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## Unequal Protection: Examining the Judiciary's Treatment of Unwed Fathers

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## UNEQUAL PROTECTION: EXAMINING THE JUDICIARY'S TREATMENT OF UNWED FATHERS

*Brett Potash\**

### I. INTRODUCTION

The Supreme Court of the United States has heard a handful of cases dealing with constitutional questions relating to unmarried fathers and their rights concerning their children.<sup>1</sup> Historically, unwed fathers have received overall negative treatment from courts around the country compared to their female counterparts.<sup>2</sup> For example, until the 1970s, mothers (whether married or not) have always been able to consent to an adoption whereas unwed fathers could not.<sup>3</sup> The differing treatment between mothers (married or not) and unwed fathers stems “from the difficulty of determining the identity of the natural father, compared with the ease of identifying the mother.”<sup>4</sup> This perception of “difficulty” affected the way courts have

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\*B.A. in History, State University of New York College at Buffalo; J.D. 2018, Touro College Jacob D. Fuchsberg Law Center. I would like to give special thanks to my two Note Editors, Jessica Voegelé and Rhona Amorado. Their patience, support, feedback, and encouragement were crucial throughout the entire writing process. This Note would not be what it is without either of them. I would also like to thank Dean Myra Berman for her many discussions with me and suggestions about how I can make this the best Note possible. Her expertise in this particular area of the law was highly valued and utilized throughout the entire Note. I would also like to thank my loving family and friends who provided me unlimited support and motivation throughout my law school career. Their understanding of the sacrifices I willingly took in order to simultaneously write this Note, while succeeding in law school, will forever be appreciated.

<sup>1</sup> Michael H. v. Gerald D., 491 U.S. 110 (1989); Lehr v. Robertson, 463 U.S. 248 (1983); Caban v. Mohammed, 441 U.S. 380 (1979); Quilloin v. Walcott, 434 U.S. 246 (1978); Stanley v. Illinois, 405 U.S. 645 (1972).

<sup>2</sup> See generally Naomi R. Cahn, *Family Issue(s)*, 61 U. CHI. L. REV. 325 (1994).

<sup>3</sup> *Id.* at 330.

<sup>4</sup> *Id.*

determined many notable cases, and in turn, have shaped the modern definition of a “family” as we know it today.<sup>5</sup>

Traditionally speaking, the term “family” is typified by the nuclear, or “marital family” (i.e., married parents and their children).<sup>6</sup> Modernly speaking, there are practically an infinite number of combinations of people living together that can constitute a family.<sup>7</sup> Changes in patterns and forms of a “traditional” family have been the subject of intense public debate, and at the forefront of that debate is not only what constitutes a family but also to what individual constitutional rights parents may be entitled.<sup>8</sup> The constitutional right to parent should be associated with the *individual* as opposed to the individual’s marital status because the definition of a “normal” marriage or family is constantly evolving.<sup>9</sup>

The judiciary’s often negative opinion on the rights of unwed fathers can be attributed to the influence of societal gender stereotyping.<sup>10</sup> Gender stereotypes are defined as “overgeneralization(s) of characteristics, differences, and attributes of a certain group based on their gender.”<sup>11</sup> Many typical gender stereotypes remain prevalent in today’s film and television industry—portraying women as “shy, passive, and submissive” and working “clean jobs” such as teaching or secretarial work, while portraying men as “tough, aggressive, dominant, and self-confident” and working “dirty” jobs such as construction or mechanics.<sup>12</sup> These are broad generalizations that are not true for every individual; nevertheless, these stereotypes continue to exist despite evidence to the contrary.<sup>13</sup>

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<sup>5</sup> See cases cited *supra* note 1.

<sup>6</sup> See generally David D. Meyer, *Self-Definition in the Constitution of Faith and Family*, 86 MINN. L. REV. 791 (2002).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 792, 794.

<sup>9</sup> This, as mentioned, is more of an issue for unwed fathers as it is for mothers. See generally Blythe Wygonik, *Refocus on the Family: Exploring the Complications of granting the Family Immigration Benefit to Gay and Lesbian United States Citizens*, 5 SANTA CLARA L. REV. 493 (2005).

<sup>10</sup> Vicky C. Jackson, *What Judges Can Learn From Gender Bias Task Force Studies*, HEINONLINE (Sept. 21, 2017), [http://heinonline.org/HOL/LandingPage?handle=hein.journals/judica81&div=9&id=&page; Patricia R. Recupero et al., \*Gender Bias and Judicial Decisions of Undue Influence in Testamentary Challenges\*, JAAPL, \(Sept. 21, 2017\), <http://jaapl.org/content/43/1/60>.](http://heinonline.org/HOL/LandingPage?handle=hein.journals/judica81&div=9&id=&page; Patricia R. Recupero et al., Gender Bias and Judicial Decisions of Undue Influence in Testamentary Challenges, JAAPL, (Sept. 21, 2017), http://jaapl.org/content/43/1/60)

<sup>11</sup> NOBULLYING, <https://nobullying.com/gender-stereotypes/> (last visited Oct. 8, 2017).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

Society expects individuals to behave in a manner consistent with his or her gender-specific stereotype and may harshly criticize those who do not.<sup>14</sup> Society expects women to get married young and start having children as soon as practical.<sup>15</sup> Men, because they are not the traditional homemakers or child-raising parents, are not normally faced with this kind of gender stereotyping.<sup>16</sup>

Society has a preconceived notion that women are superior to men in raising children and make for better parents, and men, generally, are incapable of caring for and raising children on their own.<sup>17</sup> During a custody battle, the mother will become the presumptive custodial parent, barring facts that suggest doing so would not be in the best interest of the child.<sup>18</sup> Men, however, are as capable of raising children as woman are, absent facts suggesting otherwise.<sup>19</sup> Presumptively awarding women child custody over men, absent facts favoring this decision, may be grounds for an equal protection violation.<sup>20</sup> When Courts deprive an unwed father of his rights, possibly due to a Justice's personal bias, that Justice is legislating morality and abusing his or her power of judicial discretion; thereby violating the unwed father's equal protection rights under the Fourteenth Amendment.<sup>21</sup>

This Note argues that questions concerning the constitutional rights of not only unwed biological fathers but also parents in general, as it pertains to their children, should be subject to a strict scrutiny analysis and not intermediate scrutiny, which is the current standard. This Note will analyze and discuss the Court's treatment of unwed fathers in the *Stanley-Michael H.* line of cases. Each of these cases discuss the rights, or in some cases the lack thereof, of unwed fathers.<sup>22</sup> While the Court has yet to outline a specific definition for the term "parent," this Note seeks to help form one.

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<sup>14</sup> Bonnie L. Roach, *Gender Stereotyping: The Evolution of Legal Protections for Gender Nonconformance*, 12 ATLANTIC L.J. 125 (2010).

<sup>15</sup> See generally *id.*

<sup>16</sup> *Id.*

<sup>17</sup> NOBULLYING, *supra* note 12.

<sup>18</sup> See generally Bernardo Cuadra, *Family Law- Maternal and Joint Custody Presumptions for Unmarried Parents*, 32 W. NEW ENG. L. REV. 599 (2010).

<sup>19</sup> *Id.*

<sup>20</sup> See discussion *infra* Part II.

<sup>21</sup> See discussion *infra* Part I.

<sup>22</sup> See cases cited *supra* note 1.

This Note will be divided into five parts. Part II of this Note will analyze the Equal Protection Clause under the Fourteenth Amendment of the United States Constitution, along with its history and different levels of review. Part III will provide an overview of five Supreme Court decisions in this area of law, commonly referred to as the *Stanley-Michael H.* line of cases.<sup>23</sup> Part IV will analyze and discuss the similarities of the *Stanley-Michael H.* line of cases and distinguish these cases in terms of which favor the rights of unwed fathers and which hinders these rights. Part V will suggest a solution to how the courts should treat unwed fathers as well as discuss how the Supreme Court, if ever presented the opportunity to define the term “parent,” should do so by incorporating unwed fathers into that definition. Part VI will provide an overall summary of this Note’s most central theme: That the constitutional right to parent should be associated with the *individual* as opposed to the individual’s marital status.

## II. THE EQUAL PROTECTION CLAUSE

The Equal Protection Clause of the Fourteenth Amendment provides, “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>24</sup> The Supreme Court has stated, “The purpose of the equal protection clause . . . is to secure every person within the state’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.”<sup>25</sup> For almost a century, however, the Court was consistently reluctant to use the Equal Protection Clause to invalidate any state or local laws.<sup>26</sup> During

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<sup>23</sup> Because many of these cases have strong, persuasive dissents and do not have overwhelming majorities, this is an area of the law that will likely continue to be disputed.

<sup>24</sup> U.S. Const. amend. XIV, § 1. Equal protection applies to the federal government through judicial interpretation of the Due Process Clause of the Fifth Amendment and to state and local governments through the Fourteenth Amendment. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 712 (4th ed. 2011). The Supreme Court, however, has declared that “[e]qual protection analysis in the Fifth Amendment is the same as that under the Fourteenth Amendment.” *Id.*

<sup>25</sup> *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (quoting *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923), (quoting *Sunday Lake Iron Co. v. Twp. of Wakefield*, 247 U.S. 350, 352 (1918))).

<sup>26</sup> See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 711 (4th ed. 2011).

this time, the Court only decided race-related equal protection clause claims,<sup>27</sup> as evident in the *Slaughter-House Cases*.<sup>28</sup>

### A. History of the Equal Protection Clause

In the 1872 *Slaughter-House Cases*, Louisiana created a partial monopoly concerning the slaughtering business by giving one company the sole privilege of slaughtering animals.<sup>29</sup> Competing slaughterhouses, *inter alia*, argued that this violated their “equal protection of the laws.”<sup>30</sup> The Court struck down their equal protection argument, opining that the claim was misplaced because the clause itself was established to void laws “clearly intended to prevent the hostile discrimination against the negro race.”<sup>31</sup>

The *Slaughter-House Cases* represents an example that, prior to the Warren Court Era,<sup>32</sup> the Court only applied the Equal Protection Clause to racial and ethnic minorities.<sup>33</sup> In the mid-1950s, however, Justice Oliver Wendell Holmes referred to the Equal Protection Clause as “the last resort of constitutional arguments.”<sup>34</sup> Justice Holmes was likely referring to the possibility that anyone may use the equal protection clause to challenge almost any law as discriminating against them.<sup>35</sup> He also was likely referring to the Court’s consistent reluctance over the years to use the Equal Protection Clause to invalidate state or local laws.<sup>36</sup> This reluctance, however, went awry in an infamous 1954 case concerning segregation in public schools.<sup>37</sup>

In the seminal case, *Brown v. Board of Education*,<sup>38</sup> the Court relied on the Equal Protection Clause as a key tool to overturn

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<sup>27</sup> *Id.*

<sup>28</sup> *Slaughter-House Cases*, 83 U.S. 36, (1872).

<sup>29</sup> *Id.* at 48.

<sup>30</sup> *Id.* at 66.

<sup>31</sup> *Id.* at 38.

<sup>32</sup> The Warren Court Era was between 1953-1959. See *The Eisenhower Administration*, BOUNDLESS US HISTORY, <https://www.boundless.com/u-s-history/textbooks/boundless-u-s-history-textbook/politics-and-culture-of-abundance-1943-1960-28/the-eisenhower-administration-216/the-warren-court-1460-8616/> (last visited Oct. 11, 2017).

<sup>33</sup> See Roger V. Abbott, *Is Economic Protectionism a Legitimate Governmental Interest Under Rational Basis Review?*, 62 CATH. U. L. REV. 475, n.28 (2013).

<sup>34</sup> *Buck v. Bell*, 274 U.S. 200, 208 (1927).

<sup>35</sup> CHEMERINSKY, *supra* note 26.

<sup>36</sup> *Id.*

<sup>37</sup> See generally *Brown v. Board of Education*, 347 U.S. 483 (1954).

<sup>38</sup> *Id.*

discriminatory laws and protect the citizens' most fundamental rights.<sup>39</sup> In *Brown*, the Court reviewed four state cases in which African-American children sought admission into their local public schools on a non-segregated basis.<sup>40</sup> In each case, the children were denied admission to the schools attended by Caucasian children under state laws requiring or permitting segregation based on race.<sup>41</sup> Since African-American children were treated differently from Caucasian children (in the educational setting) based solely on race, an Equal Protection violation was obvious.<sup>42</sup>

The Court in *Brown* struck down state-sponsored segregation, the "separate but equal doctrine," because of its stigmatizing effects<sup>43</sup> and because it denied some individuals educational opportunities.<sup>44</sup> The *Brown* Court felt that relying on the Equal Protection Clause in this instance was necessary because the separate but equal doctrine impinged on the paramount role that education plays "to our democratic society."<sup>45</sup> This case ushered in a new era of Equal Protection jurisprudence where the Equal Protection Clause would be used to combat invidious discrimination and for protecting fundamental rights.<sup>46</sup>

## B. Equal Protection Clause Analysis

In analyzing all Equal Protection cases, the first step is to ask whether a sufficient interest justifies the government's classification.<sup>47</sup> To help answer this question, there are three distinct levels of judicial review—strict, intermediate, and rational basis—that the Supreme Court uses for different classifications in order to evaluate the constitutionality of a law, statute, or regulation.<sup>48</sup>

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<sup>39</sup> *Id.* at 494.

<sup>40</sup> *Id.* at 487-88.

<sup>41</sup> *Id.*

<sup>42</sup> *Brown*, 347 U.S. at 495.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 493.

<sup>46</sup> *Id.*

<sup>47</sup> *Downtown Bar & Grill, LLC v. State*, 273 P.3d 709, 711 (Kan. 2012).

<sup>48</sup> See generally Melanie E. Meyers, *Impermissible Purposes and the Equal Protection Clause*, 86 COLUM. L. REV. 1184 (1986).

### 1. *Strict Scrutiny*

Strict scrutiny is “[s]trict in theory and fatal in fact”<sup>49</sup> because the test is so difficult to overcome that a law under its review will almost certainly be invalidated.<sup>50</sup> If a plaintiff can establish that strict scrutiny is the appropriate test for the Court to apply to the classification in question, the burden is on the state to show a compelling government purpose and that the means of achieving that compelling government purpose is narrowly tailored or there is no other less restrictive alternative.<sup>51</sup>

Examples of classifications subject to strict scrutiny include race, alienage, national origin, religion, right to travel within the country, right of privacy, freedom of speech, right to vote, and infringements on fundamental rights, including the right to parent.<sup>52</sup> For racial classifications, the Court applies strict scrutiny to “smoke out illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.”<sup>53</sup>

Strict scrutiny was applied in the famous case of *Loving v. Virginia*.<sup>54</sup> In *Loving*, an interracial couple married in violation of a Virginia statute and were criminally convicted.<sup>55</sup> On appeal to the Supreme Court, Virginia maintained that it had a compelling state interest to preserve racial pursuit through the anti-miscegenation statute.<sup>56</sup> The Court disagreed and struck down the statute, reasoning that regulating marriage solely on the basis of race was arbitrary and invidious.<sup>57</sup> The Court held that states might not prevent marriages between people solely on the basis of race without violating the Equal Protection clause of the Fourteenth Amendment.<sup>58</sup> Therefore, the

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<sup>49</sup> Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

<sup>50</sup> *Id.*

<sup>51</sup> See *Johnson v. California*, 543 U.S. 499, 505 (2005).

<sup>52</sup> Meyers, *supra* note 48, at n.14.

<sup>53</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

<sup>54</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>55</sup> The court agreed to set aside the verdict so long as the Lovings left Virginia and did not return for twenty-five years. *Id.* at 3.

<sup>56</sup> *Id.* at 8.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 12.



statute did not pass the strict scrutiny test because there was no compelling state interest.<sup>59</sup>

## 2. *Intermediate Scrutiny*

Under intermediate scrutiny, the state has the burden to show that a law is substantially related to an important governmental purpose.<sup>60</sup> As its name implies, intermediate scrutiny is a standard of review that is less rigorous than strict scrutiny, but more rigorous than rational basis.<sup>61</sup> Classifications that are subject to intermediate scrutiny include discrimination against children born out of wedlock, commercial speech, speech in public forums, and gender discrimination.<sup>62</sup> The Supreme Court first applied intermediate scrutiny in *Craig v. Boren*.<sup>63</sup>

In *Craig*, the plaintiffs challenged a law which allowed women aged eighteen and over to purchase low alcohol content beer, but did not allow men to purchase any alcohol until they were twenty-one.<sup>64</sup> Oklahoma argued its important governmental purpose was to decrease the rate of drunk driving among teenage males.<sup>65</sup> Statistical evidence was presented in an attempt to show the government had an important reason behind the enacted statute.<sup>66</sup> The Court, however, stated that the statistical evidence was not substantially related enough to warrant the conclusion that gender represents an accurate marker for the regulation of drinking and driving.<sup>67</sup> The Court held that this evidence was insufficient to support the gender-based discrimination that arose from the statute.<sup>68</sup>

The statute did not pass intermediate scrutiny because the state's method of achieving its objective (by banning men from purchasing alcohol until age twenty-one and allowing women to purchase low alcohol beer at age eighteen) was not substantially related to its purpose (to decrease the rate of drunk driving among

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<sup>59</sup> *Loving*, 388 U.S. at 1.

<sup>60</sup> *Lehr*, 463 U.S. at 266.

<sup>61</sup> *See generally* Meyers, *supra* note 48.

<sup>62</sup> *Id.*

<sup>63</sup> *Craig v. Boren*, 429 U.S. 190 (1976).

<sup>64</sup> *Id.* at 191-92.

<sup>65</sup> *Id.* at 201.

<sup>66</sup> *Id.* at 201.

<sup>67</sup> *Id.*

<sup>68</sup> *Craig*, 429 U.S. at 201.

teenage males). Therefore, the Court held that the gender-based discriminatory Oklahoma law violated equal protection.<sup>69</sup>

### 3. *Rational Basis*

Under rational basis scrutiny, the plaintiff has the burden to show that a law is rationally related to a legitimate government purpose.<sup>70</sup> This standard of review applies to all state classifications that do not affect a suspect or a quasi-suspect class and do not impinge a fundamental right.<sup>71</sup> Examples of classifications that, if challenged, would be subject to a mere rational basis review include, but are not limited to, economic relations, age discrimination, wealth discrimination, disability discrimination, and sexual orientation discrimination.<sup>72</sup>

Historically, most legislation reviewed under rational basis is upheld because courts almost always defer to state governments for non-suspect classifications.<sup>73</sup> The Supreme Court has held that, if a court can imagine any conceivable way in which a law or action furthers a legitimate purpose, a law subject to the rational basis test will be upheld.<sup>74</sup> However, if a state's interest in a particular piece of legislation is animus—the prejudicial disposition toward a discernible, constitutionally protected group of persons<sup>75</sup>—then the interest is not legitimate and the court will strike down the law.<sup>76</sup>

In *Romer v. Evans*,<sup>77</sup> Colorado voters adopted “Amendment 2” to their State Constitution prohibiting any judicial, legislative, or executive action designed to protect persons from discrimination based on their homosexual, lesbian or bisexual orientation, conduct, practices

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<sup>69</sup> *Id.* at 190-91.

<sup>70</sup> *See, e.g.,* *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988); *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, 175, 177 (1980); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 527 (1959).

<sup>71</sup> *See generally* Meyers, *supra* note 48.

<sup>72</sup> *Id.*

<sup>73</sup> *See, e.g.,* *Williamson v. Lee Optical*, 348 U.S. 483, 487 (1955).

<sup>74</sup> *FCC v. Beach Commc'ns*, 508 U.S. 307, 313-14 (1993).

<sup>75</sup> *Animus*, Black's Law Dictionary (10th ed. 2014).

<sup>76</sup> *See generally* Meyers, *supra* note 48.

<sup>77</sup> *Romer v. Evans*, 517 U.S. 620 (1996); *see also* *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) Here, the court used rational basis to strike down a zoning ordinance that required special use permits for group homes for the mentally retarded. *Id.* at 640. The requirement appeared to rest solely on an irrational bias towards mentally retarded people. *Id.*

or relationships.<sup>78</sup> Following a legal challenge by homosexual and other aggrieved parties, the state trial court entered a permanent injunction enjoining Amendment 2's enforcement.<sup>79</sup> The Colorado Supreme Court affirmed on appeal.<sup>80</sup> The Supreme Court struck down Amendment 2, and held that the Amendment violated the equal protection clause because it singled out homosexuals and imposed on them a "broad disability" by denying them the right to seek and receive specific legal protection from discrimination.<sup>81</sup> Even though most legislation reviewed under rational basis is upheld because of the deference is given to state legislatures for non-suspect classes, the Court held that the amendment was unexplainable "by anything but animus toward the class it affects."<sup>82</sup> As such, the Court invalidated the amendment because animus is not a legitimate governmental purpose.<sup>83</sup>

To summarize, the Court uses strict scrutiny for "suspect" classifications based on race, national origin, and alienage,<sup>84</sup> intermediate scrutiny for "quasi-suspect" classifications based on gender and legitimacy,<sup>85</sup> and rational basis for classifications based on age, wealth, disability, sexual orientation, and economic regulations.<sup>86</sup>

The Court uses intermediate scrutiny for gender-based classifications because, in its opinion, differences between men and women may, in some circumstances, justify different treatment.<sup>87</sup> While recognizing that each case is fact specific and should be decided as such, using intermediate scrutiny as the presumptive standard for applying gender-based classifications is, in many of the following cases, too lenient of an approach.<sup>88</sup> The parent-child relationship is such an important and sacred relationship that when an unwed father's rights are literally on the line, he should be afforded the utmost

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<sup>78</sup> *Romer*, 517 U.S. at 623-634.

<sup>79</sup> *Id.* at 625.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 620-621.

<sup>82</sup> *Id.* at 632.

<sup>83</sup> *Romer*, 517 U.S. at 632.

<sup>84</sup> *Suspect Classification*, Black's Law Dictionary (10th ed. 2014).

<sup>85</sup> *Id.*

<sup>86</sup> Meyers, *supra* note 48.

<sup>87</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515, 533-34 (1996) (discussing the allowable bases for gender classifications).

<sup>88</sup> See Norman T. Deutsch, *Nguyen v. Ins and the Application of Intermediate Scrutiny to Gender Classifications: Theory, Practice, and Reality*, 30 PEPP. L. REV. 185 (2003).

protection, and strict scrutiny is the standard that provides the unwed father with this utmost protection.<sup>89</sup>

### III. UNWED BIOLOGICAL FATHERS AND THEIR RIGHT TO PARENT: THE SUPREME COURT'S POSITION

The Supreme Court has long recognized that a biological parent's relationship with his or her child is a fundamental right that is tied to life, liberty, and the pursuit of happiness.<sup>90</sup> The state should only sever such a connection under limited circumstances.<sup>91</sup> Different Supreme Court Justices, however, have differing opinions on this issue.<sup>92</sup>

According to Justice Stewart, one of these limited circumstances occurs in his dissent in *Caban v. Mohammed*.<sup>93</sup> Justice Stewart suggested that a biological father's parental rights are second-rate compared to those of a biological mother:

Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring . . . . The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures.<sup>94</sup>

In Justice Stewart's view, the biological relationship between a natural unwed father and his biological child presents the unwed father with a chance to "accept . . . some measure of responsibility for the child's future" so that he can "enjoy the blessings of the parent-child relationship."<sup>95</sup>

If an unwed biological father does not grasp that chance, then Justice Stewart suggested, that person should not have a constitutionally protected right.<sup>96</sup> Once an unwed father grasps the parent-child relationship, however, the Court has recognized that "a

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<sup>89</sup> See *Santosky v. Kramer*, 455 U.S. 755, 753 (1982) (discussing "the fundamental liberty interest of natural parents in the care, custody, and management of their child").

<sup>90</sup> See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

<sup>91</sup> *Id.*

<sup>92</sup> See discussion *infra* Part III.

<sup>93</sup> *Caban*, 441 U.S. 380, 397 (1979). (Stewart, J., dissenting).

<sup>94</sup> *Id.*

<sup>95</sup> *Lehr*, 463 U.S. 248, 262 (1983).

<sup>96</sup> *Id.*

father, no less than a mother, has a constitutionally protected right to the companionship, care, custody, and management of the children he has sired and raised.”<sup>97</sup>

After more than three decades, Justice Scalia took an alternative view in his dissenting opinion in *Adoptive Couple v. Baby Girl*.<sup>98</sup> In this case, a baby girl was born to a Hispanic mother and Cherokee Indian father.<sup>99</sup> The parents were not married at the time the child was born, which occurred off the Cherokee reservation.<sup>100</sup> During pregnancy, the father voluntarily surrendered his parental rights to the mother via text message.<sup>101</sup> When the baby was born, the mother placed the child up for adoption.<sup>102</sup> The adoptive parents notified the father of the pending adoption, who in turn did not consent to the adoption, but sought custody of the child.<sup>103</sup>

The Court determined that the Indian Child Welfare Act<sup>104</sup> does not protect the rights of a parent who has never had custody of a child.<sup>105</sup> Justice Scalia opined that the Court’s decision “needlessly demean[ed] the rights of parenthood.”<sup>106</sup> Justice Scalia continued:

It has been the constant practice of the common law to respect the entitlement of those who bring a child into the world to raise that child. We do not inquire whether leaving a child with his parents is “in the best interests of the child.” It sometimes is not, he would be better off raised by someone else. But parents have their rights, no less than children do. This father wants to raise his daughter and the statute amply protects his right to do so. There is no reason in law or policy to dilute that protection.<sup>107</sup>

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<sup>97</sup> Weinberger v. Wiesenfeld, 420 U.S. 636, 652 (1975).

<sup>98</sup> *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (Scalia, J., dissenting).

<sup>99</sup> *Id.* at 2558.

<sup>100</sup> *Id.* at 2570.

<sup>101</sup> *Id.* at 2558.

<sup>102</sup> *Id.*

<sup>103</sup> *Adoptive Couple*, 133 S. Ct. at 2559.

<sup>104</sup> 25 U.S.C.S. § 1901 (LexisNexis).

<sup>105</sup> *Id.* at 2571-87. (Scalia, J., dissenting).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

Evidently, Justice Scalia and Justice Stewart have vastly different views.<sup>108</sup> The line of seminal Supreme Court cases, commonly referred to as the *Stanley-Michael H.* line, concerning the rights of unwed biological fathers tend to align closer to the sentiments of Justice Stewart's dissent in *Caban* as opposed to Justice Scalia's dissent in *Baby Girl*.<sup>109</sup> In these cases, there is a preconceived notion that an unwed biological father is not a parent per se, but that he has the opportunity to become one.<sup>110</sup> This preconceived notion stems from the belief that, in many instances, an unwed biological father does not intend to be a parent.<sup>111</sup> However, it is unfair to assume that an unwed father cannot have the same or a similar relationship or connection with his child as that of an unwed mother's relationship with her child merely because the unwed father did not physically give birth to the child.<sup>112</sup> The following cases<sup>113</sup> are instances in which an unwed father's rights were deprived mostly for arbitrary reasons, depending on the facts of each case.

#### A. Stanley v. Illinois

Historically, an unwed father's rights to the enjoyment of the care and custody of his natural child were unclear.<sup>114</sup> Prior to 1972,<sup>115</sup> the father of a child born out of wedlock was given few rights regarding his child, if any.<sup>116</sup> However, for the first time in *Stanley v. Illinois*, the Court held that unwed fathers have certain due process and equal protection rights regarding child custody.<sup>117</sup>

Joan Stanley and Peter Stanley, an unmarried couple, had three children out of wedlock.<sup>118</sup> When Joan died, Mr. Stanley took full

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<sup>108</sup> See discussion *infra* Part III.

<sup>109</sup> 133 S. Ct. at 2571-87. (Scalia, J., dissenting); *Caban*, 441 U.S. at 397 (Stewart, J., dissenting).

<sup>110</sup> See *Lehr*, 463 U.S. at 262.

<sup>111</sup> *Stanley*, 405 U.S. at 650, 665-66; *Lehr*, 463 U.S. at 263.

<sup>112</sup> See discussion *supra* Part I.

<sup>113</sup> This Note will discuss Due Process claims, if any, as well as Equal Protection Claims. The Due Process Claims, however, are beyond the scope of this Note.

<sup>114</sup> See discussion *supra* Part I.

<sup>115</sup> *Stanley*, 405 U.S. at 646.

<sup>116</sup> Karen C. Wehner, *Daddy Wants Rights Too: A Perspective on Adoption Statutes*, 31 HOUS. L. REV. 691, 702 (1994).

<sup>117</sup> *Id.*

<sup>118</sup> Although they were not married, they were so close that they shared the same surname. *Id.* at 646.

custody of his children.<sup>119</sup> Under Illinois state law,<sup>120</sup> the state did not need to show that Mr. Stanley was an unfit parent before taking away his custody rights<sup>121</sup> because the law presumed that unwed fathers were unfit parents while married fathers, married mothers, and unwed mothers were fit.<sup>122</sup> The State of Illinois then removed the children from Mr. Stanley's custody, without a hearing to determine his parental fitness, and declared the children to be wards of the state in accordance with Illinois law and procedure.<sup>123</sup>

Under this statutory scheme, Mr. Stanley, as an unwed father, had no right to an individualized hearing to determine his parental fitness.<sup>124</sup> Mr. Stanley argued that the statute violated the Due Process Clause because he was automatically stripped of his right to a hearing without an opportunity to show his fitness to parent his biological children.<sup>125</sup> Additionally, he argued that the statutory scheme violated the Equal Protection Clause because "he had never been shown to be an unfit parent and that since married fathers and unwed mothers could not be deprived of their children without such a showing, he had been deprived of the equal protection of the laws guaranteed him by the Fourteenth Amendment."<sup>126</sup> On the other hand, the State of Illinois argued that, based on "history and culture," unwed fathers were "factually different" from married fathers because they were historically physically absent from the home, lacked interest in their children, and failed to accept responsibility for them.<sup>127</sup>

The Court agreed with Mr. Stanley's arguments, holding that the statute violated both the Due Process Clause and the Equal Protection Clause.<sup>128</sup> Specifically, the Court held that Mr. Stanley had a due process right to present and defend his parental fitness in a court of law.<sup>129</sup> Additionally, the Court held that the statute violated the Equal Protection Clause because denying unwed fathers the right to a parental fitness hearing while granting this hearing to other Illinois

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<sup>119</sup> *Id.*

<sup>120</sup> ILL. REV. STAT., c. 37, § 705-8.

<sup>121</sup> *Id.*

<sup>122</sup> *Stanley*, 405 U.S. at 647.

<sup>123</sup> *Id.* at 646.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 649.

<sup>126</sup> *Id.* at 646.

<sup>127</sup> *Stanley*, 405 U.S. at 653.

<sup>128</sup> *Id.* at 658.

<sup>129</sup> *Id.* at 657-58.

parents was inescapably unequal.<sup>130</sup> It noted that while it may be true that many unwed fathers, historically, did not have a presence in their children's lives, this was not the case for all unwed fathers both historically and today.<sup>131</sup> Therefore, Mr. Stanley's due process rights and equal protection rights were violated.<sup>132</sup>

Justice Burger wrote a dissent, accepting the state's overly general characterization of unwed fathers.<sup>133</sup> In his view, Illinois had every right to protect "illegitimate" children by acknowledging a difference between unwed mothers and unwed fathers.<sup>134</sup> He classified unwed fathers as "not traditionally quite so easy to identify and locate,"<sup>135</sup> basing this "theory" on "centuries of human experience."<sup>136</sup> Justice Burger opined that in the absence of marriage, adoption, or some other legal undertaking, an unwed father might be denied the same privileges that a married father enjoys.<sup>137</sup> In Justice Burger's view, Equal Protection is not violated when the state only gives benefits to married fathers and not unmarried fathers because marriage creates legal obligations not only to the marriage itself but also legal obligations in adoption proceedings.<sup>138</sup>

Overall, while the dissent implied that men were per se reluctant fathers if they were not married or did not adopt their children, the majority looked at the issue in a more objective light.<sup>139</sup> The majority reasoned that Mr. Stanley, who had "sired and raised" his children, despite not being married, must be held to the same standard as any other parent would be.<sup>140</sup> The majority in *Stanley* rejected the stigma of unwed fathers as uninterested and uninvolved in the lives of their children.<sup>141</sup>

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<sup>130</sup> *Id.* at 650.

<sup>131</sup> *Id.* at 654-55,

<sup>132</sup> *Stanley*, 405 U.S. at 645.

<sup>133</sup> *Id.* at 659-68. (Burger, J., dissenting).

<sup>134</sup> *Id.* at 665.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 666.

<sup>137</sup> *Stanley*, 405 U.S. at 664. Additionally, Justice Burger argued that the Court should not have looked at Due Process at all because Mr. Stanley did not raise it in the lower courts. *Id.* at 662.

<sup>138</sup> Justice Burger opined that Equal Protection was not violated "when the state gives full recognition only to those father-child relationships that arise in the context of family units bound together by legal obligations arising from marriage or from adoption proceedings." *Id.*

<sup>139</sup> *See generally Id.*

<sup>140</sup> *Id.* at 650.

<sup>141</sup> *Stanley*, 405 U.S. at 649.



The *Stanley* Court applied a variation of intermediate scrutiny.<sup>142</sup> In the opinion, Justice White stated “[t]he private interest here, that of a man in the children he sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection.”<sup>143</sup> The burden placed on the State by the *Stanley* Court was not only greater than a mere rational basis test of minimal scrutiny but also less demanding than a heightened scrutiny standard, which required a showing of necessity.<sup>144</sup> The Supreme Court, however, does not always react this way when presented with an unwed father case.<sup>145</sup> Six years following the decision in *Stanley*, the Court took a step backward in giving rights to unwed fathers.

### B. *Quilloin v. Walcott*

In *Quilloin v. Walcott*,<sup>146</sup> the father, Mr. Quilloin, never actually married the mother of his child nor did he and the mother ever share an established home as a family.<sup>147</sup> When Mr. Quilloin’s child was less than three years old, the mother married another man,<sup>148</sup> and this man moved to adopt the child years later.<sup>149</sup> Mr. Quilloin “provided support only on an irregular basis,” but did visit his child on “many occasions.”<sup>150</sup> Under a Georgia statute,<sup>151</sup> unwed fathers do not have the right to veto an adoption unless they had already legitimized their children.<sup>152</sup> Despite this, however, Mr. Quilloin attempted to block the adoption via a petition for legitimation.<sup>153</sup>

The trial court found that approving the stepfather’s adoption and denying the biological father’s petition for legitimation were in the best interests of the child.<sup>154</sup> As such, it rejected Mr. Quilloin’s petition

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<sup>142</sup> Linda R. Crane, *Family Values and the Supreme Court*, 25 CONN. L. REV. 427, 453, n.171 (1993).

<sup>143</sup> *Stanley*, 405 U.S. at 651.

<sup>144</sup> Crane, *supra* note 142.

<sup>145</sup> See generally Crane, *supra* note 142.

<sup>146</sup> *Quilloin*, 434 U.S. 246 (1978).

<sup>147</sup> *Id.* at 247.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 249.

<sup>150</sup> *Id.* at 251.

<sup>151</sup> See GA. CODE ANN. § 74-403(3) and § 74-203.

<sup>152</sup> *Id.*

<sup>153</sup> *Quilloin*, 434 U.S. at 248-49.

<sup>154</sup> *Id.* at 250-51.

to block the adoption for lack of standing.<sup>155</sup> Mr. Quilloin argued he could not be shut out by the court in this way without a showing (a la *Stanley*) that he was an unfit parent.<sup>156</sup> After the Supreme Court of Georgia affirmed the trial court's decision, he appealed to the U.S. Supreme Court and was granted a writ of certiorari.<sup>157</sup> The U.S. Supreme Court held that a Georgia statute denying an unwed father the right to veto an adoption of his illegitimate child by another man did not violate the Due Process Clause or the Equal Protection Clause.<sup>158</sup>

The Court unanimously denied Mr. Quilloin's petition for legitimation under the "best interests of the child" standard and affirmed the stepfather's adoption of Mr. Quilloin's biological son.<sup>159</sup> The Court first opined that, although the *Stanley* Court found a "father's interest in the companionship, care, custody, and management" of his children to be "cognizable and substantial,"<sup>160</sup> the *Stanley* Court still "left unresolved" the rights of unwed fathers in cases where "the countervailing interests are more substantial."<sup>161</sup> The Court pointed out that Mr. Quilloin provided support only on an irregular basis,<sup>162</sup> and the mother believed that Mr. Quilloin's visits and gifts had a "disruptive effect on the child" and the family as a whole.<sup>163</sup> However, while the child wanted his stepfather to adopt him, she also desired to keep in contact with Mr. Quilloin as her biological father.<sup>164</sup>

The Court acknowledged that the "Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family . . . without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."<sup>165</sup> However, this case was different.<sup>166</sup> The Court listed three distinctions.<sup>167</sup> First, Mr. Quilloin never "had, or sought actual or legal

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<sup>155</sup> *Id.* at 251.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 253.

<sup>158</sup> *Quilloin*, 434 U.S. at 256.

<sup>159</sup> *Id.* at 253.

<sup>160</sup> *Id.* at 248.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 251.

<sup>163</sup> *Quilloin*, 434 U.S. at 251.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 255 (quoting *Smith v. Organization of Foster Families*, 431 U.S. 816, 862–863 (1977) (Stewart, J., concurring)).

<sup>166</sup> *Id.* at 255.

<sup>167</sup> *Id.*

custody of his daughter.”<sup>168</sup> Second, this was not a case “in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived.”<sup>169</sup> Lastly, the adoption will “give full recognition to a family unit already in existence, a result desired by all concerned, except [Mr. Quilloin].”<sup>170</sup> With these distinctions in mind, the Court determined that the stepfather’s adoption of Mr. Quilloin’s biological child was in the child’s best interests.<sup>171</sup>

Mr. Quilloin’s Equal Protection Clause arguments as to the unequal treatment of married fathers and unmarried fathers similarly failed.<sup>172</sup> Mr. Quilloin argued that the state impermissibly treated his case differently because “his interests [were] indistinguishable from those of a married father who is separated or divorced from the mother and is no longer living with his child.”<sup>173</sup> The Court rejected Mr. Quilloin’s arguments and emphasized that Mr. Quilloin never sought any responsibility, not even legal custody, before the stepfather’s adoption proceeding.<sup>174</sup> The Court’s reasoning was ultimately based on the fact that Mr. Quilloin was a reluctant father.<sup>175</sup> Thus, because Mr. Quilloin “never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child,” it was in the best interests of the child to live in an already existing family unit.<sup>176</sup>

Overall, the Court refused to allow Mr. Quilloin to legitimize his child because it found that such a process was not “in the best interest of the child.”<sup>177</sup> The Due Process claim failed because Mr. Quilloin did not have a previously established relationship with his child and the child’s best interests superseded any unrealized interest the father might have had.<sup>178</sup> With respect to the Equal Protection claim, the Court found that, as opposed to *Stanley* where the father was active in his child’s life, Mr. Quilloin had forfeited his constitutional

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<sup>168</sup> *Quilloin*, 434 U.S. at 255.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 256.

<sup>173</sup> *Quilloin*, 434 U.S. at 256.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 254.

<sup>178</sup> *Quilloin*, 434 U.S. at 255.

protection of his parental status with his child by failing to accept any significant parenting responsibility for his child.<sup>179</sup> The *Quilloin* Court applied intermediate scrutiny, noting that the State needed only to show that its actions were in the child's best interest—this required more than the minimal scrutiny standard of showing a rational basis for the state action, but lacked the strict scrutiny requirement of showing necessity.<sup>180</sup> Despite this brief step backward for unwed fathers, the Court would reaffirm a different unwed father's rights one year later.

### C. Caban v. Mohammed

Abdiel Caban and Maria Mohammed lived in New York City between 1968 and 1973.<sup>181</sup> They commonly presented themselves as husband and wife, although they were never legally married because of Mr. Caban's marriage with another woman.<sup>182</sup> Despite this, Mr. Caban successfully functioned as a father to his two biological children with Maria.<sup>183</sup> He lived with his children and their mother as a functioning family unit while providing them with necessary support,<sup>184</sup> and his name even appeared on both of his children's birth certificates.<sup>185</sup> In December of 1973, Maria took the two children, and left Mr. Caban, to live with Kazim Mohammed, whom she married approximately one year later.<sup>186</sup> Following Maria's remarriage, Mr. Caban continued to see his two children at their maternal grandmother's house on a weekly basis.<sup>187</sup>

The grandmother returned to her home in Puerto Rico in 1974, and she took the children with her until Maria and Kazim Mohammed ( "Mohammeds") could start a business together in New York City, after which they would retrieve the children.<sup>188</sup> At the conclusion of a trip to Puerto Rico in 1975, to visit his children, Mr. Caban took the

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<sup>179</sup> *Id.* 256.

<sup>180</sup> Crane, *supra* note 142.

<sup>181</sup> *Caban*, 441 U.S. 380, 382 (1979).

<sup>182</sup> Mr. Caban and his actual wife were separated. *Id.*

<sup>183</sup> *Id.* at 382.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Caban*, 441 U.S. at 382.

<sup>188</sup> *Id.*

children with him back to New York City.<sup>189</sup> Maria was unable to retain possession of her children through the police; she shortly, thereafter, filed for custody proceedings in New York Family Court.<sup>190</sup> The Mohammeds were awarded temporary custody and Mr. Caban was allowed visitation rights in the initial hearings.<sup>191</sup>

At trial, Mr. Caban argued that biological fathers have a due process right to maintain a parental relationship with their children absent a finding of unfitness.<sup>192</sup> He also argued that the New York statute<sup>193</sup> at issue violated the Equal Protection Clause due to

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Caban*, 441 U.S. at 385.

<sup>193</sup> The statute allowed for a mother to consent to an adoption “whether adult or infant, of a child born out of wedlock” and a father to consent to an adoption:

[W]hether adult or infant, of a child born out-of-wedlock and placed with the adoptive parents more than six months after birth, but only if such father shall have maintained substantial and continuous or repeated contact with the child as manifested by: (i) the payment by the father toward the support of the child of a fair and reasonable sum, according to the father’s means, and either (ii) the father’s visiting the child at least monthly when physically and financially able to do so and not prevented from doing so by the person or authorized agency having lawful custody of the child, or (iii) the father’s regular communication with the child or with the person or agency having the care or custody of the child, when physically and financially unable to visit the child or prevented from doing so by the person or authorized agency having lawful custody of the child. The subjective intent of the father, whether expressed or otherwise, unsupported by evidence of acts specified in this paragraph manifesting such intent, shall not preclude a determination that the father failed to maintain substantial and continuous or repeated contact with the child. In making such a determination, the court shall not require a showing of diligent efforts by any person or agency to encourage the father to perform the acts specified in this paragraph. A father, whether adult or infant, of a child born out-of-wedlock, who openly lived with the child for a period of six months within the one year period immediately preceding the placement of the child for adoption and who during such period openly held himself out to be the father of such child shall be deemed to have maintained substantial and continuous contact with the child for the purpose of this subdivision.

(e) Of the father, whether adult or infant, of a child born out-of-wedlock who is under the age of six months at the time he is placed for adoption, but only if: (i) such father openly lived with the child or the child’s mother for a continuous period of six months immediately preceding the placement of the child for adoption; and (ii) such father openly held himself out to be the father of such child during such period; and (iii) such father paid a fair and reasonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the

“overbroad generalizations” of gender-based classifications.<sup>194</sup> Seeking adoption of the children, the Mohammeds, on the other hand, argued that the gender-based distinctions were justified because there is a fundamental difference between a child’s relationship with his mother versus that of his father.<sup>195</sup> The Mohammeds explained that “a natural mother, absent special circumstances, bears a closer relationship with her child . . . than a father does,” and therefore, an unwed biological father can never be as close to their child as an unwed mother can.<sup>196</sup> The Surrogate’s Court granted Mr. Mohammed’s petition for adoption, thereby cutting off all of Mr. Caban’s “parental rights and obligations” to his children.<sup>197</sup>

Both the New York Supreme Court Appellate Division, Second Department, and the New York Court of Appeals affirmed the Surrogate’s Court’s decision.<sup>198</sup> Mr. Caban then appealed to the U.S. Supreme Court and was granted a writ of certiorari.<sup>199</sup> The U.S. Supreme Court held that a New York statute allowing a stepfather to adopt his wife’s non-marital child without the consent of the child’s biological father was a violation of the Equal Protection Clause due to overbroad generalizations of gender-based classifications.<sup>200</sup>

In a controversial five to four decision, U.S. Supreme Court found that, while there was no Due Process Clause violation,<sup>201</sup> there was an Equal Protection Clause violation based on gender discrimination because unwed mothers and unwed fathers, who maintain relationships with their children, are similarly situated, and therefore, cannot be treated differently.<sup>202</sup> The Court held that the law failed the intermediate scrutiny test because there was no showing “that the different treatment afforded [to] unmarried fathers and unmarried mothers b[ore] a substantial relationship” to the state’s asserted interest in promoting the adoption of illegitimate children.<sup>203</sup>

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mother’s pregnancy or with the birth of the child.” N.Y. DOM. REL. LAW § 111 (McKinney 1977).

<sup>194</sup> *Caban*, 441 U.S. at 394.

<sup>195</sup> *Id.* at 387.

<sup>196</sup> *Id.* at 388.

<sup>197</sup> *Id.* at 383-84.

<sup>198</sup> *Id.* at 384-85.

<sup>199</sup> *Caban*, 441 U.S. at 385.

<sup>200</sup> *Id.* at 394.

<sup>201</sup> The Court dismissed his due process argument because Mr. Caban “was given due notice and was permitted to participate as a party in the adoption proceedings” *Id.* at n. 3.

<sup>202</sup> *Caban*, 441 U.S. at 392.

<sup>203</sup> *Id.* at 393.

The Court rejected the argument that unwed fathers could *never* be as close to their children as unwed mothers because “even if unwed mothers as a class were closer than unwed fathers to their newborn infants, this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased.”<sup>204</sup> Several facts were important to the Court’s decision: (i) the children were older, (ii) there was no difficulty in identifying or locating the father, and (iii) the father had established a “substantial relationship” with his children and even “admitted his paternity.”<sup>205</sup> Thus, the New York statute violated the Equal Protection Clause because it denied unwed fathers of their right to block an adoption of their children, but granted this right to unwed mothers.<sup>206</sup>

Justice Stewart and Justice Stevens both dissented, asserting that women and men were sufficiently different to warrant different treatment under the laws of New York.<sup>207</sup> The Justices’ concerns focused on the potential impact that adoption could have on very young or newborn children.<sup>208</sup> Specifically, Justice Stevens pointed out that “[o]nly the mother carries the child; it is she who has the constitutional right to decide whether to bear it or not . . .”<sup>209</sup> and only she “knows who sired the child, and it will often be within her power to withhold that fact, and even the fact of her pregnancy from that person.”<sup>210</sup> Because the mother is obviously linked with the child throughout pregnancy and birth, Justice Stevens reasoned that her identity to the child is clear and obvious, whereas the identity of the natural father may not be known for quite some time, if ever.<sup>211</sup> Because of these differences, he argued that unmarried mothers have to make adoption decisions on their own, whereas unmarried fathers may have to marry the mothers in order to gain such rights.<sup>212</sup>

Overall, *Caban* represented another case in which the Court recognized the parental rights of unwed fathers who have established

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<sup>204</sup> *Id.* at 389.

<sup>205</sup> *Id.* at 392-93.

<sup>206</sup> *Id.* at 393-94.

<sup>207</sup> *Caban*, 441 U.S. at 394, 404.

<sup>208</sup> *Id.* at 404.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 405.

<sup>211</sup> *Id.* at 405.

<sup>212</sup> *Caban*, 441 U.S. at 407-08.

relationships with their children.<sup>213</sup> The Court struck down the New York statute using an intermediate standard of scrutiny because it treated similarly situated unwed mothers and fathers differently solely based on gender classifications while serving no important governmental interest.<sup>214</sup> Unfortunately, the rights of unwed fathers would suffer a setback via the Court's affirmance of a different New York statute four years later.

#### D. **Lehr v. Robertson**

In *Lehr v. Robertson*,<sup>215</sup> Lorraine Robertson was not married when she gave birth to her daughter in November 1976.<sup>216</sup> The father of the child, Jonathan Lehr, lived with Lorraine prior to the birth and even visited her in the hospital, but his name did not appear on the child's birth certificate.<sup>217</sup> Post-birth, he did not live with Lorraine and the child, did not provide them with financial support, and did not offer to marry Lorraine.<sup>218</sup> Mr. Lehr had also not been judicially determined to be the father, and he failed to enter his name into the state's putative father registry.<sup>219</sup> Within months of giving birth, Lorraine married another man, Mr. Robertson, who then sought to adopt Lorraine's daughter in a proceeding in Ulster County.<sup>220</sup>

One month after the adoption proceeding began in Ulster County, and still unaware of it, Mr. Lehr filed a visitation and paternity action in Westchester County Family Court asking for a "determination of paternity, an order of support, and reasonable visitation privileges with [his daughter]."<sup>221</sup> When the Ulster County court was notified of this paternity proceeding in Westchester, it issued a stay on that proceeding to determine whether that proceeding should be transferred to Ulster County.<sup>222</sup> About two weeks later, Mr. Lehr

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<sup>213</sup> See generally *Caban*, 441 U.S. 380 (1979).

<sup>214</sup> *Id.* at 394.

<sup>215</sup> *Lehr*, 463 U.S. 248 (1983).

<sup>216</sup> *Id.* at 250.

<sup>217</sup> *Id.* at 250.

<sup>218</sup> *Id.* at 248. Mr. Lehr did claim that he eventually offered financial aid to the mother and stepfather at some point. *Id.* at 269.

<sup>219</sup> *Lehr*, 463 U.S. at 251. A "putative father registry" is "[a]n official roster in which an unwed father may claim possible paternity of a child for purposes of receiving notice of a prospective adoption of the child." Ex parte D.B., 975 So.2d 940, 958 (Ala. 2007).

<sup>220</sup> *Id.* at 250.

<sup>221</sup> *Id.* at 252.

<sup>222</sup> *Id.* at 252-53.



received notice of the change of venue motion, and, for the first time, learned that an adoption proceeding was pending in Ulster County.<sup>223</sup> In the meantime, the Ulster County judge entered an adoption order without notice to Mr. Lehr because he did not believe that such notice was required.<sup>224</sup> As such, the proceeding in Westchester was not transferred to Ulster County and the judge in Westchester dismissed Mr. Lehr's paternity action instead, holding that the putative father's right to seek paternity "must be deemed severed so long as an order of adoption exists."<sup>225</sup>

Mr. Lehr then filed a petition in Ulster County Family Court to vacate the order because it was "obtained by fraud" and "violated his constitutional rights."<sup>226</sup> The Ulster County Family Court considered the question of whether it "dropped the ball" by approving the adoption without providing Mr. Lehr with proper notice.<sup>227</sup> After much deliberation, the court denied the petition.<sup>228</sup> The Appellate Division of the Supreme Court, Second Department, affirmed, holding that "appellant's commencement of a paternity action did not give him any right to receive notice of the adoption proceeding, that the notice provisions of the statute were constitutional," and that *Caban* would not apply here because the ruling from *Caban*, where a father's consent for adoption was required, "was not retroactive."<sup>229</sup> The court also noted that Mr. Lehr "could have insured his right to notice by signing the putative father registry."<sup>230</sup>

The New York Court of Appeals also affirmed, stating that the Ulster County Family Court "had not abused its discretion either when it entered the order without notice or when it denied appellant's petition to reopen the proceedings."<sup>231</sup> It reasoned that, while it "might have been prudent" to provide notice, the lower court did not abuse its discretion because the primary purpose of the notice provision was "to enable the person served to provide the court with evidence concerning the best interest of the child, and that appellant had made no tender

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<sup>223</sup> *Id.* at 253.

<sup>224</sup> *Lehr*, 463 U.S. at 253.

<sup>225</sup> *Id.* at 253.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 253.

<sup>228</sup> *See generally*, In the Matter of the Adoption by Lorraine and Richard Robertson of Jessica Martz, 423 N.Y.S.2d 378 (N.Y. Fam. Ct. 1979).

<sup>229</sup> *Lehr*, 463 U.S. at 253-54.

<sup>230</sup> *Id.* at 254, (quoting *Adoption of Martz*, 434 N.Y.S.2d at 774).

<sup>231</sup> *Id.* at 255.

indicating any ability to provide any particular or special information relevant to [his daughter's] best interest.”<sup>232</sup> The U.S. Supreme Court then invoked appellate jurisdiction to hear the case,<sup>233</sup> and the opinion was written by none other than Justice Stevens (the dissenter from *Caban*).<sup>234</sup>

Mr. Lehr argued that the aforementioned events, along with the statute in question, deprived him of a liberty interest protected under the Due Process Clause.<sup>235</sup> As such, he believed “he had a constitutional right to prior notice and an opportunity to be heard before he was deprived of that interest.”<sup>236</sup> Mr. Lehr also argued “that the gender-based classification in the statute, which . . . denied him the right to consent to [his daughter's] adoption and accorded him fewer procedural rights than her mother, violated the Equal Protection Clause.”<sup>237</sup> Mr. Lehr, thus, sought to vacate the adoption.<sup>238</sup>

As for Mr. Lehr's due process argument, the Court first carefully examined the nature of the liberty interest that was at stake—the right of parents “to control the education of their children” and the “right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.”<sup>239</sup> However, the Court noted that, while parents generally may have this protected liberty interest, this protection extended to unwed fathers only when they had assumed responsibility for their children.<sup>240</sup>

The Court, citing to *Stanley*, *Quilloin*, and *Caban*, reached the following conclusion:

When an unwed father demonstrates a full commitment to the responsibilities of parenthood by “com[ing] forward to participate in the rearing of his child,” his interest in personal contact with his child acquires substantial protection under the due process clause. At that point it may be said that he “act[s] as a father toward his children.” But the mere existence of a

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<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 254.

<sup>234</sup> *Lehr*, 463 U.S. 248 (1983).

<sup>235</sup> *Id.* at 255.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Lehr*, 463 U.S. at 535.

<sup>240</sup> *See generally Lehr*, 463 U.S. 248 (1983).

biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds.<sup>241</sup>

The Court reasoned that a biological connection itself is not enough to create a protected interest because it provides a natural father only with an *opportunity* to maintain and develop a relationship with his child.<sup>242</sup> Only if the unwed biological father seizes this opportunity and take some responsibility for the well-being and future of the child would he be able to have his parental rights protected by the Constitution.<sup>243</sup>

Because Mr. Lehr did not take advantage of the opportunity provided for him via the statute,<sup>244</sup> the Court did not recognize any sort of protected special relationship.<sup>245</sup> The Court found the state's putative registry system<sup>246</sup> to be non-arbitrary because the "right to receive notice was completely within [Mr. Lehr's] control," and he ultimately chose not to enter his name there.<sup>247</sup> Additionally, the Court used the "best interests of the child" standard in order to avoid breaking up what was already a functioning family unit, as it did in *Caban*.<sup>248</sup> Because it was Mr. Lehr's fault for not entering his name in the state's putative father registry and for not seeking to establish a legal connection to his child until after the child turned two years old, the Court struck down his due process argument.<sup>249</sup> As such, the Court held that the Due Process Clause does not require that notice be given in *all* cases to a biological father on the pendency of an adoption proceeding concerning the child.<sup>250</sup>

The Court then dismissed Mr. Lehr's Equal Protection Clause argument, holding that Mr. Lehr was not similarly situated to the

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<sup>241</sup> *Id.* at 261. (citations omitted).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> See N.Y. DOM. REL. LAW § 111-a (2) (McKinney 1977). The statute provides that if a father files with the states putative father registry, that act would demonstrate his intent to claim paternity of his child born out of wedlock, and therefore he would be entitled to receive notice of any proceeding to adopt his child. *Id.*

<sup>245</sup> *Lehr*, 463 U.S. at 264.

<sup>246</sup> The system required Mr. Lehr to simply mail in a postcard if he wanted notice. This in effect provides unwed fathers a simple means to show their interest in their children. *Id.* 248-49, 263.

<sup>247</sup> *Id.* at 264.

<sup>248</sup> *Id.* at 262.

<sup>249</sup> *Id.* at 262-63.

<sup>250</sup> *Lehr*, 463 U.S. at 249.

mother because he was a reluctant father who, unlike the mother, did not try to take advantage of his opportunity to be a parent.<sup>251</sup> Thus, the Court found that there was no gender discrimination at issue because the mother and father were not similarly situated; deciding instead that the distinction between married fathers and unmarried fathers was reasonable.<sup>252</sup>

Therefore, the U.S. Supreme Court upheld New York's law providing for the termination of an unwed father's rights if he failed to place his name on the putative father registry.<sup>253</sup> It rejected the plaintiff's claims under the Due Process Clause and Equal Protection Clause<sup>254</sup> and expanded on the distinction between reluctant fathers and fathers who actually take advantage of their parental obligations and develop a nurturing relationship with their children.<sup>255</sup> This case differs from the previous cases in that it draws a line, albeit one susceptible to debate, between unwed biological fathers who may have rights and those who may not.<sup>256</sup>

The dissent in *Lehr*, penned by Justice White and joined by Justices Marshall and Blackmun, took issue with the majority's easy dismissal of Mr. Lehr's right to notice and the opportunity to be heard.<sup>257</sup> In particular, the dissent asserted that Mr. Lehr did not have an opportunity to present his case fully,<sup>258</sup> and fair judgment could not be made "based on the quality or substance of a relationship without a complete and developed factual record."<sup>259</sup> The dissent also noted, which the opinion did not discuss, that Mr. Lehr was not a reluctant parent at all because he visited the mother every day in the hospital after the birth of his child,<sup>260</sup> and he searched for the child in vain when the mother hid from him after her release from the hospital.<sup>261</sup> In his search, Mr. Lehr even hired a detective agency, only to learn that Lorraine had already married a Mr. Robertson.<sup>262</sup> Additionally,

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<sup>251</sup> *Id.* at 267-68.

<sup>252</sup> *Id.* at 268 n.27.

<sup>253</sup> *Id.* at 264.

<sup>254</sup> *Id.* at 250.

<sup>255</sup> *Lehr*, 463 U.S. at 261-62.

<sup>256</sup> *See generally Lehr*, 463 U.S. 248 (1983).

<sup>257</sup> *Id.* at 268. (White, J., dissenting).

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 270-71.

<sup>260</sup> *See generally Lehr*, 463 U.S. at 268-77. (White, J., dissenting).

<sup>261</sup> *Id.* at 269.

<sup>262</sup> *Id.*

according to Mr. Lehr, Lorraine refused his many offers of financial assistance for the child and forced him to stay away from her and the child.<sup>263</sup> It was at this point that Mr. Lehr decided to take legal action.<sup>264</sup> The dissent suggested that the Robertson's commenced the stepfather adoption proceeding "perhaps as a response" to these actions by Mr. Lehr.<sup>265</sup>

The dissent gave the "biological relationship" more weight than the majority.<sup>266</sup> Justice White rejected "the peculiar notion that the only 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."<sup>267</sup> Justice White further stated that a "mere biological relationship is not as unimportant in determining the nature of liberty interests as the majority suggests."<sup>268</sup> He opined that, where there was no doubt about the identity or location of a putative father, it is difficult to accept such careless treatment of procedural protections and insistence on "the sheerest formalism to deny him a hearing because he informed the State in the wrong manner."<sup>269</sup> Thus, in addition to portraying how simple it is to distort the facts and paint a different picture of Mr. Lehr's behavior, the dissent primarily focused on the majority's diminishing of procedural due process.<sup>270</sup>

In deciding the due process issue, the Court applied only a minimal level of scrutiny after it decided that the facts failed to show Mr. Lehr had rights which were significant enough to require an application of a higher level of scrutiny.<sup>271</sup> The Court did not apply a standard of scrutiny to the equal protection claim because it determined that Mr. Lehr was not similarly situated to the mother of his child.<sup>272</sup> The Court noted that "[i]f one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does

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<sup>263</sup> *Id.*

<sup>264</sup> *Id.* 269. (White, J., dissenting).

<sup>265</sup> *Lehr*, 463 U.S. at 269.

<sup>266</sup> *See generally id.* at 268-77. (White, J., dissenting).

<sup>267</sup> *Id.* at 271.

<sup>268</sup> *Id.*

<sup>269</sup> Clearly, the dissent took issue with this "grudging and crabbed approach to due process." *Id.* at 274-75.

<sup>270</sup> *Lehr*, 463 U.S. at 276.

<sup>271</sup> *Crane*, *supra* note 142.

<sup>272</sup> *Lehr*, 463 U.S. at 267-68.

not prevent a state from according the two parents different legal rights.”<sup>273</sup>

In sum, the Court in *Lehr* diminished the rights of unwed fathers when it upheld the New York law providing for the termination of an unwed father’s rights if he fails to place his name on the putative father registry.<sup>274</sup> This case illustrates this Note’s argument that unwed fathers, in a similar position as Mr. Lehr, should be able to reap the benefits of a strict scrutiny analysis as opposed to the minimal level applied in this case.<sup>275</sup> Although this case affirmed the rights of fathers who *did* put their names on the putative father registry, such an act would not be enough for that same unwed father to have his rights affirmed in the following case.

### E. Michael H. v. Gerald D.

In *Michael H. v. Gerald D.*,<sup>276</sup> a woman named Carole had an extramarital affair with her neighbor, Michael, and became pregnant with his child.<sup>277</sup> Carole still lived with her husband, Gerald, during this time.<sup>278</sup> Post-birth, Carole and the child briefly resided with Michael,<sup>279</sup> but then Carole returned with the child to live with Gerald and attempted to sever the relationship between Michael and the child.<sup>280</sup> Blood tests confirmed there was a 98.07% chance that Michael was the biological father of the child.<sup>281</sup> Carole claimed the child was a product of her marriage to Gerald, and she withdrew her stipulation to the results of Michael’s blood tests, which showed with high probability that he was the child’s biological father.<sup>282</sup> Under California law,<sup>283</sup> only a mother or her *husband* could deny paternity of a child born into a marriage.<sup>284</sup> Absent Carole’s consent, Michael lacked standing to establish paternity over his biological child or even

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<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 264.

<sup>275</sup> See discussion *supra* Part I.

<sup>276</sup> *Michael H.*, 491 U.S. 110 (1989).

<sup>277</sup> *Id.* at 114.

<sup>278</sup> *Id.* at 113-14.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 115.

<sup>281</sup> *Michael H.*, 491 U.S. at 114.

<sup>282</sup> *Id.* at 114-15.

<sup>283</sup> CAL. EVID. CODE § 621.

<sup>284</sup> *Michael H.*, 491 U.S. at 117.

to seek visitation.<sup>285</sup> Although the child referred to Michael as her “daddy,”<sup>286</sup> the child resided with Carole and Gerald.<sup>287</sup> Gerald held the child out to be his own.<sup>288</sup> When the court prevented Michael from establishing any legal relationship with his biological child,<sup>289</sup> it automatically elevated Gerald’s status from stepfather to actual legal father without going through an adoption proceeding.<sup>290</sup>

Michael argued that his due process rights were violated because the California law denied him his rights as a putative father to legally establish a relationship with his biological child since the mother of his child was married to a different man.<sup>291</sup> He did not argue an Equal Protection violation.<sup>292</sup> The California trial court and the California Court of Appeal upheld the constitutionality of the California law.<sup>293</sup> While the California Supreme Court denied discretionary review of the case, the U.S. Supreme Court asserted “probable jurisdiction” to hear the case.<sup>294</sup> In a plurality opinion, the Court held that a biological father does not have a fundamental right to obtain legal parental rights over his child after the presumptive father has already exercised significant responsibility over the child.<sup>295</sup>

On appeal to the U.S. Supreme Court, Michael argued both his procedural due process rights<sup>296</sup> and substantive due process rights were violated.<sup>297</sup> Specifically, he argued his procedural due process rights were violated because he was not afforded the “opportunity to demonstrate his paternity in an evidentiary hearing” before the state terminated his liberty interest with his child.<sup>298</sup> However, the Court upheld the California law, reasoning that although the law was facially procedural, it was, in reality, a substantive rule because it helped to further the state’s interest in preserving the integrity of the family

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<sup>285</sup> *Id.* at 126.

<sup>286</sup> *Id.* at 144. (Brennan, J., dissenting).

<sup>287</sup> *Id.* at 110.

<sup>288</sup> *Id.* at 110.

<sup>289</sup> *Michael H.*, 491 U.S. at 116.

<sup>290</sup> *Id.* at 116.

<sup>291</sup> *Id.* at 111.

<sup>292</sup> *Id.* at 116-17.

<sup>293</sup> *Id.* at 116.

<sup>294</sup> *Michael H.*, 491 U.S. at 116.

<sup>295</sup> *Id.* at 125.

<sup>296</sup> *Id.* at 124.

<sup>297</sup> *Id.* at 121.

<sup>298</sup> *Id.* at 119.

unit.<sup>299</sup> Thus, Michael's procedural due process claim failed because the statute was not in fact procedural in purpose.<sup>300</sup>

The Court also denied Michael's substantive due process claim because Michael did not have a protected liberty interest as an unwed biological father of a child born into a pre-existing marital relationship.<sup>301</sup> Specifically, it reasoned that, where "the child is born into an extant marital family, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter."<sup>302</sup>

The Court noted that in order for Michael to be successful, it was his burden to prove society traditionally allows a father to assert parental rights over his child born into an existing marital family; the Court could not find anything "in the older sources, nor in the older cases."<sup>303</sup> Michael argued his case was similar to those of *Stanley*, *Quilloin*, *Caban*, and *Lehr* in that these established a liberty interest created by biological fatherhood plus an established parental relationship—factors that he argued existed in his case.<sup>304</sup> The Court, however, thought Michael's interpretations "distorts the rationale of those cases."<sup>305</sup> The Court felt those cases "rest not upon such isolated factors but upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family."<sup>306</sup> Therefore, since the Court could not find any relevant sources to back up Michael's claim, it ruled that Michael did not have a substantive due process right.<sup>307</sup>

For the above reasons, it did not matter that Michael had established a parental relationship with his biological child during the first three years of her life by living with her, visiting her when possible, caring for her, and holding her out as his own.<sup>308</sup> Although Michael had demonstrated "a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his

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<sup>299</sup> *Michael H.*, 491 U.S. at 119.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* at 111.

<sup>302</sup> *Id.* at 129.

<sup>303</sup> *Id.* at 125.

<sup>304</sup> *Michael H.*, 491 U.S. at 123.

<sup>305</sup> *Id.* at 123.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at 127.

<sup>308</sup> *Id.* at 143-44. (Brennan, J., dissenting).



child,” he did not have a liberty interest because his child was born into an existing family unit, and it was in the child’s best interests to preserve the integrity of that family unit.<sup>309</sup> In other words, the Court held that the only way a legal relationship between Michael and his biological child could be recognized would be if there were not already a functioning legal family unit.<sup>310</sup> Interestingly, the Court did not apply any standard of constitutional scrutiny in this case; instead, the Court “embellish[ed] elaborately” on the importance of protecting the “traditional presumptions of paternity.”<sup>311</sup>

In a lengthy and fiery dissent, Justice Brennan argued that the Court’s reliance on a basic definition of “tradition” was “misguided.”<sup>312</sup> Justice Brennan wrote:

[T]he plurality ignores the kind of society in which our Constitution exists. We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else’s unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncra[s]ies. Even if we can agree, therefore, that “family” and “parenthood” are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do. In a community such as ours, “liberty” must include the freedom not to conform. The plurality today squashes this freedom by requiring specific approval from history before protecting anything in the name of liberty.<sup>313</sup>

It is evident Justice Brennan did not play into what appears as gender stereotyping that Justice Scalia’s plurality opinion does; Justice Brennan made it clear that unwed fathers are entitled to fundamental

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<sup>309</sup> *Michael H.*, 491 U.S. at 143 (citations omitted).

<sup>310</sup> *Id.* at 126-27.

<sup>311</sup> *Crane*, *supra* note 142.

<sup>312</sup> *Michael H.*, 491 U.S. at 140.

<sup>313</sup> Justice Brennan admonished the plurality for its decision to deny Michael his liberty interest in being a father. Basing its decision on the fact that a similar situation has not happened before, the plurality, in Justice Brennan’s view, turns the Constitution into a “stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past.” *Id.* at 141.

rights despite the circumstances.<sup>314</sup> He referred to the plurality's exclusive reliance on "tradition" as both "misguided" and "novel"<sup>315</sup> and felt that the plurality's approach was "troubling" because of how "unnecessary" it was.<sup>316</sup> With mention of *Stanley*, *Quilloin*, *Caban*, and *Lehr*, Justice Brennan rejected the notion that concern for the "unitary family" can alter the meaning of this line of cases.<sup>317</sup>

*Michael H. v. Gerald D.* was clearly different from the previous four cases in that it based its decision on the sacredness and historical influence of the unitary family.<sup>318</sup> Combined, this line of cases represents the Courts present take on the rights, or lack thereof, of unwed biological fathers.<sup>319</sup>

#### IV. ANALYSIS

The rights of unwed biological fathers is a topic that has been and likely to continue to be debated by Courts and scholars alike.<sup>320</sup> It is evident that the general consensus on this topic changes based on which generation of Supreme Court Justices are sitting on the Court at the time a relevant case is presented to them.<sup>321</sup> To see where the Court may be headed in the near future regarding this issue, an analysis of where it has been in the not so distant past is required.<sup>322</sup>

##### A. The Stanley-Michael H. Line

Commonly referred to as the "Stanley-Lehr line,"<sup>323</sup> *Stanley*, *Quilloin*, *Caban*, and *Lehr* each examined the constitutional rights of unwed fathers.<sup>324</sup> While each case mainly focused on resolving factual issues rather than developing a systematic theoretical scheme, each case builds on its predecessor; thus, this line of cases presents an

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<sup>314</sup> *Id.* Even if the child in question is already a part of a functioning familial atmosphere.  
*Id.*

<sup>315</sup> *Id.* at 140.

<sup>316</sup> *Id.* at 141.

<sup>317</sup> *Michael H.*, 491 U.S. at 143-47.

<sup>318</sup> *Id.* at 123.

<sup>319</sup> See discussion *infra* Part IV.

<sup>320</sup> See discussion *supra* Part I.

<sup>321</sup> See discussion *supra* Part I.

<sup>322</sup> See discussion *infra* Part IV.

<sup>323</sup> See Mark Strasser, *The Often Illusory Protections of "Biology Plus:" On the Supreme Court's Parental Rights Jurisprudence*, 13 TEX. J. ON C.L. & C.R. 31 (2007).

<sup>324</sup> See cases cited *supra* note 1.

“integrated articulation of the parental rights of unwed fathers.”<sup>325</sup> The cases stand for the notion that a father who participates in his child’s life enjoys the fundamental constitutional right to have a relationship with his child despite not being married to the child’s mother.<sup>326</sup> *Caban v. Mohammed*, in particular, strongly supported this notion by upholding the rights of Mr. Caban, an unwed father.<sup>327</sup> *Lehr v. Robertson* and *Quilloin*, despite denying the rights of the unwed father because he did not contribute or partake in his respective children’s lives, still acknowledged that substantial rights of an unwed father do in fact exist if the father chooses to participate in his children’s lives.<sup>328</sup> Since the fathers in the *Stanley-Lehr* line of cases “did not meet any other criteria for establishing parenthood,” it can be said that the Court’s interpretation of the word “father” in these cases meant a “natural or biological father.”<sup>329</sup>

*Michael H. v. Gerald D.*, the most recent of the unwed father cases, changed the game and is an example of the Court’s confusion when it comes to unwed father cases because it had no majority opinion<sup>330</sup> and the positions of each of the Justices was relatively unclear.<sup>331</sup> Thus, to develop a constitutional rule that can be broadly applied to a future unwed father case may be “almost impossible.”<sup>332</sup> Despite a plurality opinion, *Michael H.* rejected the general rule from the *Stanley-Lehr* line of cases—that an unwed father can maintain his parental rights if he chooses to participate in his children’s lives; meaning, five Justices still, in fact, accepted the validity of this rule in *Michael H.*<sup>333</sup>

While this Note agrees with the general rule of the *Stanley-Lehr* line of cases, this Note more specifically aligns itself with the outcomes of *Stanley* and *Caban*, where the individual father’s rights

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<sup>325</sup> Anthony Miller, *The Case for the Genetic Parent: Stanley, Quilloin, Caban, Lehr, and Michael H. Revisited*, 53 LOY. L. REV. 395, 415-16 (2007).

<sup>326</sup> See *Lehr*, 463 U.S. at 261; *Caban*, 441 U.S. at 392; *Quilloin*, 434 U.S. at 255; *Stanley*, 405 U.S. 645, 657-58.

<sup>327</sup> *Caban*, 441 U.S. at 391-94.

<sup>328</sup> See *Quilloin*, 434 U.S. at 255; *Lehr*, 463 U.S. at 260-61.

<sup>329</sup> Miller, *supra* note 325, at 416.

<sup>330</sup> It was a plurality opinion.

<sup>331</sup> Miller, *supra* note 325, at 416-17.

<sup>332</sup> *Id.* at 417.

<sup>333</sup> *Michael H.*, 491 U.S. at 136 (Brennan, J., dissenting). Here, Justice Brennan described the common ground that most of the Justices did share despite not agreeing on the overall outcome of the case. *Id.*

were affirmed, and against *Lehr*, *Quilloin*, and *Michael H.*, where the individual father's rights were denied.<sup>334</sup>

In *Stanley* and *Caban*, the Court specifically upheld the rights of the unwed fathers because those fathers previously had custody of their respective child.<sup>335</sup> While the Court in *Michael H.* later stated that even if a father once had custody, that still may not be a sufficient condition to protect the unwed father's rights.<sup>336</sup> The fathers in *Stanley* and *Caban* had established parental bonds with their respective children, while the fathers in *Lehr* and *Quilloin* did not have such a relationship—this may be why the Court chose to uphold the individual father's rights in the former cases and not the latter.<sup>337</sup>

In the *Lehr* and *Quilloin* cases, although the Court refused to enforce the rights of the unwed fathers because they did not participate in their children's lives, the Court acknowledged potential substantial rights for an unwed participatory father under a different set of facts not before the Court.<sup>338</sup> Thus, a concise rule from these four cases (and further explored in *Lehr*) may be stated as: “the genetic father who has *participated* in his child's life has a constitutional right to have a relationship with his child.”<sup>339</sup>

As previously referred to, *Michael H.* was an anomaly that wanted no part of this “rule” from the *Stanley- Lehr* line of cases.<sup>340</sup> One scholar noted that “it is uncertain whether Michael H. rejected this principle or overruled these cases.”<sup>341</sup> *Michael H. v. Gerald D.* was a plurality opinion, so therefore, it is important to note that “[f]our Members of the Court agree that Michael H. has a liberty interest in

<sup>334</sup> See discussion *supra* Part III.

<sup>335</sup> See generally *Stanley*, 405 U.S. 645 (1972); *Caban*, 441 U.S. 380 (1979).

<sup>336</sup> See generally *Michael H.*, 491 U.S. 110 (1989).

<sup>337</sup> June Carbone, *The Legal Definition of Parenthood*, 65 LA. L. REV. 1295 at note 142 (2005). As the Court explained in *Lehr*, the difference between the “developed parent-child relationship that was implicated in *Stanley* and *Caban*, and the potential relationship involved in *Quilloin* and [ *Lehr* ]” is that in the former cases the unwed fathers came forward to participate in the rearing of their children. Lawrence Schlam, *Third Part Disputes in Minnesota: Overcoming the “Natural Rights” of Parents Pursuing the “Best Interests” of Children?*, 26 WM. MITCHELL L. REV. 733, 744, n.57 (2000).

<sup>338</sup> See, e.g., *Quilloin*, 434 U.S. at 255. The justices distinguished “a case in which the unwed father had, or sought, actual or legal custody of his child.” *Lehr*, 463 U.S. at 260-61. The Court stated that an unwed father acquires substantial protection when he participates in the rearing of his child. *Id.*

<sup>339</sup> Miller, *supra* note 325, at 416.

<sup>340</sup> See *Michael H.*, 491 U.S. 110.

<sup>341</sup> Miller, *supra* note 325, at 453.

his relationship with [his biological child].”<sup>342</sup> Justice Scalia’s opinion, being harsh towards the biological father, has indeed become the most renowned, but its “effect and meaning . . . are ambiguous to say the least.”<sup>343</sup> Luckily, since *Michael H.* was a plurality opinion, its decision binds only the parties and it has no precedential effect.<sup>344</sup> Thus, this ongoing debate of constitutional protections of unwed fathers clearly remains unresolved.<sup>345</sup>

The holdings of *Stanley* and *Caban* should be expanded to include non-participatory fathers, and *Lehr* and *Quilloin* should have enforced the non-participatory father’s rights by arguing that being a biological father alone, absent exceedingly persuasive facts that paint the father in a negative light, should entitle an unwed biological father to at least some constitutional right to affect the “care, custody, and management”<sup>346</sup> of his child.<sup>347</sup> Involvement in a child’s life should absolutely be encouraged and rewarded, but not being involved should not dispel an unwed father of all his constitutional rights as it pertains to his biological children, as it did in *Michael H.*<sup>348</sup>

Clearly, the issue of who should qualify as a parent, be it unwed fathers or even unwed mothers, is currently in a state of flux.<sup>349</sup> Anthony Miller, a Professor at Pepperdine University School of Law writing for Loyola Law Review, argued that a logical conclusion from *Michael H.* is that each state is free to extend or deny constitutional rights of parents “almost at will.”<sup>350</sup> He argued this because the only expressed definition of “parent” (genetic parents who have participated in their child’s) from the *Stanley-Lehr* line of cases was ignored by *Michael H.*’s plurality.<sup>351</sup> Since *Michael H.*, the Supreme Court has yet to definitively rule on what a constitutional “parent” entails and whether an unwed biological father may fit into that hypothetical definition.<sup>352</sup>

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<sup>342</sup> *Michael H.*, 491 U.S. at 136. (J. Brennan, dissenting).

<sup>343</sup> Miller, *supra* note 325, at 454-55.

<sup>344</sup> *Id.* at 455.

<sup>345</sup> See discussion *supra* Part IV.

<sup>346</sup> *Quilloin*, 434 U.S. at 253.

<sup>347</sup> See discussion *supra* Part IV.

<sup>348</sup> See *Michael H.*, 491 U.S. 110.

<sup>349</sup> See generally Miller, *supra* note 325.

<sup>350</sup> *Id.* at 449.

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

## V. SOLUTION: RAISING THE STANDARD TO A HIGHER LEVEL OF SCRUTINY

When examining a case dealing with the rights of an unwed father, the Court has historically applied an intermediate level of scrutiny to analyze the basis of the father's claim.<sup>353</sup> This is because the Court was analyzing the treatment of a specific statute as applied to unwed fathers as opposed to unwed mothers—a blatant gender discrimination and, by definition, subject to intermediate scrutiny.<sup>354</sup> However, the focus of analysis should not be on the mistreatment between genders, rather the Court's focus should be based on the deprivation of a fundamental right, the right to parent; thus, subjecting the Court to apply strict scrutiny instead of intermediate scrutiny.

The Supreme Court has held that the rights of individual parents are fundamental rights and are, thus, subject to strict scrutiny.<sup>355</sup> Logically, this would mean that cases concerning the rights of *unwed biological fathers* are (or at least should be) subject to strict scrutiny.<sup>356</sup> This, of course, assumes that the phrase “unwed biological father” fits into the Courts perspective of what a parent is.<sup>357</sup> Acknowledging the importance of this relationship, the Court has held the parent-child relationship to be such an important and sacred relationship that it should be afforded the utmost protection.<sup>358</sup> The application of strict scrutiny would afford unwed fathers, as parents, the right to make decisions regarding the care of their children, giving them the fundamental constitutional protection they deserve.<sup>359</sup>

## VI. CONCLUSION

The Supreme Court has yet to conclusively rule on what the definition of a constitutional parent entails and whether an unwed

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<sup>353</sup> *Caban*, 491 U.S. at 391.

<sup>354</sup> Karen J. McMullen, *The Scarlet “N:” Grandparent Visitation Statutes That Base Standing on Non-Intact Family Status Violate the Equal Protection Clause of the Fourteenth Amendment*, 83 ST. JOHN'S L. REV. 693, 699 (2009).

<sup>355</sup> See generally *Troxel v. Granville*, 530 U.S. 57 (2000).

<sup>356</sup> See *supra* notes 357-59.

<sup>357</sup> See discussion *infra* Part VI.

<sup>358</sup> See *Santosky*, 455 U.S. 755, 753 (1982) (discussing “the fundamental liberty interest of natural parents in the care, custody, and management of their child”).

<sup>359</sup> See generally *id.*

biological father may fit into that hypothetical definition.<sup>360</sup> If and when this unique opportunity comes along, the Court should seize this moment by defining, constitutionally, the term parent and incorporating unwed fathers into that definition.<sup>361</sup>

The definition of parent, including unwed fathers, should be “restored back to its pre-*Michael H.*” role.<sup>362</sup> The Court in *Michael H.* denied rights to a biological father because he was not married to the mother at the time the child was born (despite being a part of the child’s life).<sup>363</sup> This directly conflicts with the standard set forth from the *Stanley-Lehr* line of cases.<sup>364</sup>

Additionally, the general rule stemming from the *Stanley-Lehr* line of cases, that substantial rights for an unwed father do in fact exist if the father chooses to participate in his children’s lives, should be expanded.<sup>365</sup> As one author eloquently put it, a biological father should fit into this newfound definition of parent even if he did not receive an opportunity to develop a relationship with his biological child when: he has been “prevented through no fault of his or her own from establishing a relationship,” and when he partakes in utilizing “cutting edge reproductive technology and the state has moved to sever the parent-child relationship before the opportunity to develop such a relationship has arisen.”<sup>366</sup> If the government had the power to determine the definition of parent for constitutional purposes, as it did in *Michael H.*, then it must also have the power to determine *who* can assert the fundamental constitutional rights that parents receive and the protections that go with it.<sup>367</sup>

The constitutional right to parent should be associated with the *individual* as opposed to the individual’s marital status because the definition of a “normal” marriage or family is constantly evolving.<sup>368</sup> This Note argues that questions concerning the constitutional rights of not only unwed biological fathers but also parents in general, as it pertains to their children, should be subject to a strict scrutiny analysis.

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<sup>360</sup> See discussion *supra* Part V.

<sup>361</sup> See Miller, *supra* note 325, at 349.

<sup>362</sup> See Miller, *supra* note 325, at 450.

<sup>363</sup> See *Michael H.*, 491 U.S. 110 (1989).

<sup>364</sup> See discussion *supra* Part III.

<sup>365</sup> See discussion *supra* Part III.

<sup>366</sup> See discussion *supra* Part III.

<sup>367</sup> See discussion *supra* Part III.

<sup>368</sup> See discussion *supra* Part I.

In some unwed father cases, the U.S. Supreme Court stands up for and recognizes the rights of unwed biological fathers<sup>369</sup> and, in other cases, denies basic liberty interests of unwed fathers<sup>370</sup> possibly based on the Justices' personal biases interfering with their judicial discretion.<sup>371</sup> This Note agrees with the general rule from the *Stanley-Lehr* line that substantial rights for an unwed father do in fact exist if the father chooses to participate in his children's lives (and the holdings themselves in *Stanley* and *Caban*).<sup>372</sup> Furthermore, this Note also believes that this rule should be expanded absent facts that paint the unwed father in a negative light; therefore, disagreeing with the specific holdings of *Lehr* and *Quilloin*.<sup>373</sup> The *Stanley* and *Caban* Courts enforced the respective unwed father's rights in part because the unwed fathers had established parental relationships with their children.<sup>374</sup> The Court failed to enforce such rights in *Quilloin* or *Lehr* because of a lack of such relationship, though the Court did allude that different facts may have a different outcome.<sup>375</sup>

This Note critically disagrees with the holding in *Michael H.* in which the Court held that a biological father does not have a fundamental right to obtain legal parental rights over his child after the presumptive father has already exercised significant responsibility over the child.<sup>376</sup> If and when presented with the opportunity to define parent in a constitutional aspect, the Court must include unwed fathers and grant them constitutional rights to affect the "care, custody, and management"<sup>377</sup> of their children even if only a limited variation thereof and even if the unwed father has historically been non-participatory in his child's life.<sup>378</sup>

Gender stereotyping has been and unfortunately likely will continue to be a part of American society.<sup>379</sup> When the Court denies an unwed father his parental rights with his biological child, the Court

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<sup>369</sup> *Caban*, 441 U.S. 380 (1979); *Stanley*, 405 U.S. 645 (1972).

<sup>370</sup> *Michael H.*, 491 U.S. 110 (1989); *Lehr*, 463 U.S. 248 (1983); *Quilloin*, 434 U.S. 246 (1978).

<sup>371</sup> See discussion *supra* Part I.

<sup>372</sup> See discussion *supra* Part IV.

<sup>373</sup> See discussion *supra* Part I.

<sup>374</sup> See *Stanley*, 405 U.S. 645 (1972); *Caban*, 441 U.S. 380 (1979).

<sup>375</sup> See *Quilloin*, 434 U.S. 246 (1978); *Lehr*, 463 U.S. 248 (1983).

<sup>376</sup> *Michael H.*, 491 U.S. at 125.

<sup>377</sup> See *Quilloin*, 434 U.S. at 253.

<sup>378</sup> Unless there are facts that paint the unwed father in a negative light.

<sup>379</sup> See discussion *supra* Part I.



does this based on what it believes a “normal” marriage or family to be.<sup>380</sup> The Supreme Court has held that a biological parent’s relationship with his or her child is a fundamental right that is tied to life, liberty, and the pursuit of happiness, and such a connection should only be severed by the state under limited circumstances.<sup>381</sup> Therefore, this Note argues that attempts by the government to impinge these rights should be subject to a strict scrutiny type level of review rather than the current standard of intermediate scrutiny under Equal Protection.<sup>382</sup>

Additionally, the Court should focus on the *individual father’s* rights having been violated rather than overemphasizing that individual’s marital status.<sup>383</sup> Unwed fathers may not fit into the literal definition of what constitutes a parent, as established in *Michael H.*, but there should be a place in a court-mandated expanded definition of the term parent to include all biological parents having protected, fundamental constitutional rights.<sup>384</sup> Society should no longer allow Supreme Court Justices to legislate their interpretation of morality.<sup>385</sup> Unwed biological fathers should be protected by the fundamental right to parent, absent any negative facts to the contrary.<sup>386</sup> This freedom should be protected by the highest level of scrutiny, protected even from any judicial biases.<sup>387</sup>

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<sup>380</sup> See discussion *supra* Part IV.

<sup>381</sup> See *Skinner*, 316 U.S. 535, 541 (1942).

<sup>382</sup> See discussion *supra* Part V.

<sup>383</sup> See discussion *supra* Part V.

<sup>384</sup> See discussion *supra* Part V.

<sup>385</sup> See discussion *supra* Part I.

<sup>386</sup> See discussion *supra* Part I.

<sup>387</sup> See discussion *supra* Part V.