his children and their mother as a “natural family”¹¹² and had “participated in the care and support” of the children.¹¹³

When *Stanley*, *Caban*, and *Quilloin* are read together, the Court’s focus on the family unit as the defining prerequisite for a father’s rights is underscored. The parental relationships of Stanley and Caban, both of whom lived together with the children and their mother in family units, were entitled to protection, whereas the social relationship of Quilloin with his child was not protected.¹¹⁴

109. *Id.* at 389.

110. *Id.* at 388 (deletion in original).

111. *Id.* at 389.

112. *Id.* Janet Dolgin argues that by “natural family” the Court meant not only that the mother and father cohabited, but also that they did so in a relationship that was like a marriage. Dolgin, *supra* n. 73, at 658-659.

113. *Caban*, 441 U.S. at 389 (“In rejecting an unmarried father’s constitutional claim in *Quilloin*, . . . we emphasized the importance of the appellant’s failure to act as a father toward his children, noting that he “ ‘has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child. Appellant does not complain of his exemption from these responsibilities and, indeed, he does not even now seek custody of his child.’ ”). *Id.* at 389 n. 7. “In *Quilloin* . . . , we noted the importance in cases of this kind of the relationship that in fact exists between the parent and child.” *Id.* at 393 n. 14.

114. Janet Dolgin reached the same conclusion that the father’s participation in a “family unit” as opposed to the father’s social relationship with the child is the defining pre-requisite for recognition of the father-child relationship. Dolgin, *supra* n. 73, at 657-658.

Commentators analyzing *Caban* have noted the Court’s acknowledgment that an unwed father may have a ‘relationship with his children fully comparable to that of the mother,’ but have frequently failed to recognize the extent to which the *Caban* Court, in fact, premised the recognition of the father-child relationship on the unwed father’s having set up a ‘natural family’ with the children and their mother.

Three years after *Caban*, the Court accepted review in *Lehr v. Robertson*. Like *Quilloin* and *Caban*, the adoption petition in *Lehr* was filed by the child's stepfather.¹¹⁵ Lehr, the unmarried father, lived with the child's mother prior to her birth and visited her in the hospital.¹¹⁶ After the mother's discharge from the hospital, however, "she concealed her whereabouts from [Lehr]" and he was only sporadically able to locate her and visit the child over the course of the next two years.¹¹⁷ In December 1978, the mother's new husband filed a petition seeking to adopt the child.¹¹⁸ Notice of this proceeding was not given to Lehr.¹¹⁹ One month after the adoption petition was filed, Lehr filed an action seeking a determination of paternity and seeking visitation with the child.¹²⁰ Shortly after the paternity action was filed and without notice to the father, the New York Court entered an order of adoption.¹²¹

Although the Supreme Court upheld the adoption, it reasoned that even a father with no established relationship with his child has a liberty interest protected by the Constitution:

The significance of the biological connection [between father and child] is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the

Id.

Compare Forman, *supra* n. 98, at 974 ("The language of *Caban* strongly suggests that the existence of a social father-child relationship is crucial to recognizing an unwed father's equal right to veto an adoption. However, the prior existence of a family unit composed of *Caban*, the children, and the children's mother undoubtedly influenced the Court as well.").

115. 463 U.S. at 250.

116. *Id.* at 252.

117. *Id.* at 269 (White, Marshall & Blackmun, JJ., dissenting).

118. *Id.* at 250.

119. *Id.*

120. *Id.* at 252.

121. *Id.* at 250.

Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.¹²²

The Court acknowledged that its earlier decisions had established the proposition that fathers who have established relationships with their children are entitled to more constitutional protection than fathers who have not yet established their relationships with their children.¹²³ The Court also reasoned that "the mere existence of a biological link does not merit" the same constitutional protection as had been previously afforded established relationships.¹²⁴ It concluded, nonetheless, that even unwed fathers who had never established a relationship with their children could not be completely foreclosed from decision making regarding their child under all circumstances.¹²⁵ Biological fathers, according to *Lehr*, have an "opportunity interest" that no other man has to establish a relationship with their children.¹²⁶ Based on its recognition that unwed fathers have a constitutionally protected interest in establishing a relationship with their children, the Court framed the question in *Lehr* as "whether New York has adequately protected [the unwed father's] opportunity to form [a parent-child] relationship."¹²⁷ Thus, the Court imposed the constitutional burden on states to provide a process in which the unwed father could act independently of the mother to protect his interest in forming a relationship with the child.¹²⁸

The Court's reasoning is enigmatic. On the one hand, it seems to extend its prior recognition that the Constitution protects established father-child relationships. At the same time, it upholds an adoption where the father received no notice and did not participate in any way,¹²⁹ despite the fact that he had diligently and continuously sought

122. *Id.* at 262.

123. *Id.* at 259-260.

124. *Id.* at 261.

125. *Id.* at 267.

126. *Id.* at 262.

127. *Id.* at 262-263.

128. *Id.* at 263.

129. *Id.* at 253. The court entering the adoption order was aware of *Lehr*'s pending paternity action. The fathers in *Stanley*, *Quilloin*, and *Caban* had all been notified of the adoption proceedings involving their children. See *supra* nn. 71, 80, 102 and accompanying text.

to establish a relationship with his child.¹³⁰ On the latter score, it appears that the only reason Lehr had not established a relationship with his child was because of the mother's interference.¹³¹

The New York statutory scheme in effect at the time of the *Lehr* decision provided for a putative father registry in which an unwed father interested in asserting parental rights could file notice of his interest by mailing an index card to the registry.¹³² Access to the registry was completely within the control of the putative father. Lehr had not filed in the putative father registry at any time during the two years he sought to locate his child.¹³³ The existence of the registry, which the majority viewed as simple and clear-cut, was crucial to the Court's decision upholding the New York statute.¹³⁴ In describing the New York statutory scheme, the Court noted that it was arrived at as the result of a legislative commission that was charged with accommodating the rights of unwed fathers and the competing interests of a prompt, efficient, and reliable adoption system.¹³⁵ The fact that New York had such a straightforward and simple procedure, in which compliance was totally within the control of the unwed father, was the primary basis upon which the Court upheld the New York statute.¹³⁶ Although it upheld the New York statute, the Court cautioned that "[i]f

130. In his dissent, Justice White observed, "Lehr never ceased his efforts to locate Lorraine and Jessica." *Lehr*, 463 U.S. at 269 (White, Marshall & Blackmun, JJ., dissenting).

131. *Id.*

132. *Id.* at 263-264 (majority).

133. *Id.* at 251.

134. *Id.* at 263-264.

135. *Id.*

136. *Id.* at 265. Putative father registries have received mixed evaluations from the commentators. Compare Shirley D. Howell, *The Putative Father Registry: Behold Now the Behemoth (A Cautionary Tale)*, 64 Ala. Law. 237, 238 (2003) (criticizing Alabama's registry which imposes a thirty day statute of limitations on the assertion of parental rights by unwed fathers) with Mary Beck, *Toward a National Putative Father Registry Database*, 25 Harv. J.L. & Pub. Policy 1031, 1038 (2002) (arguing that nationalizing putative father registries will help make them more effective). While registries have significant limitations, they can contribute to the stability of adoptions by providing a mechanism for interested fathers to alert prospective adoptive parents of their interest in parenting their child. See Laurence Nolan, *Preventing Fatherlessness through Adoption while Protecting the Parental Rights of Unwed Fathers: How Effective Are Paternity Registries?*, 4 Whittier J. Child & Fam. Advoc. ____ (forthcoming 2005) (copy on file with the *Whittier J. of Child & Fam. Advoc.*).

this scheme [referring to the New York putative father provisions] were likely to omit many responsible fathers, and if qualification for notice were beyond the control of an interested putative father, it might be thought procedurally inadequate.”¹³⁷

The Court’s decision in *Lehr* is a significant departure from its reasoning in *Stanley*, *Caban*, and *Quilloin*. Although the Court upheld the adoption in *Lehr*, it based its reasoning on the father’s procedural default under the New York statutory scheme. In doing so, the Court did not distinguish between nonresidential relationships in which the father visits the child and provides financial support for the child and relationships in which the father, mother, and child reside together in a family unit.¹³⁸ It also appeared ready to hold that a man, who had not established a relationship with his child or lived with the child and mother as a family unit, still might be able to object to the termination of his parental rights and/or adoption of the child through a process such as putative father registration. The apparent willingness of the majority in *Lehr* to recognize father-child relationships that arise from less substantial contexts than a “family unit” is curious in light of facts not raised in the majority opinion. In his dissent, Justice White points out that *Lehr* made substantial efforts to contact and visit his child over the objection of the mother who threatened to have him arrested if he attempted to visit the child.¹³⁹ After *Lehr*, it is not clear what kind of father-child relationship will be entitled to recognition. Certainly, the Court did not disavow its prior reasoning that father-child relationships arising in a family unit with the mother and children are entitled to recognition. But, the Court’s equivocal focus on less formal or substantial relationships opens the possibility that at least some father-child relationships outside family units may be entitled to recognition. Nor is it clear how much of an opportunity states must provide a father

137. *Lehr*, 463 U.S. at 263-264.

138. *Id.* at 262-263 (discussing the necessary qualities of a father-child relationship that might be subject to protection, the Court used language such as “accept[ing] some measure of responsibility for the child’s future,” “enjoy[ing] the blessings of the parent-child relationship,” “mak[ing] uniquely valuable contributions to the child’s development,” and maintaining a “significant custodial, *personal*, or *financial* relationship” with the child) (emphasis added).

139. *Id.* at 269 (White, Marshall & Blackmun, JJ., dissenting) (“During this time *Lehr* never ceased his efforts to locate Lorraine and Jessica and achieved sporadic success until August, 1977. . . . Lorraine threatened *Lehr* with arrest unless he stayed away and refused to permit him to see Jessica.”).

to establish such a relationship over the objection of the mother. Must the father act prior to the birth of the child? May a state establish a time frame after which a father's rights are cut off?

The central unresolved question left by the *Lehr* is whether and under what circumstances must states recognize the father-child relationship when the child is an infant. *Lehr* certainly comes closest to resolving the newborn issue. Certainly, it stands for the proposition that a state may rely on an appropriate registry process to terminate the parental rights of unwed fathers. However, the child in *Lehr* was a two-year-old by the time the litigation commenced.¹⁴⁰ Although the father diligently sought to establish his relationship with his daughter and was consistently thwarted by the mother, he also missed opportunities to do so. He could have filed a paternity action much sooner when it became clear that the mother would not recognize his parental interests. He could have registered in New York's putative father registry. Regardless of what one thinks of the result in the case, it simply does not address the issues raised when a child is placed for adoption with third parties (who are not married to or related to the biological parents) at the moment of birth. Both of the cautionary tales described in this Article deal with the adoption at birth issue. Many of the most notorious cases also deal with the adoption-at-birth scenario.

The adoption-at-birth situation raises significantly different issues than those raised in the stepparent or older child adoption cases. In the latter situation, it is at least plausible to expect an unwed father who seeks to veto an adoption to have taken some steps, whether formal or informal, to establish a relationship with his child. In the adoption-at-birth scenario, however, it is not reasonable to impose such requirements. In many states, it is impossible for an unwed father to initiate a paternity action prior to the birth of the child. He may not know the mother is pregnant or may believe that she has terminated the pregnancy. If she resists his attempts to remain in communication, the father may be the subject of anti-harassment orders precluding communication.

The most recent foray of the Supreme Court into the question of unwed fathers' rights was decided in 1989.¹⁴¹ In *Michael H.*, the unwed father, Michael, had a child, Victoria, with Carole, a married

140. *Id.* at 249-250.

141. *Michael H.*, 491 U.S. 110.

woman.¹⁴² During the first three years of Victoria's life, she and Carol lived variously with Gerald (Carole's husband), Michael, and a third man, Scott.¹⁴³ Although Gerald was listed as Victoria's father on her birth certificate and held himself out throughout this time as Victoria's father, Carole, Michael, and Victoria obtained paternity tests establishing that Michael was Victoria's biological father.¹⁴⁴ When Michael's relationship with Carole deteriorated, she refused to permit Michael to visit Victoria.¹⁴⁵ Michael filed a filiation action in California seeking to establish paternity and obtain visitation with Victoria.¹⁴⁶ During the pendency of this action, Carole and Michael reconciled and lived together with Victoria for a number of months.¹⁴⁷ In the end, however, the relationship did not last and Carole returned to her husband, Gerald.¹⁴⁸

At the time, California law provided that " 'the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.' "¹⁴⁹ This presumption could only be rebutted by the husband or the wife.¹⁵⁰ Thus the court, based on affidavits indicating that Gerald and Carole were cohabiting at the time of Victoria's conception and birth, dismissed Michael's action and refused to order visitation.¹⁵¹

Challenging the constitutionality of the California statute, Michael argued that the conclusive presumption precluding him from establishing his paternity violated his liberty interest in establishing a relationship with his child pursuant to *Stanley*.¹⁵² The majority rejected Michael's argument, reasoning that *Stanley*, *Quilloin*, *Caban*, and *Lehr* did not recognize a liberty interest in biological fatherhood, but rather recognized an interest in fatherhood that develops "within

142. *Id.* at 113.

143. *Id.* at 114.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 115.

149. *Id.* (quoting Cal. Evid. Code Ann. § 621(a) (West 1995) (repealed 1992)).

150. *Id.*

151. *Id.*

152. *Id.* at 123.

the unitary family.”¹⁵³ Once the case law was re-characterized this way, the majority concluded that Michael did not have a constitutionally protected interest.¹⁵⁴ Rather, the Court reasoned that the law has traditionally protected family units such as that between Carole, Gerald, and Victoria, from the interference by individuals such as Michael.¹⁵⁵

The reasoning of the *Michael H.* Court was foreshadowed in *Quilloin*, where the Court also protected the mother’s new marital family unit at the expense of recognizing the father-child relationship.¹⁵⁶ It also carried forward the Court’s reasoning in *Lehr* that potential relationships are not entitled to recognition merely based on biology.¹⁵⁷ The Court’s reasoning is also consistent with its focus in both *Stanley* and *Caban* on the development of the father-child relationship within an existing family unit.¹⁵⁸ But the decision in *Michael H.* seems inconsistent with the decision in *Lehr*, where the Court seemed willing to give recognition to father-child relationships arising outside family units.¹⁵⁹ It also seems inconsistent with the emphasis in *Stanley*, *Caban*, and *Quilloin* on the protection of

153. *Id.*

154. *Id.* at 124.

155. *Id.*

Thus the legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection. We think it impossible to find that it has. In fact, quite to the contrary, our traditions have protected the marital family (Gerald, Carole, and the child they acknowledge to be theirs) against the sort of claim Michael asserts.

Id.

156. 434 U.S. at 550.

157. *See generally id.*

158. The *Lehr* Court pointed out that “this Court has held that the Federal Constitution supersedes state law and provides even greater protection for certain *formal* family relationships. [T]he rights of the parents are a counterpart of the responsibilities they have assumed.” 463 U.S. at 257 (emphasis added). The Court concluded that “[t]he difference between the developed parent-child relationship that was implicated in *Stanley* and *Caban*, and the potential relationship involved in *Quilloin* and this case, is both clear and significant.” *Id.* at 261.

159. *Id.* at 267.

established relationships. Despite Carole and Gerald's marriage, Gerald had only resided in a family unit with Carole and Victoria for short periods of time.¹⁶⁰ Moreover, the family unit in existence at the time the case was filed was comprised of Carole, Michael, and Victoria.¹⁶¹

The web of these cases often appears to be impenetrable. Upon reflection, however, several propositions arise from them:

1. Where the mother of a child is married, states may decline to recognize the interests of an unmarried biological father even where that person has established a substantial relationship of long duration with the child;

2. Where the mother of the child is unmarried, and the mother, father, and child lived together in a family unit, states may not summarily dispose of the interests of the father. Moreover, the best interest of the child test is not a sufficiently respectful basis upon which to terminate the rights of a father who has resided in a family unit with the mother and child;

3. Where the mother is unmarried and the father has never resided in a family unit with the mother and child, states must establish a procedural framework, such as a putative father registry, that permits a father to assert his interest in parenting his child unilaterally and independently of the mother;

4. Where the mother is unmarried and the father has never resided in a family unit with the mother and child, and where the state does not have a putative father registry or similar statutory framework, the procedural protections due the father are unclear. It may be, based on *Quilloin*, that notice of an adoption and/or parental termination is required, but that parental rights may be terminated based on the best interests of the child.

160. *Michael H.*, 491 U.S. at 114-115.

161. *Id.* at 143-144 (Brennan, Marshall & Blackmun, JJ., dissenting). Not only did Michael and Carole live together in a family unit in the same household, but Michael supported Victoria financially. Victoria called Michael, "Daddy." *Id.*

B. MEN'S AND WOMEN'S ROLES AND CHANGING NORMS OF PARENTING

The Court's decisions in the *Stanley* line of authority coincide with (and possibly reflect) a more engaged norm of parenting by men. Fathers have been steadily becoming more involved in parenting their children.¹⁶² Increasing involvement in parenting has created heightened expectations by men that they will be engaged parents, and that their parenting will be uniquely important to their children.¹⁶³ Involvement has also caused men to increasingly value their roles as parents.¹⁶⁴

Social science research on parenting documents a heightened level of parental engagement with children. One important long-range study of parenting reached the following conclusions:

1. Most fathers who live with their children participate regularly in some kind of leisure or play activity with them. While mothers are more likely to do 'quiet' activities (reading a book or doing a puzzle, for example), fathers are more likely to play an outdoor game or sports activity. Very high levels of both fathers and mothers report talking at least once a week with their children about their family.

2. Substantial percentages of fathers who live with their children are engaged in monitoring their children's daily activities and in setting limits on those activities. For example, 61 percent set limits on what television programs their children are allowed to watch.

3. More than one in five young children in two-parent families have their father as the primary caregiver when the mother is at work, attending school, or looking for work.

4. While 40 percent of children whose fathers live outside the home have no contact with them, the other 60 percent had contact an average of 69 days in the last year.¹⁶⁵

162. Kathleen Gerson, *No Man's Land: Men's Changing Commitments to Family and Work* 8 (BasicBooks 1993); Robert L. Griswold, *Fatherhood in America: A History* 269 (BasicBooks 1993).

163. Gerson, *supra* n. 162, at 8; Griswold, *supra* n. 162, at 269.

164. Gerson, *supra* n. 162, at 8; Griswold, *supra* n. 162, at 269; *but see* Miranda Kaye & Julia Tolmie, *Discoursing Dads: The Rhetorical Devices of Fathers' Rights Groups*, 22 *Melbourne U. L. Rev.* 162, 190-193 (1998).

165. U.S. Dept. of Health and Human Servs., *Child Trends: Charting Parenthood:*

Men are more likely to seek significant custodial contact with their children upon family breakdown.¹⁶⁶ Popular culture has focused more on active and engaged fathers¹⁶⁷ and has vilified men who are

A Statistical Portrait of Fathers and Mothers in America, Executive Summary [¶ 3], <http://www.fatherhood.hhs.gov/charting02/executive.htm> (last accessed Mar. 30, 2005).

166. Most of the statistical research regarding gender preferences in custody litigation is becoming quite dated and is very inconsistent. In a major study published in 1992, Eleanor Maccoby and Robert Mnookin concluded that women got sole custody in approximately seventy percent of the cases. Eleanor E. Maccoby & Robert H. Mnookin, *Dividing the Child: Social and Legal Dilemmas of Custody* 104, 112 (Harv. U. Press 1992). While in only ten percent of the cases did fathers have sole custody. *Id.* at 112. The remaining twenty percent of the cases involved some form of shared custody. *Id.* Even in contested custody cases, mothers were granted their preference for custody two to four times more often than fathers. *Id.* at 103-104. Other studies showed fathers to be more successful in custody litigation. See Jeff Atkinson, *Criteria for Deciding Custody in the Trial and Appellate Courts*, 18 Fam. L.Q. 1, 11 (1984) (suggesting that fathers may win up to fifty-one percent of the cases); Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of the Criteria Used in Child Custody Determinations*, 7 Women's Rights L. Rptr. 235, 236 (1982) (summarizing studies indicating that fathers succeed in custody cases as much as sixty-three percent of the time in contested cases). The differences in these statistics are likely attributable to how paternal success in custody litigation was defined. *Id.* (arguing that studies should not count cases in which fathers do not want custody).

The biggest weakness of the studies is that baseline data with which to compare current outcomes in custody cases is lacking – we simply do not know how often fathers sought custody of children in the past. My own sense is that even Maccoby and Mnookin's conservative numbers show an increase in the percentage of fathers who seek custody and contest a mother's preference for custody today. Also, I believe fathers are more likely to have and exercise significant custodial rights with their children today, even where they are not awarded primary physical custody.

167. One of the most visible depictions of the active, engaged father was presented in the film *Kramer v. Kramer* (Columbia Picture Corp. 1979) (motion picture). Other recent films such as *Mrs. Doubtfire* (Twentieth Cent. Fox 1993) (motion picture) portray dads trying to stay engaged with their children. *Full House* (ABC 1987-1995) (TV series), a popular television sitcom depicted a custodial father parenting his children alone, with the inept help of two of his friends. Although fathers are often depicted as buffoons, these images are layered on a well-meaning and engaged dad, such as in television shows including *The Simpsons* (Twentieth Cent. Fox TV 1989-present) (TV series) and movies such as *Daddy Day Care* (Columbia Picture Corp. 2003). My purpose is not to affirm the stereotypical depiction of fathers in these television shows and movies; rather, I merely intend to suggest that these modern dads get their hands dirty doing everything from changing diapers to washing dishes. They are portrayed as actively engaged with their children.

disengaged and do not pay child support as “deadbeat dads.”¹⁶⁸

The increasing role of fathers in active parenting is often obscured by a debate regarding the relative roles of men and women in work and parenting with families.¹⁶⁹ Thus, despite changing norms of parenting, men’s and women’s political roles within the family structure and economic spheres have not changed substantially. As Karen Czapanskiy has pointed out, when it comes to parenting, “men are volunteers, women are draftees.”¹⁷⁰ By this, Czapanskiy means that mother’s roles within the home and regarding the nurturing of children are mandatory, while father’s roles are largely voluntary.¹⁷¹ Nancy Dowd, too, points out that historically, “fatherhood,” as opposed to “motherhood,” has not been associated with nurturing: “Fatherhood is defined by the status it can confer upon children, rather than in terms of responsibilities, obligations, relationship, or nurturing.”¹⁷² Dowd succinctly summarized the entrenched yet changing context in which fatherhood is defined:

Thus while historically fatherhood existed almost exclusively within marriage, we have moved to include non-marital fathers within our legal definition, primarily in order to obtain monetary support for children. At the same time, notions of gender equity have removed formal barriers to the custody and nurture of

168. The term “deadbeat dads” has been used to describe child support obligors who fail to meet their obligations. Internet sites have arisen in which their faces appear on “wanted posters.” See e.g. Miss. Dept. of Human Servs., *Division of Child Support Enforcement: 10 Most Wanted*, <http://www.mdhs.state.ms.us/mswant.html> (last accessed Mar. 30, 2005); Wantedpostersdotcom, <http://www.wantedposters.com> (last accessed Mar. 30, 2005). See also David Ray Papke, *State v. Oakley, Deadbeat Dads, and American Poverty*, 26 W. New. Eng. L. Rev. 9, 20-24 (2004) (discussing the “deadbeat dad” phenomenon).

169. Feminist scholars argue that despite the fact that many women have entered the paid labor force, they still are likely to bear the primary responsibility within the family for direct parenting of children. The reform of family law around an egalitarian model has disadvantaged women in the custody arena. See Mary Becker, *Maternal Feelings: Myth, Taboo and Child Custody*, 1 S. Cal. Rev. L. & Women’s Stud. 133, 203-223 (1992); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 Harv. L. Rev. 727, 770-774 (1987).

170. Czapanskiy, *supra* n. 73, at 1415-1416.

171. *Id.*

172. Nancy E. Dowd, *Rethinking Fatherhood*, 48 Fla. L. Rev. 523, 527 (1996).

children by their fathers, although childcare disproportionately remains in mothers' hands. This acknowledgment of men's ability to nurture and parent, however, has remained far secondary to defining men's role as purely economic, within the classic paradigm of the breadwinner.¹⁷³

Nonetheless, while the general political structure of families and work has not changed radically, men's roles within the family structure are evolving as are men's expectations regarding parenting. Even though men may still be, in large measure "volunteers," and men's success is still defined outside the family structure, in today's culture a "good man" is an active and engaged parent. This expectation of engagement is driving men's decision to pursue relationships with their children.

C. STATE LEGISLATIVE ATTEMPTS TO PRESERVE A MORE TRADITIONAL APPROACH TO ADOPTION

States have responded to the Court's confused jurisprudence on unwed fathers and to the increasing activism of fathers seeking parental rights in two general ways. The first group – the "substantive states" – are those that have left the question of whether a father's commitment is substantial enough to merit recognition for evaluation on a case-by-case basis within a larger procedural framework.¹⁷⁴ Other states – the "procedural states" – have adopted procedures intended to sort fathers with actual interests in parenting their children from those who do not have such an interest.¹⁷⁵ In both groups, however, state legislation is characterized by an antipathy toward unwed fathers, assumptions that they are generally not truly interested in stating parenting their

173. Nancy E. Dowd, *From Genes, Marriage and Money to Nurture: Redefining Fatherhood*, 10 *Cardozo Women's L.J.* 132, 132-133 (2003).

174. Forman, *supra* n. 98, at 1007.

175. *Id.* at 1001. Forman divides the states into those that require compliance with technical requirements and those that evaluate whether the father has a "substantial commitment to parenting." See Rebeca Aizpuru, *Protecting the Unwed Fathers' Opportunity to Parent: A Survey of Paternity Registry Statutes*, 18 *Rev. Litig.* 703, 705 (1999) (explaining the idea behind state paternity registries); Kimberly Barton, *Who's Your Daddy?: State Adoption Statutes and the Unknown Biological Father*, 32 *Cap. U. L. Rev.* 113, 127-140 (2003) (cataloging state legislation regarding unwed fathers).

children, and if they are, they would not be competent parents.¹⁷⁶ This antipathy results from the desire of state legislatures to cling to a more traditional model of adoption in which unwed fathers did not play a substantial role.¹⁷⁷ Thus, while paying lip service to the recognition of the relationships unwed fathers might form with their children, most states have sought to dispense with the consent of unwed fathers in adoption.¹⁷⁸

The “procedural states” rely on a procedural framework that purports to identify those fathers who intend to parent their children (and presumably who would have substantial relationships with them) from other fathers, whose father-child relationship need not be recognized.¹⁷⁹ For example, in Utah, an unwed father’s consent to adoption is only required under the following circumstances: 1) the father is listed on the child’s birth certificate with the consent of the mother;¹⁸⁰ 2) the father is living in the same household as the child at the time the mother executes a consent to adoption or relinquishes the child to an agency and is holding himself out as the child’s father;¹⁸¹ and 3) the father files a paternity action and registers notice of that action with the state’s Department of Vital Statistics prior to the mother’s execution of consent to adoption or relinquishment of the child to an agency.¹⁸² Utah law permits a paternity action to be initiated prior to the child’s birth.¹⁸³ No specific notice is required to any father who fails to file a paternity action prior to the mother’s consent to adoption or relinquishment of the child.¹⁸⁴ In fact, the Utah legislation provides:

176. *Id.* at 1000-1001.

177. *Id.* at 1012.

178. For much of the twentieth century, unmarried men were excluded from the adoption process. *See Clark, supra* n. 62, at § 20.2, 855 (“Until 1972 the statute in the various states generally provided that the consent of the mother of an illegitimate child would alone be sufficient to make the child available for adoption”); Robert M. Horowitz & Howard A. Davidson, *Legal Rights of Children, Family Law Series 234* (Shepard’s/McGraw Hill 1984); Harry Krause, *Illegitimacy: Law and Social Policy 32* (The Bobbs-Merrill Co. 1971).

179. Forman, *supra* n. 98, at 1004.

180. Utah Code Ann. § 78-30-4.14(1)(e) (2005).

181. *Id.* at § 78-30-4.14(2)(a)(iii).

182. *Id.* at § 78-30-4.14(2)(b)(i)-(ii).

183. *Id.* at § 78-30-4.13(3)(a) (2005).

184. *See id.* at § 78-30-4.13(7)(c).

An unmarried, biological father, by virtue of the fact that he has engaged in a sexual relationship with a woman, is considered to be on notice that a pregnancy and an adoption proceeding regarding that child may occur, and has a duty to protect his own rights and interests. He is therefore entitled to actual notice of a birth or an adoption proceeding with regard to that child only as provided in this section.¹⁸⁵

There are a number of variations among the procedural states. Some require that the notice of intent to claim paternity be filed within a specific period of time, such as thirty days after the child's birth.¹⁸⁶ Regardless of the variations, these statutes share the common characteristic that an unwed father's claim is dependent upon compliance with procedural requirements and not upon the facts of his relationship with the child's mother or with the child.

The approach of the procedural states is particularly troubling because the statutes are explicitly anti-father. The Idaho legislature made extensive and antagonistic findings regarding fathers. Among other findings, the legislature determined:

1. "An unmarried biological father has an inchoate interest that acquires constitutional protection only when he demonstrates a timely and full commitment to the responsibilities of parenthood, both during pregnancy and upon the child's birth."¹⁸⁷

2. "The legislature prescribes the conditions for determining whether an unmarried biological father's action is sufficiently prompt and substantial to require constitutional protection."¹⁸⁸

3. "If an unmarried biological father fails to grasp the opportunities to establish a relationship with his child . . . his . . . parental interest may be lost entirely."¹⁸⁹

4. "If an unmarried . . . father is presumed to know that the child

185. *Id.* at § 78-30-4.13(1). Idaho's statutory scheme is very similar to Utah's. *See e.g.* Idaho Code §§ 16-1504, 16-1505, 16-1513.

186. Ala. Code § 26-10C-1(i) (2004); Ariz. Rev. Stat. Ann. § 8-106.01(B) (West 1999); 750 Ill. Comp. Stat. Ann. 50/12.1(b) (West 1999).

187. Idaho Code § 16-1501A(2)(e) (1998).

188. *Id.* at § 16-1501A(3)(a).

189. *Id.* at § 16-1501A(3)(b).

may be adopted without his consent unless he strictly complies with the provisions of this chapter, manifests a prompt and full commitment to his parental responsibilities, and establishes paternity.”¹⁹⁰

Although many other states have not included such extensive negative findings in their statutes governing the rights of unwed fathers in adoption, the statutory schemes are nonetheless built around an assumption of disinterest or incompetence of unwed fathers assuming (or hoping) that unwed fathers are neither willing nor competent parents on their own.

The hallmark of the substantive states is that courts must evaluate the substantive quality of the unwed father’s relationship with either the child or with the child’s mother. These states require that notice of adoptions be provided to men based on various factors such as whether they lived with and/or supported the mother during her pregnancy, whether they lived with the child or held themselves out as the father of the child, or whether they maintained contact with the child.¹⁹¹ Some of these states provide for “putative father registries.”¹⁹² However, registration is only one way for a father to be eligible for notice, and failure to register does not automatically disqualify a father from seeking recognition of his relationship with the child.

While the substantive states are not characterized by the negative findings of some of the procedural states, they suffer from their own form of systematic bias against fathers. It is difficult for a father to establish a record of substantial commitment to parenting when the child is a newborn¹⁹³ or when the mother thwarts his attempts.

190. *Id.* at § 16-1501A(3)(e).

191. Mich. Comp. Laws Ann. § 710.39(2) (West 2004) (father’s parental rights may be terminated if he does not establish or seek a custodial relationship with the child); N.C. Gen. Stat. § 48-3-601(2)(b)(4) (2004) (father entitled to notice of an adoption if he has provided “reasonable and consistent” support for the mother or child and has attempted to communicate with the mother or child); Or. Rev. Stat. Ann. § 109.096(b) (2003) (putative father is entitled to notice if he has “repeatedly tried” to contribute to child’s support); S.C. Code Ann. § 20-7-1690(A)(5)(a)-(b) (Westlaw current through 2004 Reg. Sess.) (father of newborn entitled to notice of adoption if he lived with the child or the child’s mother and held himself out as the father, or provided financial support to the mother during pregnancy or provided financial support to the child). *See also* Unif. Putative & Unknown Fathers Act § 5 (2003) (providing for consideration of a number of factors in evaluating an unwed father’s relationship with his child).

192. *See e.g.* Or. Rev. Stat. Ann. § 109.096.

193. Deborah Forman has developed a critique of the “substantial commitment”

Moreover, the objection to adoption by an unwed father almost necessitates litigation. Without facts, and facing costly litigation, fathers often lose or give up.

Neither the procedural approach nor the substantive approaches to the recognition of unwed fathers' rights in adoption have discouraged litigation. Utah, one of the strictest procedural states, has had substantial litigation over adoption notice.¹⁹⁴ New York and California, leading examples of the substantive approach to recognition of unwed fathers, also have seen extensive litigation.¹⁹⁵

IV. RESOLVING THE LITIGATION CRISIS

There are many approaches to resolving litigation arising from the complex series of forces detailed here. Certainly, rationalizing the substantive standards for recognition of fathers' relationships with their non-marital children is one.¹⁹⁶ Such solutions will be more effective if state legislatures can move beyond stereotypes of unwed fathers and mothers toward legislation rooted more clearly in reality.

Substantive solutions to the problem of litigation at the moment of adoption can only go so far, however. Complex human behaviors and conflicting relationships will ensure that there is always some controversy between birth mothers, birth fathers, and prospective adoptive parents. Thus, in addition to reforming substantive

approach concluding that it is the best approach to the resolution of the unwed father problem at adoption. Forman, *supra* n. 98, at 1014-1018. See also Scott A. Resnik, *Seeking the Wisdom of Solomon: Defining the Rights of Unwed Fathers in Newborn Adoptions*, 20 Seton Hall Legis. J. 363, 397-398 (1996).

194. Cases arising from Utah Code Ann. § 78-30-4.13 and its immediate predecessors have gone up to the Utah appellate courts four times since 1996. See generally *In re B.B.D.*, 984 P.2d 967 (Utah 1999); *In re B.T.D.*, 68 P.3d 1021 (Utah App. 2003); *In re S.L.F.*, 27 P.3d 583 (Utah App. 2001), *cert. denied sub nom. Sanchez v. Fluhman*, 40 P.3d 1135 (Utah 2001); *Beltran v. Allan*, 926 P.2d 892 (Utah App. 1996), *cert. denied*, 936 P.2d 407 (Utah 1997).

195. California has had at least sixteen appellate cases since 2002. See e.g. *In re T.T.*, 2004 WL 2472638 (Cal. App. 5th Dist. Nov. 4, 2004); *In re Kyle F.*, 112 Cal. App. 4th 538; *In re Lauren K.-S.*, 2003 WL 1605786 (Cal. App. 4th Dist. Mar. 27, 2003); *Steven L. v. Tracy W.*, 2003 WL 116142 (Cal. App. 4th Dist. Jan. 14, 2003); *In re Jonah C.*, 2002 WL 1733628 (Cal. App. 2d Dist. July 26, 2002). For a detailed discussion of the early New York cases, see Forman, *supra* n. 98, at 1008-1015.

196. Forman suggests the adoption of a version of the "substantial commitment" standard. Forman, *supra* n. 98, at 1039.

approaches to fathers' rights, states must address the procedural context of adoption litigation and must take special steps to ensure that such litigation is resolved swiftly and accurately with the goal of facilitating stable placement of the child either with adoptive parents or with one or both of the child's birth parents. To manage litigation at the moment of adoption in a way that most accurately assesses parental rights and stabilizes adoption, states should ensure that all known or reasonably ascertainable birth fathers are notified of adoption proceedings. States should also adopt procedures to hear the factual bases for unwed fathers' claims or reasons why an unwed father has not been notified of the action. Such procedures could be modeled on the expedited procedures in place in some states to allow minors to bypass parental consent requirements in abortion.

A. PROVIDE ACTUAL NOTICE TO ALL KNOWN OR REASONABLY ASCERTAINABLE UNMARRIED FATHERS

Given my argument that there is a growing expectation by men that they will be involved in parenting their children, any system that finalizes an adoptive placement without notifying the father risks increased litigation at the moment of adoption. Neither of the fathers was notified in the cautionary tales that began this Article.¹⁹⁷ Lack of notice also characterizes cases, such as Baby Jessica¹⁹⁸ and Baby Richard,¹⁹⁹ that have captured the public's attention. In many cases the father is known to the parties and disclosed to the court, but does not receive notice.²⁰⁰ The philosophy of omitting notice to such

197. See *supra* nn. 1-2 and accompanying text. See also *Doe*, 88 P.3d at 751-752:

RFS advised the Mother that it was her decision whether to tell the Father of the adoption. [T]he Mother testified the Father did not know she was proceeding with the adoption and that he was opposed to placing the baby. The Father received no notice of the [] hearing.

198. See *In re Clausen*, 502 N.W.2d 649, 652 (Mich. 1993), cert. denied sub nom. *DeBoer v. Schmidt*, 509 U.S. 1301 (1993) (The birth mother testified that she lied as to who the father of the child was and, as a result, he was not notified of the parental termination action and of the release of the child for adoption.).

199. *In re Kirchner*, 649 N.E.2d 324, 326 (Ill. 1995) (stating the birth mother told the birth father that the baby died at birth, and although prospective adoptive parents and their attorney knew of the lie, no notice of the adoption was provided to the birth father).

200. See e.g. *In re B.G.S.*, 556 So. 2d 545, 547 (La. 1990) (birth father visited mother at hospital and was known to prospective adoptive parents but not permitted to

known or reasonably ascertainable²⁰¹ fathers seems to be rooted in fear that the father will object if he knows of the adoption and that evaluating his relationship with the child will be too time-consuming, expensive, or unpredictable.²⁰²

As a matter of policy, however, not notifying the adoptive father is a shortsighted method of accomplishing the policy objective of stabilizing adoptive placement. First, if birth fathers are going to object to an adoption, it would be better to find out sooner rather than later. Upsetting adoptive placements after a child has formed an attachment to the adoptive parents is harmful to the child.²⁰³ Moreover, once placement occurs without the participation of the committed birth father the positions of the parties become polarized. Experience seems to indicate that birth fathers may challenge (and upset) adoptions even after they are final. Notice would, in all likelihood, cause such objections to surface sooner and permit them to be resolved earlier in the process with less disruptive impact. Moreover, the secrecy with which these cases move forward may, in itself, result in polarization and mistrust leading to litigation that might

participate in adoption); *In re McLarrin*, 865 So. 2d at 319-321 (great-grandparents adopting a four-year-old child knew identity of birth father but did not provide him notice); *Beltran*, 926 P.2d at 899-900 (Billings, J., dissenting) (noting that both the mother and LDS Social Services were fully aware of the father's opposition to the adoption but did not notify him); *Kessel v. Leavitt*, 511 S.E.2d 720, 735 (W. Va. 1998) (commenting attorney for birth mother knew identity of birth father and actively concealed information).

201. This standard comes from the preeminent U.S. Supreme Court case regarding the notice requirement in civil litigation, *Mullane v. C. Hanover Bank & Trust Co.*, 339 U.S. 306, 320 (1950). By relying on the *Mullane* standard, I do not mean to suggest that notice to all unwed fathers is constitutionally required. Clearly, the Court in *Lehr* authorized parental termination without such notice under some circumstances. See *supra* nn. 114-140 and accompanying text. However, I am suggesting that, as a matter of policy, states require notice to unwed fathers. In that context, the *Mullane* definition of what constitutes effective notice makes sense.

202. Discussing New York's registry statute which permits completely dispensing with notice under some circumstances, the Court in *Lehr* noted, "[t]he New York Legislature concluded that a more open-ended notice requirement would merely complicate the adoption process, threaten the privacy interests of unwed mothers, create the risk of unnecessary controversy, and impair the desired finality of adoption decrees." 463 U.S. at 264. See also Hamilton, *supra* n. 62, at 992-998 (discussing the public policy considerations involved in notifying unwed fathers).

203. See *supra* nn. 48-49 and accompanying text.

not otherwise take place.²⁰⁴ Notice may serve to give voice to a father's concerns, thereby defusing his fears and facilitating the placement. Finally, requiring notice to unwed fathers can help curb bad conduct by the mother and prospective adoptive parents.²⁰⁵

One of the reasons fathers are not notified is that mothers refuse to disclose the father's identity, are not certain of his identity, or lie about his identity.²⁰⁶ Significant debate has taken place regarding whether birth mothers should be compelled to disclose the identity of the birth father. Many states have taken a very protective approach to the mother on this issue, declining to require disclosure.²⁰⁷ Scholars are split on the question of requiring mothers to disclose the identity of the father.²⁰⁸ The reasons for not requiring disclosure include

204. One unwed father wrote: "When I saw the publication notice stating that the unknown father had been 'sued,' I became angry. When I saw a 'father information sheet' left almost blank, and a court order stating that the parental rights of the unknown father were forever terminated, I was furious." Smith, *supra* n. 54, at [¶ 5].

205. See *supra* Section I.A., "Tale of the Teenage Father and Mother." The parties proceeded with a parental termination action in a forum that lacked venue and convinced the court that the father was not truly interested in pursuing parental rights. Although the action was styled as the prospective adoptive parents versus the birth parents, the parties were not truly adverse. In fact, the same lawyer represented both the mother and the prospective adoptive parents. Everyone who was made a party to the action wanted the adoption to go through. The court, viewing the case as just one more on a busy docket, did not see the "red flags."

206. See *In re Kirchner*, 649 N.E.2d at 326 (discussing that not only did the mother lie, but the adoptive parents and their attorney knew of the lie and participated in the mother's deception of the birth father); *In re Clausen*, 502 N.W.2d at 652 (noting the birth mother initially lied about the father's identity). The reasons for these deceptions are complex and it is a mistake, in my view, to vilify the mothers for engaging in them.

207. Forman, *supra* n. 98, at 1028-1034 (discussing the different approaches to the question of declining disclosure to require disclosure). See also Hamilton, *supra* n. 62, at 987-990; Stacey Lynn Hill, *Putative Fathers and Parental Interests: A Search for Protection*, 65 Ind. L.J. 939, 957-960 (1990) (discussing measures states should undertake to protect a father's right to notice); Teanna West Neskora, Student Author, *The Constitutional Rights of Putative Fathers Recognized in Louisiana's New Children's Code*, 52 La. L. Rev. 1009, 1038-1043 (1992) (expressing concern that Louisiana state law provides mothers with a means of circumventing a father's right to notice); Jeffrey A. Parness, *Participation of Unwed Biological Fathers in Newborn Adoptions: Achieving Substantive and Procedural Fairness*, 5 J. L. & Fam. Stud. 223, 235-236 (2003).

208. Forman, *supra* n. 98, at 1032-1033 (arguing for disclosure with deference to the mother in situations involving threats of harassment or where the mother's safety would be jeopardized). See also Katharine T. Bartlett, *Re-expressing Parenthood*, 98

deferring to maternal decision making because the mother is known and has a stronger interest in the child's future, protecting the privacy of the mother, reducing barriers mothers might encounter in deciding to place children for adoption, and protecting the safety of the mother.²⁰⁹ Given what is at stake – the father's constitutionally recognized right to a relationship with his child and the stability of the familial unit for the child and adoptive parents – the norm should be disclosure of the fathers' identity. With the exception of protecting the mother, none of the rationales for not requiring disclosure justify the forfeiture of the father's rights by the unilateral act of the mother. *Lehr* recognized that states cannot subject a father's relationship to unilateral control by the mother. Although it permitted termination of the father's rights without notice, it did so only as a result of a statutory scheme in which most fathers were likely to be notified and in which the father had the opportunity to qualify for notice irrespective of the mother's wishes.²¹⁰ In addition to the impact on the father's exercise of his constitutional rights, states should also be concerned about the interests of the child and the reliance of the adoptive parents on the stability of the adoptive placement itself.

In cases in which the mother refuses to disclose the birth father's identity, and his identity is not otherwise reasonably ascertainable, a court should expect the mother or the adoptive parents to present reasons on the record for declining disclosure – such as that disclosure of his identity would jeopardize her safety²¹¹ or where the mother truly

Yale L.J. 293, 320-321 (1988); Czapanskiy, *supra* n. 73, at 1478. Both Bartlett and Czapanskiy favor requiring disclosure because it would foster responsibility. *But see* Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Children's Rights*, 14 Cardozo L. Rev. 1747, 1803-1804 (1993) (suggesting that disclosure requirement would not protect the mother's "network of moral obligation[s]" to herself and those around her).

209. Forman, *supra* n. 98, at 982-983 (providing a detailed review of cases relying on each of these rationales as justifications for requiring only maternal consent to adoption).

210. *Lehr*, 463 U.S. at 264. The *Lehr* Court justified the use of putative father registries based on this reasoning. While I believe such registries are useful, *see infra* notes 177-180 and accompanying text, alone they have not stemmed the tide of adoption litigation. Because most registries open the door to adoption without paternal consent, I do not believe they will stem the tide of litigation.

211. Both Czapanskiy and Forman would excuse a mother from notice in cases where the birth father had engaged in abusive behavior toward the mother. Czapanskiy, *supra* n. 73, at 1479; Forman, *supra* n. 98, at 1032-1033.

does not know the identity of the father.²¹²

Putative father registries can play a major role in finding and notifying the men most likely to assert their parental rights.²¹³ However, putative father registries cannot be the only path to notice. Such registries are currently inherently flawed and they are limited by jurisdiction.²¹⁴ Many putative fathers, including those with established relationships, will not register because they do not know of the registry or understand its importance.²¹⁵ Finally, registries pose substantial unresolved constitutional problems where they are used as a basis to terminate parental relationships of fathers who have admitted paternity or established relationships with their children.²¹⁶ Thus, registries should be viewed as evidence of a father's interest in parenting his children – a safe harbor for men interested in notice. However, if the identity of the father is known, he should be provided notice even if he does not register.

212. This might be the case if the mother was incapacitated at the time she had intercourse or if she had intercourse with a man she did not know. Florida temporarily addressed this problem in a particularly intrusive way by requiring that notice be published in relevant newspapers containing the name and description of the mother, the unknown father, the date of conception, and the location where the mother believed conception occurred. See Alison S. Pally, Student Author, *Father by Newspaper Ad: The Impact of In re the Adoption of a Minor Child on the Definition of Fatherhood*, 13 Colum. J. Gender & L. 169, 172-175 (2004) (describing Florida's former adoption notice provisions – Fla. Stat. Ann. § 63.087(6) (West Supp. 2005) (repealed 2003); Fla. Stat. Ann. § 63.088(5) (West Supp. 2005) (repealed 2003)).

213. The Supreme Court approved New York's putative father registry in *Lehr*. 463 U.S. at 264. Registries as a way of providing unwed fathers a way of asserting their interest in establishing a relationship with their child are discussed in a number of recent articles. See Barton, *supra* n. 175, at 127-140; Beck, *supra* n. 136; see generally Donna L. Moore, Student Author, *Implementing a National Putative Father Registry by Utilizing Existing Federal/State Collaborative Databases*, 36 J. Marshall L. Rev. 1033 (2003).

214. See Beck, *supra* n. 136, at 1042; Moore, *supra* n. 213, at 1035.

215. Justice White pointed out the limitations of such registries in his dissent in *Lehr*. 463 U.S. at 274-275 (White, Marshall & Blackmun, JJ., dissenting).

216. See *Doe*, 88 P.3d at 751-752 (The trial court held that the father's rights could be terminated without notice because he did not register in Idaho's putative father registry, even though he had executed a Voluntary Acknowledgment of Paternity.).

B. ESTABLISH A MANDATORY EXPEDITED PROCEDURE FOR EVALUATING FATHERS' CLAIMS

For all the attempts to expedite these cases, no state has seriously implemented a procedure that permits swift resolution of unmarried fathers' claims.²¹⁷ Even where fathers are notified, cases can drag through the system interminably.²¹⁸ The chief lesson of the cases since *Stanley* is that the potential for litigation exists no matter what substantive standard states adopt to determine whether the consent of unwed fathers is necessary. The expectations of an increasing number of men that they will be involved in parenting their children ensures that their goals will continue to conflict with the choices of birth mothers and adoptive parents. This is not to say that the substantive standard employed to evaluate the parenting claims of unwed fathers is not important. But, because litigation of adoption is inherently harmful to children and to the adoption system, it is imperative that states adopt an exhibited procedure for evaluating the claims of unwed fathers.

In developing an efficient system for evaluating claims, states should look to the judicial bypass procedure employed in minors' consent to abortion cases.²¹⁹ The central requirement of the minor abortion rights cases relevant in the unwed father adoption context is that the Supreme Court required states to adopt a timely procedure for reviewing minor's claims.²²⁰ In response to the Supreme Court's directive in the minor consent cases, most states requiring parental consent for a minor's abortion developed judicial bypass provisions that permit review of the minor's claims swiftly enough to allow the

217. Litigation in contested adoptions is painfully time consuming. Even the cases that move quickly can stretch out for several months. *In re Williams* was resolved very quickly – the child was returned to the birth father in a little over three months. See *supra* Section I.A.

218. Typical of the reported cases are periods of up to two years. See e.g. *Doe*, 88 P.3d at 749, 752.

219. The general judicial bypass procedure in minor consent to abortion cases was outlined by the Supreme Court in its decision in *Bellotti v. Baird*, 443 U.S. 622 (1979) (known in abortion rights analysis as “*Bellotti II*” because it was the second appeal considered by the Supreme Court in the litigation regarding Massachusetts' minor consent to abortion law). Karen Czapanskiy has suggested such an approach to determine whether mothers should be relieved of the responsibility of identifying the father in adoption cases. Czapanskiy, *supra* n. 73, at 1478-1479.

220. *Bellotti II*, 443 U.S. at 643.

minor to obtain the abortion if a bypass was granted.

The procedure established by states under parental involvement states is instructive. Most states do not require the filing of a highly formalized pleading. In fact, many states have developed a form pleading that can be filled out by checking boxes and filling in blanks on the form.²²¹ Once a petition for bypass is filed, most states require the court to provide a hearing and reach a decision within two to seven days.²²² Finally, states generally provide for immediate review of a decision denying a judicial bypass. Time frames for review are approximately ten days.²²³

The questions a court must resolve at a judicial bypass proceeding involve significant factual issues. The U.S. Supreme Court has held that states must provide a bypass if a minor is mature enough to make his or her own decision about abortion or if the court decides that an

221. See e.g. Colorado Judicial Branch, *Petition for Waiver of Parental Notification Requirements of § 12-37.5-104*, C.R.S. (available at <http://www.courts.state.co.us/chs/court/forms/judicialbypass/jdf11.pdf>) (last accessed Apr. 4, 2005). Some states require courts to prepare easy step-by-step forms for bypass applicants. See e.g. La. Stat. Ann. § 40:1299.35.5(2)(B)(2) (2005). The Louisiana statute requires:

Each clerk of each court which has jurisdiction to hear such applications shall prepare application forms in clear and concise language which shall provide step-by-step instructions for filling out and filing the application forms. All application forms shall be submitted to the attorney general for his approval. Each clerk shall assist each minor who requests assistance in filling out or filing the application forms.

222. See e.g. Ariz. Rev. Stat. Ann. § 36-2152(E) (West 2004) (bypass hearing and decision must be completed within forty-eight hours excluding weekends); Ga. Code Ann. § 15-11-113 (Harrison 1998) (hearing must be held within three days of filing excluding weekends and holidays); La. Stat. Ann. § 40:1299.35.5(3)(a) (application must be heard within four days of filing); N.C. Gen. Stat. § 90-21.8(d) (2003) (requiring all proceedings to be completed within seven days of filing); 18 Pa. Consol. Stat. Ann. § 3206(f)(1) (West 2000) (hearing must be held within three business days of filing); Tex. Fam. Code Ann. § 33.003(h) (2004) (court must rule by 5:00 p.m. on second business day after filing).

223. See e.g. Ala. Code § 26-21-4(h) (1992) (appeal must be perfected within five days); Ariz. Rev. Stat. Ann § 36-2152(F) (West 2003) (appellate court must hold hearing and issue a ruling within forty-eight hours after petition for appellate review is filed); Nev. Rev. Stat. § 442.2555(5) (2000) (notice of appeal required within one day of ruling and appeal must be perfected within five days); N.C. Gen. Stat. § 90-21.8(d) (hearing on appeal must be held within seven days of filing).

abortion is in the minor's best interest.²²⁴ These are discretionary decisions that are rooted in the individual facts of each case.²²⁵ The determination of whether an abortion is in a minor's best interest can involve the evaluation of whether pregnancy will damage the family structure or irreparably undermine the minor's relationship with her parents.²²⁶ The mature minor standard requires consideration of a minor's success in school, future plans, demeanor at the hearing, appreciation of the physical and emotional consequences of the abortion, and consideration of alternatives to abortion and their consequences.²²⁷

The example of judicial efficiency achieved by states in the abortion bypass cases stands as a model for other situations that require quick and efficient resolution of issues such as the unwed father consent cases. The procedures employed in the abortion bypass cases hold the promise of resolving issues within fifteen business days of the initiation of an action. Even if the timelines were relaxed slightly in the unwed father situation to reflect the fact that there is no *per se* biological clock driving the decision, there is no reason to believe that unwed father claims to adoption consent could not be resolved within thirty days from when they arise. To be fair, there are important differences between the abortion bypass cases and the adoption consent cases. The most important difference is that abortion bypass cases are generally uncontested. There is no opposing party because of the requirement that the minor's confidentiality be preserved. In the adoption consent cases, there would almost always be an adverse party. The need to provide an opportunity to be heard to both sides of the

224. *Belotti II*, 443 U.S. at 643-644.

225. Suellyn Scarnecchia & Julie Kunce Field, *Judging Girls: Decision Making in Parental Consent to Abortion Cases*, 3 Mich. J. Gender & L. 75, 81, 83 (1995) (describing the issues in an abortion bypass case as "hard to define but 'we know it when we see it'").

226. Richard F. Storrow & Sandra Martinez, "Special Weight" for Best-Interests Minors in the New Era of Parental Autonomy, 2003 Wis. L. Rev. 789, 807 (discussing the substantive content of the best interest test in the context of judicial bypass of parental consent to abortion); Satsie Veith, *The Judicial Bypass Procedure and Adolescents' Abortion Rights: The Fallacy of the "Maturity" Standard*, 23 Hofstra L. Rev. 453, 470 (1994) (arguing that "maturity" is an "amorphous" term).

227. Stephen P. Rosenberg, Student Author, *Splitting the Baby: When Can a Pregnant Minor Obtain an Abortion without Parental Consent?: The Ex Parte Anonymous Cases (Alabama 2001)*, 34 Conn. L. Rev. 1109, 1117-1118 (2002).

adoption litigation could undermine the need for efficiency. However, in most situations, there is no reason for this delay. Often, the questions involved in adoption-consent cases are factual and relatively simple. Most of the reported cases did not involve substantial factual disputes.²²⁸ The two cautionary tales are illustrative. In *In re Williams*, there was no dispute about the father's conduct.²²⁹ The mother and adoptive parents admitted all the relevant facts including the father's identity in their pleadings.²³⁰ The only question was whether, as a matter of law, the Idaho statutes required notice to a father who had done what that father did.²³¹ In *Doe*, the question involved law applied to fact (whether the father's execution of a Voluntary Acknowledgment of Paternity entitled the father to notice) or pure law.²³²

Even if the efficiency of the procedure is lost in a few cases in which the parties get caught up in complex factual issues, in many cases, the father's interests will be quickly dealt with – either by recognizing early in the process that the consent of the father is required for the adoption or by a finding that the father's consent was not required because he failed to comply with technical requirements or because he had not made a substantial commitment to the child. There is simply no reason to expect that these issues pose any more complex questions than those raised in abortion bypass proceedings.

V. CONCLUSION

The well-being of children in adoption and the integrity of the adoption system depend on states striking the appropriate balance in adjudicating the claims of unwed fathers. This balance cannot be struck by legislation that is based on unrealistic assumptions about the parties to the adoption, nor can the balance be struck by ignoring desires and expectations of the men and women whose interests are involved in the adoption. Finally, the balance can only be struck by

228. There did not appear to be significant dispute about the facts in any of the major cases (*Stanley*, *Caban*, *Quilloin*, or *Lehr*). Even in the Baby Jessica and Baby Richard situations there did not appear to be significant discord over the facts.

229. See *supra* n. 1 and accompanying text.

230. *Id.*

231. *Id.*

232. 88 P.3d 754.

providing an efficient and swift system of adjudication. Providing notice to all the interested parties – including the birth father, while not constitutionally required – is good policy. Establishing a swift and efficient system for adjudicating interests protects the child's best interests and saves the adults involved from extended emotional controversies and financial loss. Acknowledging the potentially legitimate claims of fathers and providing a swift mechanism for adjudicating them protects the integrity of the adoption system itself.