1995

Rock-a-bye Baby: When Determining How and Where the Cradle Should Fall, Nebraska "Blows It"—An Examination of Unwed Fathers' Rights Regarding Their Children and Nebraska's Infringement of Those Rights

Kevin T. Lytle
University of Nebraska College of Law

Follow this and additional works at: https://digitalcommons.unl.edu/nlr

Recommended Citation
Available at: https://digitalcommons.unl.edu/nlr/vol74/iss1/6

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.
Rock-a-bye Baby: When Determining How and Where the Cradle Should Fall, Nebraska “Blows It”—An Examination of Unwed Fathers’ Rights Regarding Their Children and Nebraska’s Infringement of Those Rights

TABLE OF CONTENTS
I. Introduction ............................................ 181
    A. Factual History of Scovell and Babb .......... 181
    B. The Trial: Scovell v. Scheele ................ 183
    C. Scope of this Note .............................. 184
II. Historical Background and Development of the Law .... 185
    A. Overview of Putative Fathers’ Rights .......... 185
    B. U.S. Supreme Court Decisions ................ 187
        1. Stanley v. Illinois: Recognizing an Unwed
           Father’s Rights ............................ 187
        2. Quillioin v. Walcott: No Responsibility or
           Relationship Equals No Rights .............. 189
        3. Caban v. Mohammed: Similarly Situated, Unwed
           Parents .................................... 191
        4. Lehr v. Robertson: Grasping an Opportunity to
           Retain Rights—The Supreme Court Only Helps
           Those Who Help Themselves ................ 194
        5. Michael H. v. Gerald D.: The Division Grows .... 197
        6. Is a Synthesis or Prediction Possible? ....... 199
    C. Unwed Fathers’ Rights at the State Level ....... 200
        1. Recent State Court Interpretation and
           Application of United States Supreme Court
           Rulings Regarding Unwed Fathers’ Rights ...... 200
           a. Baby Jessica ............................ 200

Copyright held by the NEBRASKA LAW REVIEW.
I. INTRODUCTION

The rights and responsibilities associated with the "family" have, across the ages, changed along with the social, religious, and economic conditions of the times. Among the aspects of the family relationship that have only recently come to be recognized by the law is the right of an unwed father to establish a relationship or seek custody of his children born out of wedlock. As this Note discusses, further progress must yet be made.

A. Factual History of Scovell and Babb

In September of 1992, Ronald A. Scovell, then still a high school student, met Jessica M. Babb. The two worked together at a local fast food restaurant in Virginia, Minnesota, and over the course of several months came to be friends.

During the holiday season of 1992, Scovell's relationship with his girlfriend began to disintegrate, and in early 1993 his relationship with Babb began to strengthen. Because Scovell did not own a car, Ms. Babb frequently transported Scovell to or from work. On one such occasion, Scovell's mother invited Babb to spend the night, so that she would not have to drive home late that night through the severe Minnesota winter weather. Babb was allowed to sleep in Scovell's bed-

2. Id. at 2. The interaction of Scovell and Babb included Babb's training of Scovell while he was a new employee, working regularly together on overlapping shifts, and holiday-season volunteer work for the Salvation Army. Id.
3. Id. at 2-3.
4. Id. at 3. Ms. Babb did not live in Virginia, Minnesota, where she worked and attended classes at a community college. She lived with her parents in Cook, Minnesota, 48 miles from Virginia, and commuted each day.
room. When Babb spent the night again, only a few days later, the two engaged in sexual relations. According to both, they continued to engage in sex until early April of 1993. Both also testified at the time of trial in this case that the sexual relations were at all times consensual.

In early May, Babb confided to Scovell's mother that she was pregnant and arranged to meet Scovell to convey that news. When the two met on May 8, 1993, Scovell questioned the reliability of Babb's home pregnancy test and asked her to confirm her condition with a doctor. Scovell's doubt led to an argument between the two and ultimately resulted in Babb stating that she intended to seek an abortion. Although Scovell urged her to consider allowing him to have custody of the child, he took no actions to provide support for Babb or the expected child, nor did he have any contact with Babb until January 8, 1994.

Jessica Babb contacted an attorney in Lincoln, who recommended she place the child for adoption. In late November, 1993, Babb met with Monty and Julie Scheele to tell them that she had selected them

6. Brief for Respondents at 4, Scovell v. Scheele (Lancaster County Dist. Ct. July 18, 1994)(No. 510-145). In spite of the trial testimony from Babb that the sexual encounters were consensual, she had reported to her co-workers in Virginia, to her friends developed upon relocation to the University of Nebraska-Lincoln, to her attorney, and to the Nebraska State Legislature that she had been the victim of date rape. Id.

Given that the Supreme Court and numerous inferior courts have held that neither husbands nor lovers have any authority to prevent an abortion and that such a decision is for the woman alone to make, Scovell's last enumerated explanation for his failure to make contact is, if not defensible, at least understandable. See, e.g., Planned Parenthood v. Danforth, 428 U.S. 52, 71 (1976)(stating that a woman may unilaterally choose abortion over childbirth, as she must physically bear the child); Jones v. Smith, 278 So. 2d 339, 342 (Fla. Dist. Ct. App. 1973)(holding that a putative father has no right to enjoin the natural mother from terminating the pregnancy).
to be the adoptive parents of her child.\textsuperscript{10} On December 17, Jessica Babb gave birth to Jorie Lyn Babb. On December 19, pursuant to a valid relinquishment signed by Jessica Babb,\textsuperscript{11} Monty and Julie Scheele were given custody of Jorie Lyn.

On January 8, 1994, Babb contacted Scovell in Minnesota, telling him that she had not aborted her pregnancy, that she had delivered a baby girl on December 17, 1993, and that she had relinquished the baby to an adoptive couple.\textsuperscript{12} On January 12, 1994, Scovell filed a Notice of Intent to Claim Paternity with the Department of Social Services as required by Nebraska law.\textsuperscript{13} On February 22, 1994, Scovell filed a habeas corpus action seeking custody of Jorie Lyn.\textsuperscript{14}

B. The Trial: \textit{Scovell v. Scheele}

In his petition, Ronald Scovell challenged Nebraska's requirement that in order to preserve his parental rights to his child born out of wedlock he must file a Notice of Intent to Claim Paternity with the Nebraska Department of Social Services within five days after the birth of the child. Scovell claimed the requirement was violative of both the due process and equal protection guarantees of the United States Constitution.


\textsuperscript{11} See \textit{infra} note 14, regarding Babb's challenge of the validity of the relinquishment.


\textsuperscript{13} NEB. REV. STAT. § 43-104.02 (Reissue 1988). See \textit{infra} notes 204-29, 279-94 and accompanying text for further discussion of this statute.


Ms. Babb had, prior to Scovell's filing of this action, filed her own habeas corpus action alleging that she had lacked the mental capacity to sign or understand the relinquishment, and that she had executed the relinquishment under extreme duress and coercion. Babb v. Scheele, No. 510-221 (Lancaster County Dist. Ct. May 25, 1994)(order denying writ of habeas corpus).

In denying Babb's claim, the court found:

The evidence shows that the petitioner is an intelligent, independent and self-reliant young woman; that she knew what she was doing, made her decision independently and without influence from any other party, and had intended to give up her baby all along, at least until she returned to her home in Minnesota and finally reported her pregnancy and resulting birth to her mother.

\textit{Id.}
States Constitution. He further alleged that, because he had not relinquished his parental rights to Jorie Lyn, he was entitled to custody.

In his order, Judge William Blue held that the Nebraska laws were constitutional as applied to Scovell and cited Scovell's "completely irresponsible" behavior in making his decision. Judge Blue specifically noted that Scovell made no offers to assume responsibility for Babb's medical bills, made no offer to support the baby upon its birth, made no inquiries regarding Babb's whereabouts after their May 8, 1993 meeting, and made no effort to comply with Nebraska's statutory requirements, despite his opportunity and ability to do all of these things. Blue further ordered a "best interest" hearing to be held on July 26, 1994, at which time he determined that Jorie Lyn's best interests would be served by the Scheeles' continued custody.

C. Scope of this Note

This Note will chronicle the development of putative fathers' rights in the law, as recognized in recent Supreme Court cases and synthesize those varied holdings into the Supreme Court's current and probable future position. It will analyze how these holdings have been applied in recent state court decisions and discuss the development of Nebraska's statutory law and case law on this topic. This Note will also analyze how Nebraska's law conforms with or violates the standards set by the Supreme Court and other state courts. Finally, it recommends changes that should be made to Nebraska law as a means of recognizing the further development of fathers' rights while at the same time maintaining the state's interests in the adoption process.


16. Id.

17. Id.

18. Id.

19. See infra notes 48-163 and accompanying text.

20. See infra notes 164-69 and accompanying text.

21. See infra notes 170-203 and accompanying text.

22. See infra notes 204-29 and accompanying text.

23. See infra notes 230-78 and accompanying text.

24. See infra notes 279-322 and accompanying text.

25. See infra notes 279-322 and accompanying text.
II. HISTORICAL BACKGROUND AND DEVELOPMENT OF THE LAW

A. Overview of Putative Fathers’ Rights

Roman adoption law is the acknowledged root of American adoption statutes.26 The thrust of Roman adoption law was to benefit the adopting families in terms of creating and continuing the family name.27 Up until 291 A.D., only men were allowed to adopt.28

English law recognized and authorized bastardy proceedings as early as 1576 in order to relieve the public of its duty to support illegitimate children.29 At common law, a child born out of wedlock was held to be filius nullius, the child of no one, or filius populi, the child of the people.30 The common law did not recognize adoption or custody determinations as we know them today. Since Roman times, children had been treated as a chattel of the father to be treated or traded as the father saw fit.31 Early in the 17th century, children were frequently “bound out” to other families.32 Many such children were orphans and some were treated well in this situation, but the majority were exploited for their cheap labor.33 In fact, even into the middle of the 19th century, parents often placed their children in distant homes with complete strangers.34 The emphasis on the economic or property

27. Leo Albert Huard, The Law of Adoption: Ancient and Modern, 9 Vand. L. Rev. 743, 745 (1956); Presser, supra note 26, at 446.
29. Under the Poor Law Act of 1876, each parish was authorized to impose a charge upon the parents of a child in order to provide for its support. Kenneth M. Davidson et al., Sex-Based Discrimination 310 (1974).
31. Under the Roman law doctrine of patria potestas, the father had absolute authority. The father was given authority over all aspects of the child including the child’s life. A. Haralambie, Handling Child Custody Cases 2, § 1.02 (1983). See also, Weston, supra note 30, at 686 (mother’s first rights came in 1883).
32. Presser, supra note 26, at 458.
33. Presser, supra note 26, at 459. “No legal regulations existed to control the wholesale distribution of children to uninvestigated homes where they were used as cheap labor.” Ruth-Arlene W. Howe, Adoption Practice, Issues, and Laws 1988-1983, 17 Fam. L.Q. 173, 176 (1983), cited in DuRocher, supra note 26, at n.27.
34. Presser, supra note 26, at 460. That is not to say, however, that such was true in every case. In fact, numerous parents of “bound out” children registered complaints to the courts regarding their children’s ill treatment at the hands of their custodial keepers. Yasuhide Kawashima, Adoption in Early America, 20 J. Fam. Law 677, 685 (1981-82).
value of children worsened to such a degree that children were often advertised, sold, or arbitrarily given away.\(^{35}\)

The State of Massachusetts passed the first adoption statutes to combine legislative rules for the adoption procedure with legislation regarding the welfare of the children.\(^{36}\) In an attempt to protect the potential adoptee (the child), the statute created strict requirements for parental qualification, among them: 1) both a husband and wife had to join in the petition for adoption; 2) the judge hearing the petition had to be satisfied that the potential adopting parents were of "sufficient ability" to raise the child; 3) all legal rights and obligations concerning the child had to be surrendered by the biological parents; and 4) the biological parents had to provide written consent for the adoption.\(^{37}\) The Massachusetts statute was used as a model by other state legislatures, and, eventually, all fifty states and the District of Columbia enacted their own adoption statutes.\(^{38}\)

Because of the property-like treatment of children, and the recognition that the father was the owner of that property, custody was generally awarded to the father when such a dispute did arise.\(^{39}\) However, Lord Talfourd's Act of 1839\(^{40}\) allowed courts of equity to award custody of children of tender years to the mother.\(^{41}\) In 1885, the Guardianship of Infants Act of 1885\(^{42}\) elevated the mother to equal footing with the father in all custody disputes. Further, the issue of child welfare came to be recognized as being relevant to child custody litigation at this time.\(^{43}\)

Because of the rising concern for the welfare of the child, the presumption of equality between the mother and father soon gave way to the presumption that the child needed the "care, love and discipline"

35. Howe, supra note 33, at 176; Presser, supra note 26, at 460.
37. Presser, supra note 26, at 465. See also Janet Hopkins Dickson, The Emerging Rights of Adoptive Parents: Substance or Specter?, 38 UCLA L. Rev. 917, 924 (1991) (identifying welfare of the child and qualifications of adopters as the main concerns of the Massachusetts' statute).
38. Dickson, supra note 37, at 924.
40. 2 and 3 Vict. Stat., ch. 54 (1839), cited in Weston, supra note 30, at 688.
41. The tender years doctrine, in essence, presumed that a child under the age of six or seven was best protected by placement with the mother. The doctrine is generally traced to the American case of Helms v. Franciscus, 2 Bland Ch. 544 (Md. 1 1830), which held that a young child needed the nurture and protection that an "affectionate mother" would provide. Weston, supra note 50, at 689 n.39. "In custody law, the 'tender years doctrine' has lost ground and is rejected or relegated to a role of 'tiebreaker' in most states." Doris Jonas Freed & Timothy B. Walker, Family Law in the Fifty States: An Overview, 19 Fam. L.Q. 331, 401 (1986).
42. 40 and 50 Vict. Stat., ch. 27 (1886), cited in Weston, supra note 30, at 689 n.40.
43. Roman & Haddad, supra note 39, at 29-32. See also Weston, supra note 30, at 689 (mother and father on equal footing in custody dispute).
that a mother, but not a father, would provide.\textsuperscript{44} This maternal preference doctrine dominated custody litigation for nearly 75 years and was reinforced by society’s determination to view people in terms of roles, rather than as individuals.\textsuperscript{45} It was not until society began to view each person, each case, individually that the courts began to insist on a neutral and objective determination in custody disputes.\textsuperscript{46}

While fathers eventually gained equal footing in custody disputes for their legitimate children, fathers were still at a decided disadvantage when seeking custody of a child born out of wedlock. Men who had fathered children outside the sanctity of a marital relationship were presumed to be uninterested in such children; were presumed to have no desire to provide care for such children; were presumed to have no desire to seek custody of such children; and were presumed to have no capacity to love such children.\textsuperscript{47}

The following Section discusses how the United States Supreme Court has sought to destroy those presumptions in the law, in order to preserve the rights of the putative father, while not abridging the rights of the other parties or the interests of the state.

B. U.S. Supreme Court Decisions

1. \textit{Stanley v. Illinois: Recognizing an Unwed Father’s Rights}

The United States Supreme Court has long recognized that citizens of this great Union have certain personal freedoms with which the state may not interfere.\textsuperscript{48} It was not until 1972, however, that the Court recognized that an unwed father had a constitutionally pro-

\textsuperscript{44} Ullman v. Ullman, 135 N.Y.S. 1080, 1083 (1912). \textit{See also} Weston, \textit{supra} note 30, at 690.

\textsuperscript{45} Weston, \textit{supra} note 30, at 690.

\textsuperscript{46} See, for example, Boroff v. Boroff, 197 Neb. 641, 250 N.W.2d 613, 616-17 (1977), where the court cited and followed the Nebraska statute which provided that the court shall not give preference to either parent based on the sex of the parent and that no presumption shall exist that either parent is more fit to have custody of the child than the other.

\textsuperscript{47} Stanley v. Illinois, 405 U.S. 645, 653 n.5, 655 nn.6-7, 656 n.8 (1972).

\textsuperscript{48} See Meyer v. Nebraska, 262 U.S. 390 (1923), where the court said: While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. \textit{Id.} at 399. \textit{See also} Griswold v. Connecticut, 381 U.S. 479 (1965)(right of privacy in marital relationship); Skinner v. Oklahoma, 316 U.S. 535 (1942)(right of marriage and procreation); Pierce v. Society of Sisters, 268 U.S. 510 (1925)(right of parents to direct the upbringing and education of children under their control).
tected interest in the "companionship, care, custody, and management of his . . . children." 49

In Stanley v. Illinois, 50 Joan and Peter Stanley lived together for 18 years raising their three children. 51 When Joan Stanley died, because Joan and Peter had been unmarried, Illinois law mandated that the Stanley children be declared wards of the state. 52 After the state-instituted dependency proceeding, which declared the Stanley children wards of the state and placed them with court-appointed guardians, Peter Stanley appealed, claiming he had been denied an opportunity to establish that he was a fit parent, i.e., he had been denied due process of law. 53 Stanley further claimed that since neither married fathers nor unwed mothers may be deprived custody of their children without a showing of parental unfitness, he had been denied equal protection of the law as guaranteed by the Fourteenth Amendment. 54 While recognizing that Stanley had not been shown to be unfit, the Illinois Supreme Court rejected his claims, holding that the single fact that he had not been married to the children's mother made him presumptively unfit. 55 His actual fitness or unfitness, the court held, was irrelevant. 56

On appeal, the Supreme Court held that "as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him." 57 In reaching its decision, the Court did not challenge the state's duty to protect minor children. 58 In fact, the Court stated the "establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication." 59 However, the Court pointed out that "if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family." 60 In addressing Stanley's due process claim, Mr. Justice White concluded: "Procedure by presumption is always cheaper and easier then individualized determination." 61 Because the "Constitution recognizes higher values than speed and efficiency," 62 White reasoned, and because the particular presumption employed by the State

50. 405 U.S. 645 (1972).
51. Id. at 646.
52. Id.
53. Id.
54. Id.
55. Id. at 646-47.
56. Id. at 647.
57. Id. at 649.
58. Id. at 649-50.
59. Id. at 656.
60. Id. at 652-53.
61. Id. at 656-57.
62. Id. at 656.
of Illinois in this case foreclosed the opportunity to be heard when faced with the loss of cognizable and substantial interests, it must be struck down. The Court further found that because the Constitution guarantees that all parents are entitled to a hearing of fitness before their children are removed from their custody, the Illinois statute denying Stanley such a hearing necessarily also violated the Equal Protection Clause.

2. Quilloin v. Walcott: No Responsibility or Relationship Equals No Rights

Although the Court's decision in Stanley made it clear that an unwed father had constitutionally protected rights in his children, the extent of those rights was still unclear. The case Quilloin v. Walcott began to help define the boundaries of a putative father's rights. Justice Marshall, writing for a unanimous court, held that an unwed father who had "never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child," and who was not seeking custody of the child, but only

63. Id. at 652.
64. Id. at 657.
66. In Stanley, the Court stated that it was protecting the private interests of a man "in the children he has sired and raised." Stanley v. Illinois, 405 U.S. 645, 651 (1972). However, the Court also recommended service by publication so that unknown fathers would also have the opportunity to assert their interests. Id. at 657 n.9.

Those facially inconsistent provisions left many states, which were responding to Stanley by amending their adoption statutes, in a state of confusion. Some states interpreted Stanley to extend to all biological fathers. These states enacted legislation that provided for actual notice of pending adoption proceedings via personal service or registered mail for fathers whose identity and location was known and provided notice by publication for all others. On the other hand, some states interpreted it more narrowly. These states placed the burden on the father to take actions to protect his interests in any children he may have conceived. New York (and Nebraska and Utah) requires that a man, who suspects he may have contributed to the conception of a child, sign a state registry indicating the woman's name. If the named woman does indeed give birth and attempts to place the child for adoption, the registered father will be notified, giving him the opportunity to contest the procedure. 2 Homer H. Clarke, Jr., The Law of Domestic Relations in the United States, § 21.2, at 574-75 (1987). See infra, notes 204-29 and accompanying text for discussion of the development of Nebraska adoption law.
68. Id. at 256.
seeking to prevent the child's adoption by his stepfather, could not use
the Due Process and Equal Protection Clauses to resurrect rights he
had relinquished through inaction and irresponsibility.69

In December of 1964, Ardell Williams gave birth to a child fathered
by Leon Quilloin.70 The two never married each other, never estab-
lished a home together, and the child never lived with Quilloin.71 In
1967, Williams married Randall Walcott; in 1969, the child began to
live with the Walcotts;72 and in 1976, the mother consented to adop-
tion of the child by her husband.73 Quilloin attempted to block the
adoption and secure visitation rights, but he did not seek custody and
did not object to the child remaining with the Walcotts.74 All of these
matters were consolidated for trial to allow "the biological father . . . a
right to be heard with respect to any issue or other thing upon which
he desire[s] to be heard, including his fitness as a parent."75 Despite
finding that Quilloin was a fit parent and that he had not abandoned
his child, the trial court granted the adoption, finding it was in the
child's "best interests."76

Quilloin appealed to the Georgia Supreme Court, claiming that
Georgia law, which provided that both parents must consent to the
adoption of a child born in wedlock,77 while only the consent of the
mother was required for the adoption of a child born out of wedlock,78
violated his constitutional rights of due process and equal protection.
Emphasizing the state interests involved, the fact that the pending
adoption would cement the bonds of an already existing family unit,
and the fact that Quilloin had never been a part of the child's family
unit, the Georgia Supreme Court affirmed.79

Upon his appeal to the United States Supreme Court, Quilloin ar-
gued that, absent a finding of unfitness, the denial of his right to exer-
cise an absolute veto over the adoption of his child was violative of his
rights of due process and equal protection.80 Although the Walcotts
asserted that Quilloin lost any constitutionally protected interest by

69. Id. at 255-56.
70. Id. at 247.
71. Id.
72. The child previously lived with its maternal grandmother. Id. at n.1.
73. Id. at 247.
74. Id.
75. Id. at 250 (quoting In re Randall Walcott, No. 8466, App. 70, (Ga. Super. Ct. July
12, 1976)).
76. Id. at 247, 251.
77. GA. CODE ANN. §§ 74-403(1), (2) (1975).
78. GA. CODE ANN. § 74-403(3) (1975).
246 (Ga. 1977).
80. Quilloin v. Walcott, 434 U.S. 246, 253 (1978). The equal protection claim was not
addressed by the Court, as it was not properly presented in Quilloin's jurisdic-
tional statement. Id. at n.13.
his failure to legitimize the child sometime during the prior eleven years, the Court refused to rest its decision on that fact, because Quilloin was unaware of the legitimization process.81 The Court instead noted the special circumstances of the case.82 It recognized that the Due Process Clause would undoubtedly be offended if a state were to break up an existing natural family, with no showing of unfitness, simply because to do so would be, in the estimation of the court, in the children’s best interests.83 The Court continued, however, distinguishing the case at hand from the hypothetical one. Justice Marshall noted that Quilloin had never had nor sought custody of the child; the adoption would recognize and legitimize an already existing family unit; and all parties involved, save Quilloin, desired that result.84

Noting these distinguishing facts, Justice Marshall concluded: “Under any standard of review, the state was not foreclosed from recognizing this difference in the extent of commitment to the welfare of the child.”85

3. *Caban v. Mohammed: Similarly Situated, Unwed Parents*

Just one year after announcing the *Quilloin* decision, the Court had the opportunity to further define the rights of putative fathers in *Caban v. Mohammed*.86 Under New York adoption law, an unwed mother could unilaterally block the adoption of her child by simply withholding her consent.87 The unwed father, on the other hand, had no such authority to block an adoption.88 The only way for an unwed father to prevent the termination of his parental rights was by showing that the adoption was not in the child’s best interests.89

Abdiel Caban and Maria Mohammed lived together in New York City for over five years. Although the two never legally married,90 they held themselves out as husband and wife.91 During this period of cohabitation, the two conceived and raised two children.92 Caban and

81. *Id.* at 254.
82. *Id.* at 255.
83. *Id.*
84. *Id.*
86. 441 U.S. 380 (1979).
87. *Id.* at 386; *N.Y. Dom. Rel. Law § 111(c)* (McKinney 1977).
90. *Id.* at 382. Caban was, in fact, married to another woman the entire time but was separated from her while living with Mohammed. *Id.*
91. *Id.*
92. *Id.*
Mohammed both contributed to the support of the family, until Mohammed took the children from Caban and married another man. Despite Mohammed's marriage, Caban was able to maintain contact with his children each weekend for the next nine months, until their maternal grandmother took them to Puerto Rico. Caban went to Puerto Rico, brought the children back to New York, then refused to surrender custody to Mohammed. The Mohammeds were granted custody of the children and then petitioned the court for adoption. Caban cross-petitioned for adoption, but the trial court granted the Mohammeds' petition for adoption. The New York Supreme Court, Appellate Division, affirmed, and the New York Court of Appeals dismissed Caban's appeal.

On appeal to the Supreme Court, Caban claimed that the distinction made between unwed fathers and other parents in New York adoption law violated the Equal Protection Clause. He further claimed that his substantive due process rights were violated as he had never been found to be an unfit parent.

The Court's sharply divided decision reversing the New York courts' decisions made it plainly apparent that the issue of putative fathers' rights was far from settled. In assessing Caban's equal protection claim, Justice Powell noted: "Gender-based distinctions 'must serve important governmental objectives and must be substantially related to achievement of those objectives' in order to withstand

93. Id.
94. Id.
95. Id. at 383.
96. Id. Caban and his new wife were given visitation rights. Id.
97. Id.
98. Id.
102. Id. The majority opinion noted: "As the appellant was given due notice and was permitted to participate as a party in the adoption proceedings, he does not contend that he was denied procedural due process held to be requisite in Stanley. . . ." Id. at 385 n.3 (citation omitted). When the Court ruled that the challenged statutory scheme was unconstitutional under the Equal Protection Clause, it then had no occasion to express its "view as to whether a state is constitutionally barred from ordering adoption in the absence of a determination that the parent whose rights are being terminated is unfit." Id. at 394 n.16. Thus, the substantive due process claim was neither addressed nor decided. Id.
103. See Caban v. Mohammed, 441 U.S. 380 (1979). In the 5-4 decision, Justice Powell delivered the opinion of the Court, joined by Justices Brennan, White, Marshall, and Blackmun. Id. at 381. Justice Stewart filed a dissenting opinion. Id. at 394-401 (Stewart, J., dissenting). Justice Stevens also filed a dissenting opinion, joined by Chief Justice Burger and Justice Rehnquist. Id. at 401-17 (Stevens, J., dissenting).
judicial scrutiny under the Equal Protection Clause." In response to the Mohammeds’ first assertion that the distinction made under New York law is justified because a natural mother bears a closer relationship to her child than a natural father does, the Court disagreed, stating that "an unwed father may have a relationship with his children fully comparable to that of the mother." As such, the majority struck down the broad, gender-based distinction.

The Mohammeds further asserted that the distinction was substantially related to the state interest of promoting the adoption of illegitimate children. The majority fully recognized that such a state interest was, indeed, "important." It rejected, however, the means used to achieve that important end. For such a classification to stand, the Court said, it "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation...." The majority then found that the challenged statute did not meet this test, as its effect was to discriminate against all unwed fathers, even those who "have manifested a significant paternal interest in the child."

---

104. Id. at 388 (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)). Craig was the first case in which a majority of Justices agreed upon a definition for the "intermediate scrutiny" standard of review in gender discrimination cases. Jesse Choper et al., The Supreme Court: Trends and Developments 1978-79, at 24-25 (Dorothy Opperman ed., National Practice Institute 1979).


106. Id.

107. Id.

108. Id. at 391.

109. Id.

110. Id. (quoting Reed v. Reed, 404 U.S. 71, 76 (1971)).

111. Id. at 394. In this last quote it becomes clear that the majority in Caban, as it did in Stanley and Quillioin, looked to an existing and substantial relationship between father and children in order to determine what rights, if any, the putative father held. See id. at 391-93. Further, in his dissent, Justice Stevens asserted that under his reading of the majority's opinion, neither the holding nor the reasoning advanced in that opinion would affect the adoption of an infant. Id. at 416 (Stevens, J., dissenting). Moreover, the majority specifically noted that it would not express an opinion regarding whether a statutory scheme, as presented in this case, would pass constitutional scrutiny in the case of newborn adoptions. Id. at 392 n.11.

4. Lehr v. Robertson: Grasping an Opportunity to Retain Rights—The Supreme Court Only Helps Those Who Help Themselves

Justice Stevens, who had authored one of the two Caban dissents, wrote the majority decision for a still divided Court in Lehr v. Robertson. In Lehr, the Court held that "the mere existence of a biological link does not merit equivalent constitutional protection" as compared to a relationship where the unwed father has demonstrated "full commitment to the responsibilities of parenthood." After enunciating this rule, the Court emphasized that Lehr "never had any significant custodial, personal, or financial relationship," nor did he ever "seek to establish a legal tie until after she (his illegitimate child) was two years old."

Jonathon Lehr and Lorraine Robertson began living together in 1974, and remained together until the birth of their child in November of 1976. Throughout the pregnancy and after the child's birth, Lorraine acknowledged to all that Lehr was the father, and while Lorraine was in the hospital, Lehr visited every day. However, upon her discharge from the hospital and until August of 1978, Lorraine concealed her whereabouts from Lehr. When Lehr finally located Lorraine and their child, she was already married to another man. Upon threatened legal action from Lehr to gain visitation rights, the Robertsons commenced the adoption action contested here.

In response to Stanley and Caban, the State of New York had instituted a putative father registry. The State likewise had developed

112. 463 U.S. 248 (1983). In Lehr, Justices Powell and Brennan, who had been with the majority in Caban, were convinced to change positions and join Justice Stevens in denying the fathers' rights. Justice O'Connor replaced Justice Stewart, maintaining his position aligned with Stevens. This left Justices White, Marshall, and Blackmun as the lone advocates of fathers' rights. See id.

113. Id. at 261.
114. Id.
115. Id. at 262.
116. Id.
117. Id. at 250, 268. The facts of Lehr are somewhat in dispute. The majority's recitation of facts is quite brief and, according to the dissenters, biased. Id. at 270-71 (White, J., dissenting). In fact, Justice White accusationally states that the majority's version of the facts "obviously does not tell the whole story." Id. at 271. White further complained that the Court "cannot fairly make a judgment based on the quality or substance of a relationship without a complete and developed factual record." Id.
118. Id. at 269.
119. Id.
120. Id. Lorraine married Richard Robertson eight months after the birth of Lehr's child. Id. at 250.
121. Id. at 269.
122. Id. at 250 n.4; N.Y. SOC. SERV. § 372-C (McKinney Supp. 1982-1983). The statute provided:
a scheme whereby certain classes of unwed fathers were entitled to notice of any adoption involving their children. Because Lehr fell into none of the statutory classifications, he was not given notice of the pending adoption proceedings. The judge hearing the adoption proceeding granted the adoption in favor of the Robertsons. In addition, at the request of the Robertsons, the judge dismissed Lehr's paternity petition, stating that the adoption had terminated Lehr's parental rights and, therefore, his standing.

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

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

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

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

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


(2) Persons entitled to notice, pursuant to subdivision one of this section, shall include: (a) any person adjudicated by a court in this State to be the father of the child; (b) any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry, pursuant to section three hundred seventy-two-c of the social services law; (c) any person who has timely filed an unrevoked notice of intent to claim paternity of the child, pursuant to section three hundred seventy-two of the social services law; (d) any person who is recorded on the child's birth certificate as the child's father; (e) any person who is openly living with the child and the child's mother at the time the proceeding is initiated and who is holding himself out to be the child's father; (f) any person who has been identified as the child's father by the mother in written, sworn statement; and (g) any person who was married to the child's mother within six months subsequent to the birth of the child and prior to the execution of a surrender instrument or the initiation of a proceeding pursuant to section three hundred eighty-four-b of the social services law.

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

124. Id. at 251-52.

125. Id. at 253.
Lehr then petitioned the New York courts for vacation of the order granting the Robertson adoption, on the grounds that his constitutional rights of due process and equal protection had been violated.\textsuperscript{126} On appeal to the Supreme Court, Lehr claimed that he had “an absolute right to notice and an opportunity to be heard.”\textsuperscript{127} The majority held that there had been no denial of due process because the right to receive notice of a pending adoption action was completely within Lehr’s control.\textsuperscript{128} Quoting from Justice Stewart’s \textit{Caban} dissent, Justice Stevens stated: “Parental rights do not spring full-blown from the biological connection between parent and child.”\textsuperscript{129} It is not until the unwed father comes forward to participate in the rearing of his child and demonstrates commitment to the child, that the father’s interest in a relationship with the child reaches a stature worthy of substantial constitutional protection.\textsuperscript{130} Summarizing the majority’s position, Stevens wrote:

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child’s future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child’s development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child’s best interests lie.\textsuperscript{131}

Given the finding under the due process inquiry that Lehr had not established a relationship with his child worthy of protection, the Court also rejected his equal protection claim.\textsuperscript{132} Under an equal protection inquiry, if it can be shown that classes treated differently under the law are not in fact similarly situated, the law may constitu-

\textsuperscript{126} \textit{Id.} at 253-54.
\textsuperscript{127} \textit{Id.} at 250.
\textsuperscript{128} \textit{Id.} at 264. Registration with the putative father registry would have guaranteed Lehr notice of an adoption proceeding. \textit{See supra} notes 122-23.
\textsuperscript{129} Lehr v. Robertson, 463 U.S. 248, 260 (1983). Driving home the point that biological relationships are of secondary importance to emotional ones, Justice Stevens further asserted for the majority:

[The importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in ‘promot[ing] a way of life’ through the instruction of children . . . as well as from the fact of blood relationship.] \textit{Id.} at 261 (quoting Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 844 (1977)).

\textsuperscript{130} Lehr v. Robertson, 463 U.S. 248, 261 (1983).
\textsuperscript{131} \textit{Id.} at 262. The dissenters, however, contend that the mother’s actions interfered with Lehr’s ability to grasp the opportunity offered by the majority. \textit{Id.} at 271 (White, J., dissenting). The dissent further argued that “[a] ‘mere biological relationship’ is not as unimportant in determining the nature of liberty interests as the majority suggests.” \textit{Id.}

\textsuperscript{132} \textit{Id.} at 265-68.
tionally stand.\textsuperscript{133} Finding that Lehr and Robertson were not similarly situated because of their differing levels of involvement with the child, the majority upheld the challenged statute.\textsuperscript{134}

5. \textit{Michael H. v. Gerald D.: The Division Grows}

The Supreme Court most recently considered the issue of unwed fathers' rights in \textit{Michael H. v. Gerald D.}\textsuperscript{135} Facing the Court was the issue of the constitutionality of a California statute which presumed that the child of a woman living with her husband is a child of the marriage.\textsuperscript{136} This presumption could be rebutted only by showing that the husband was impotent or sterile or by blood tests.\textsuperscript{137}

After two years of marriage to Gerald D., Carol D. began an adulterous affair with her neighbor, Michael H.\textsuperscript{138} Three years later, Carol gave birth to a baby girl, and, although Gerald was listed on the birth certificate as the father, Carol told Michael that he was the father.\textsuperscript{139} Subsequent blood tests established with 98.07\% probability that Michael was, indeed, the father.\textsuperscript{140}

In the three years following the child's birth, Carol and her daughter lived intermittently with Gerald, Michael, and another man. Upon reconciling with Gerald just one year after the birth, however, Carol refused Michael any future visitation with his daughter.\textsuperscript{141} In response, Michael filed a paternity action and sought to secure visitation rights.\textsuperscript{142} Gerald successfully intervened, and his motion for summary judgment was granted on the ground that the marital presumption left no issue of fact in dispute.\textsuperscript{143}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{133} \textit{Id.} at 267.
  \item \textsuperscript{134} \textit{Id.} The differing situation found by the Court was that Robertson had established a custodial relationship with the child while Lehr had established no relationship with the child. \textit{Id.} at 267-68.
  \item \textsuperscript{135} \textit{491} U.S. 110 (1989).
  \item \textsuperscript{136} \textit{Id.} at 115. The challenged statute was \textit{Cal. Evid. Code} § 621(a) (West Supp. 1989)(amended 1990).
  \item \textsuperscript{138} Michael H. v. Gerald D., \textit{491} U.S. 110, 113 (1989).
  \item \textsuperscript{139} \textit{Id.} at 113-14.
  \item \textsuperscript{140} \textit{Id.} at 114.
  \item \textsuperscript{141} \textit{Id.}
  \item \textsuperscript{142} \textit{Id.}
  \item \textsuperscript{143} \textit{Id.} at 115.
\end{itemize}
\end{footnotesize}
The continued division of the Court on this issue showed in that no majority opinion was offered.144 Justice Scalia, writing the plurality opinion, stated that a reading of the Stanley, Caban, and Lehr precedents "as establishing that a liberty interest is created by biological fatherhood plus an established paternal relationship . . . distorts the rationale of those cases."145 On the other hand, four dissenters held a contrary position. They asserted that Michael's rights did deserve constitutional protection because he had met the "biological plus" test set forth in those previous decisions.146 And in a separate concurring opinion, Justice Stevens, who had written the majority opinion in Lehr147 and a strong dissent in Caban,148 admitted that the Stanley149 and Caban150 decisions do "demonstrate that enduring 'family' relationships may develop in unconventional settings."151 For that reason, he "would not foreclose the possibility that a constitutionally protected relationship between a natural father and his child might exist in a case like this."152

Nevertheless, the plurality asserted that the parentage presumption was constitutional, both facially and as applied in the case at bar, because it was a reasonable and justifiable means for the state to "promot[e] the 'peace and tranquility of states and families.'"153 According to Scalia, to merit constitutional protection, an unwed father's right to maintain a relationship with his child must be a right that has been "traditionally protected by our society."154 Gerald's relationship, therefore, merited protection, while Michael's did not, because our society has traditionally protected the marital relationship and the family unit, and has not traditionally recognized the "power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man."155 Criticizing this reasoning, Justice Brennan stated that if the Court had asked itself whether the specific interest under consideration had been tradition-

144. Id at 110.
145. Id. at 123.
146. Id. at 142-43 (Brennan, J., dissenting), 159-60 (White, J., dissenting).
152. Id. In fact, Justice Stevens stated he was "willing to assume . . . that Michael's relationship with Victoria [was] strong enough to give him a constitutional right" to be heard. Id. This statement shows Justice Stevens' recognition of the "biology-plus" test.
153. Id. at 125.
154. Id. at 122.
155. Id. at 125.
ally protected when it heard Eisenstadt,\textsuperscript{156} Griswold,\textsuperscript{157} Ingraham,\textsuperscript{158} Vitek,\textsuperscript{159} or Stanley,\textsuperscript{160} the answer, necessarily, would have been "no."\textsuperscript{161} Yet, that was not how the Court addressed those cases.\textsuperscript{162}

In sum, Michael H. left more questions unresolved regarding the position of the Supreme Court on the issue of unwed fathers' rights than it answered.\textsuperscript{163}

\section{Is a Synthesis or Prediction Possible?}

Prior to the announcement of Michael H.,\textsuperscript{164} the test to be applied in actions challenging an alleged statutory deprivation of unwed fathers' rights seemed, if not clear, at least discernible. The Lehr Court's full development of the "biology-plus" test held that a biological link "offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring."\textsuperscript{165} Although the Court did not offer constitutional protection to the biological relationship itself, the Court held that if the father grasps the opportunity afforded him by that biological link and develops a relationship with the child his rights will receive constitutional protection.\textsuperscript{166}

As noted previously, Justice Scalia's plurality decision in Michael H. seemed to reject the biology-plus test,\textsuperscript{167} while the dissenting opinions of Justices Brennan, Marshall, Blackmun, and White argued forcefully for the validity of the test.\textsuperscript{168} Given that since the 1989 decision in Michael H., the four dissenters have left the Court, replaced

\begin{footnotes}
\item 158. Ingraham v. Wright, 430 U.S. 651 (1977)(recognizing right of freedom from corporal punishment in schools).
\item 162. Id.
\item 165. Lehr v. Robertson, 463 U.S. 248, 262 (1983). See supra notes 112-34 and accompanying text.
\item 166. Lehr v. Robertson, 463 U.S. 248, 262 (1983). See supra notes 112-34 and accompanying text.
\end{footnotes}
by Justices Thomas, Souter, Ginsburg, and Breyer, the biology-plus test could, indeed, be dead at the Supreme Court level.

Adding to the confusion, the Supreme Court has not yet addressed a case where an infant was placed for adoption, terminating the parental rights of an unwed father without his consent. Under the biology-plus test, such a father would be unable to assert any constitutional rights because he would lack the necessary substantial relationship with the child. If the biology-plus test was rendered impotent by Michael H., would the Court, instead, choose to protect only those rights “traditionally protected by our society?” Would it consider the biological link itself, or only such a link coupled with an attempt to establish a relationship worthy of constitutional protection? It is quite impossible to predict. Nonetheless, as the following highly publicized state court decisions have shown, the trend is to confer more and more deference to that biological link.

C. Unwed Fathers’ Rights at the State Level

1. Recent State Court Interpretation and Application of United States Supreme Court Rulings Regarding Unwed Fathers’ Rights

a. Baby Jessica

In one of the most highly-publicized child custody battles ever, the courts of Iowa and Michigan addressed the implications created by the placement of an infant for adoption in In re B.G.C. Baby girl Clausen, or Baby Jessica, was born February 8, 1991 to an unwed Cara Clausen. Cara named her current boyfriend, Scott, as the father of the baby, and both signed a release of parental rights, as well as waivers of notice of the termination hearing. On February 25, 1991, a hearing was held terminating the parental rights of Scott and Cara, and granting custody of Jessica to Jan and Roberta DeBoer.

When Cara later moved to revoke her release of custody, she also stated that she had lied earlier, and that Daniel Schmidt was the natural father of Jessica. Daniel then intervened in the adoption proceeding, established his paternity, and sought to assert his parental rights. In support of their petition for adoption, the DeBoers claimed that Schmidt was an unfit parent because he had abandoned Jessica and had also abandoned two other illegitimate children born

---

170. 496 N.W.2d 239 (Iowa 1992).
171. Id. at 240.
172. Id. at 240-41.
175. Id.
several years earlier. The Iowa Supreme Court affirmed the district court, ruling that the DeBoers had failed to establish by clear and convincing evidence that Schmidt had abandoned Jessica or that Schmidt was an unfit parent, and that a "best interests" inquiry was irrelevant until abandonment had been established.

In introducing its opinion, the court admitted it would be tempting to decide such a case based on emotion, but asserted that to do so would be an impermissible attempt at "uncontrolled social engineering." The court then rejected the argument that Schmidt had abandoned his child simply because he failed to protect his rights at the time Cara Clausen's pregnancy became known. More importantly, the court noted that a finding of abandonment, and therefore, a resulting termination of parental rights, "would deprive a father of a meaningful right, protected by the Constitution, to develop a parent-child relationship." This court, it appears, has taken the constitutional protection afforded by the Supreme Court to an existing biological and emotional relationship, and extended that protection to the opportunity to develop an emotional relationship, which the biological link provides.

In an unprecedented action, the DeBoers challenged the Iowa ruling in their home state of Michigan, asking the Michigan courts to apply a best interest of the child standard. Although a Michigan county court ruled in favor of the DeBoers, the Michigan Court of Appeals ruled that the Michigan courts had no jurisdiction to intervene, and held that the Iowa order compelling the return of Jessica to Daniel Schmidt must be enforced. The Michigan Supreme Court echoed the sensitivity of the Iowa court, but confirmed that Jessica

177. Id.; In re B.G.C., 496 N.W.2d 239, 241 (Iowa 1992).
178. In re B.G.C., 496 N.W.2d 239, 241 (Iowa 1992)(quoting In re Burney, 259 N.W.2d 322, 324 (Iowa 1977)).
179. In re B.G.C., 496 N.W.2d 239, 241 n.1 (Iowa 1992). The court noted that such an expectation of the father would be "totally unrealistic; [as] it would require a potential father to become involved in the pregnancy on the mere speculation that he might be the father." Id. Given that Iowa law requires a clear and convincing showing of abandonment by the father before his parental rights may be terminated, the court stated: "To hold that Daniel's action was required immediately ... at the risk of losing his parental rights would fly in the face of that standard." Id. See IOWA CODE ANN. § 600.8 (1992).
181. Id. at 246. The court did not do so lightly either. It recognized "the heartache which this decision will ultimately cause," but asserted that it was "presented with no other option than that dictated by the law in this state." Id. (quoting the district court's opinion).
183. Id. at 198.
must be returned to Daniel pursuant to the Iowa ruling.\textsuperscript{184} In the DeBoers' appeal to Justice Stevens, Circuit Justice for the Sixth Circuit, asking for a stay of the Iowa and Michigan rulings, they again argued that Jessica's best interests would be served if she remained with the DeBoers.\textsuperscript{185} Justice Stevens found that "[n]either Iowa law, Michigan law, nor federal law authorizes unrelated persons to retain custody of a child whose natural parents have not been found to be unfit simply because they may be better able to provide for her future and her education."\textsuperscript{186}

\textbf{b. Baby Richard}

In \textit{In re Doe}, an equally well-publicized and disputed case, the Illinois Supreme Court unanimously overturned the trial court and appellate court decisions, which had found the natural father was unfit, and therefore, had no standing to withhold his consent to the adoption of his child.\textsuperscript{187} Baby Richard was born to unwed parents Daniella Janikova and Otakar Kirchner on March 16, 1991.\textsuperscript{188} Four days later Daniella executed a consent to adoption, stated that the biological father was unknown, and Baby Richard was placed with his adoptive family.\textsuperscript{189} Fifty-seven days after Richard's birth, Daniella reconciled with Otakar and finally told him of Richard's existence and adoption.\textsuperscript{190} She had previously maintained that Richard died at birth.\textsuperscript{191}

In response to the news that he had a son, Otakar filed an appearance in the adoption proceeding, which was subsequently struck by the trial court because he lacked standing.\textsuperscript{192} After Otakar and

\footnotesize{\textsuperscript{184} \textit{In re Clausen}, 502 N.W.2d 649, 668 (Mich. 1993). Although recognizing the emotional stake that the parties had in the outcome, the court recognized a higher purpose. It stated: [T]hese cases have been litigated through fervent emotional appeals, with counsel and the adult parties pleading that their only interests are to do what is best for the child, who is herself blameless for this protracted litigation and the grief it has caused . . . . It is now time for the adults to move beyond saying that their only concern is the welfare of the child and to put those words into action by assuring that the transfer of custody is accomplished promptly. \textit{Id.} (footnote omitted).


\textsuperscript{187} \textit{In re Doe}, 638 N.E.2d 181 (Ill. 1994).


\textsuperscript{189} \textit{Id.}

\textsuperscript{190} \textit{Id.}

\textsuperscript{191} \textit{Id.}

\textsuperscript{192} \textit{Id.} at 651.
Daniella's September, 1991 wedding, Otakar filed a petition to establish paternity, which successfully established his paternity. Responding to Otakar's newfound standing, the Does amended their adoption petition, asserting that Otakar was an unfit parent by virtue of the "failure to demonstrate a reasonable degree of interest, concern or responsibility" as to Richard during the first 30 days after his birth.

Both the trial and appellate courts agreed with the Does, finding that Otakar was unfit, and that the interests of the child must come before the interests of biological parents. Specifically, the courts noted that Otakar did not confront Daniella about her claim of Richard's death, he did not consult a lawyer about his rights and responsibilities as an unwed father, and he did not file suit to establish paternity prior to Richard's birth. A strong dissent at the appellate court level admitted the best interests of the child are important, but noted that "we cannot ignore the gross injustice perpetrated upon the biological father in this instance."

Building off the appellate court dissent, the Illinois Supreme Court reversed in a very short, unanimous, opinion. Justice Heiple, writing for the court, stated that the lower court findings were not supported by the evidence, that Otakar had been denied the opportunity to discharge his familial duty, and that there was not compliance with the Illinois law requirement of a good-faith effort to notify natural parents of adoption proceedings. The court also noted that efforts by the mother, adoptive family, and other interested parties to prevent the unwed father from establishing contact or discovering the whereabouts of the child were ineffectual.

---

193. Id.
194. The identity of the adoptive parents was protected by the use of the fictional name "Doe."
196. Id. at 652, 655-56.

   The tradition of adoption in our society was created in order to provide a place of love and care for abandoned, unwanted and orphaned children. Baby Richard was never abandoned or unwanted. American society should not be so devoid of humanity, fairness and just plain good common sense.

   Id. at 666 (Tully, P.J., dissenting).
199. Id. at 663 (Tully, P.J., dissenting).
200. Id. Showing his displeasure with the lower court holdings, Heiple further wrote:

   "The adoption laws of Illinois are neither complex nor difficult of application . . . . These laws are designed to protect natural parents in their preemptive rights to their own children wholly apart from any consideration of the so-called best interests of the child." Id. at 182.
bouts of his child must be taken into consideration. In writing in support of the denial of rehearing, Justice Heiple stated that where the adoptive parents and their attorney knew that a real father existed and that the name of the father was known to the mother but she simply refused to disclose it, the adoptive parents proceed at their own peril.

This holding is significant in that it also extends the unwed father's rights beyond the requirements set forth in the "biology-plus" test. Here, sufficient attempts to establish contact or provide support will qualify the father's interests for constitutional protection.

201. Id. at 182 (McMorrow, J., concurring). The concurrence stated that the court must be "mindful of the circumstances in each case. ... [A] court is to examine the parent's efforts to communicate with and show interest in the child, not the success of those efforts." Id. (quoting In re Syck, 562 N.E.2d 174 (Ill. 1990)).

202. Id. at 181. Justice Heiple concluded that writing, in which he responded to the criticism heaped upon the court by the Chicago media, by stating: "We must remember that the purpose of an adoption is to provide a home for a child, not a child for a home." Id.

203. See id. For additional developments of unwed fathers' rights via case law, see In re Kayla L.C., 503 N.W.2d 22 (Wis. Ct. App. 1993)(holding that putative father accused of sexual assault has right to demonstrate a protected liberty interest and if successful, contest the sexual assault allegation); In re M.N.M., 605 A.2d 921 (D.C. 1992)(holding that once paternity is established, unwed father must have opportunity to present evidence of child's best interests, despite passing of statute of limitations); In re Kelsy S., 823 P.2d 1216 (Cal. 1992)(interpreting Lehr to mean that unwed father need only make reasonable and meaningful attempt to establish a relationship and holding that when the father steps forward to grasp his opportunity, his rights deserve constitutional protection); In re Raquel Marie X., 559 N.E.2d 418 (N.Y. 1990)(holding a father who has taken every available avenue to demonstrate that he is willing and able to enter into the fullest possible relationship with his child is entitled to full constitutional protection in preventing the termination of the relationship by strangers, even if he has not yet established any relationship with his child.); In re B.G.S., 556 So. 2d 545 (La. 1990)(holding that the interest of a biological parent in having an opportunity to establish a relationship with his child is worthy of constitutional protection, and further holding that Louisiana's putative father registry is insufficient to protect the father's interests in that it does not provide for notice or pre-termination procedure before a neutral decision maker); In re K.B.E. and T.M.E, 740 P.2d 292 (Utah 1987)(holding that father's failure by a few hours to timely file his notice of intent to claim paternity could not bar father from asserting his parental rights, because to do so would fly in the face of fundamental due process and because the registry statute was not created to encourage a "race" to cut off the father's rights); In re Baby Boy Doe, 717 P.2d 686 (Utah 1986)(holding that where a father does not know of the need to protect his rights, he has no reasonable opportunity to assert or protect those rights, and therefore, coming forward within a reasonable time thereafter should be deemed to comply with the statutory registry deadline).
D. Nebraska: Development of a Statutory Adoption Scheme and its Application in Case Law

1. L.B. 224: Nebraska Responds to Stanley

Scared into action by the implications of the United States Supreme Court's decision in Stanley, in September of 1974, a committee of attorneys and adoption agency representatives began work on a legislative bill that would revise the Nebraska adoption statutes. At the time of the Stanley decision, the Nebraska adoption statutes provided no rights for an unwed father. Only the consent of the mother was required to place a child born out of wedlock for adoption, and no notice to the father of an adoption proceeding was necessary.

The call to arms of the committee members came, not when Stanley was handed down, but in 1974 when a county court judge, concerned about the statute's failure to provide notice to the father prior to termination of his parental rights, ordered publication of an adoption proceeding notice. In cases where the unwed father's identity was unknown, the judge required publication of a notice similar to the following:

Notice, Sarpy County, the County Court of Sarpy County, Nebraska, (book page and number given), the matter of the adoption of baby girl (surname of mother), a minor, to the unknown father and to all concerned. Notice is hereby given that a petition has been filed in the adoption of baby girl (surname), a minor, alleging that this child has been abandoned by her natural father, as defined by the Nebraska statute, and that a petition will be heard in this Court, on (some date), at 9:00 in the morning.

While such a notice would, admittedly, pose little cause for concern in a metropolitan area, the "horror" of publishing such a notice in a rural community, the "injury to [the] clients as adopting parents," and the injury "to the child who is being adopted" caused by such notice served as quite a motivating factor in the development of the

No adoption shall be decreed unless the petition therefor is accompanied by written consents thereto executed by (1) the minor child, if over fourteen years of age, (2) any district court or separate juvenile court in the State of Nebraska having jurisdiction of the custody of a minor child by virtue of divorce proceedings had in any district court or separate juvenile court in the State of Nebraska, and (3) both parents, if living; the surviving parent of a child born in lawful wedlock; or the mother of a child born out of wedlock . . . .

205. Id.
207. Id. at 7.
208. Id. at 8.
209. Id.
210. Id.
The committee developed one bill which was proposed to the Legislature during the 1974 session but died there.\footnote{211} The product of further effort was Legislative Bill 224 (L.B. 224),\footnote{212} which was "intended to provide a definitive procedure whereby the rights of paternity, if any, of a natural father of a child born out of wedlock being placed for adoption be resolved and/or extinguished."\footnote{214} The scheme developed by the committee to satisfy that intent was to terminate completely the unwed father's parental rights if he failed to file a notice of intent to claim paternity within five days after the child's birth.\footnote{215}

The fundamental flaw with L.B. 224 was that it was developed by people concerned about the ramifications of \textit{Stanley}.\footnote{216} These people, naturally, were adoption agencies, their lawyers, and lawyers representing adoptive parents.\footnote{217} Unwed fathers were not represented during development of the bill. Despite testimony that members of the committee "have done their best to protect the interest of the father,"\footnote{218} the concerns addressed by the committee focused on the problems created by \textit{Stanley}'s recognition of an unwed father's rights. Among the problems discussed by committee members at the committee hearing were: (1) court requirements of notice to the father in lieu of relinquishment,\footnote{219} (2) providing assurances to adoptive couples that their adoption will not be blocked or delayed by a putative father,\footnote{220} and (3) avoiding the public embarrassment or condemnation resulting from publications of notice.\footnote{221}

In order to solve these problems, which are all created by the existence of an unwed father with protected rights, the committee proposed a scheme in which failure to file the necessary notice of parental intent within five days of the child's birth resulted in a statutory relin-
quishment of all parental rights. This relinquishment allowed the mother's consent to be sufficient to place a child born out of wedlock for adoption. If the necessary notice was timely filed, the statutory scheme provided procedures for a judicial determination of paternity and for a determination of custody.


(1) Relinquishment or consent for the purpose of adoption given only by a mother of a child born out of wedlock pursuant to section 43-104 shall be sufficient to place the child for adoption and the rights of any alleged father shall not be recognized thereafter in any court unless the person claiming to be the father of the child has filed with the Department of Social Services on forms provided by the department, within five days after the birth of such child, a notice of intent to claim paternity.

(2) The notice shall contain the claimant's name and address, the name and last-known address of the mother, and the month and year of the birth or the expected birth of the child.


If a notice of paternity is not filed within five days, the mother of a child born out of wedlock or an agent specifically designated in writing by the mother may request, and the Department of Social Services shall supply, a certificate that no notice of intent to claim paternity has been filed with the department and the filing of such certificate pursuant to section 43-102 shall eliminate the need or necessity of a consent or relinquishment for adoption by the natural father of such child.

224. L.B. 224, § 6, 1975 Neb. Laws 444, 446 (codified as amended at Neb. Rev. Stat. § 43-104.05 (Reissue 1993)). The codified section now reads:

If a notice of intent to claim paternity is filed within five days after the birth of such child, either the claimant-father, the mother, or her agent specifically designated in writing may file a petition in the county court in the county where such child is a resident for an adjudication of the claim of paternity. After the filing of such petition, the court shall set a hearing date upon proper notice to the parties not less than ten nor more than twenty days after such filing. If the mother contests the claim of paternity, the court shall take such testimony as shall enable it to determine the facts.

225. Id. § 7, 1975 Neb. Laws 444, 446 (codified as amended at Neb. Rev. Stat. § 43-104.06 (Reissue 1993)). The codified section now reads:

(1) If the claimant seeks to oppose any proposed relinquishment of a child by the mother and requests custody of the child, the court shall inquire into the fitness of the claimant, his or her ability to properly care for the child, and whether the best interests of the child will be served by granting custody to the claimant. Only upon the appointment of a guardian ad litem for the child, and a finding that the claimant is a fit person, is able to properly care for the child, and that the child's best interests will be served by granting custody to the claimant, shall custody be granted to the claimant.

(2) Except as otherwise provided in the Nebraska Indian Child Welfare Act, upon relinquishment by the mother to a child placement agency licensed by the State of Nebraska, or upon a finding that the child's best interests would not be served by granting custody to the claimant, to-
Filing of the required notice had a more substantial effect on the unwed father than mere reservation of his potential parental rights. Legislative Bill 224 provided that the notice form must also contain an acknowledgment by the father of his financial liability for the support and education of his child and for any pregnancy-related medical expenses of the mother.\textsuperscript{226} Further, the bill provided that the acknowledgment may be introduced as evidence in any paternity adjudication and may be used to estop the unwed father from denying his paternity or liability for support.\textsuperscript{227} In spite of the one-sidedness of the proposed legislative scheme, L.B. 224 was quickly passed by the legislature\textsuperscript{228} and signed into law by the Governor.\textsuperscript{229}

2. Judicial Application of the New Statutory Scheme

\textit{a. Shoecraft v. Catholic Social Services Bureau, Inc.}\textsuperscript{230}

Jerry Shoecraft learned that his girlfriend, Sheri Davis, was pregnant in June 1984.\textsuperscript{231} During the pregnancy the two remained in contact and had extended discussions concerning the prospective birth of the child.\textsuperscript{232} Shoecraft knew as much as four months in advance of the expected birth of plans for Davis to move to an outstate home and of the possibility that the child would be placed for adoption.\textsuperscript{233} Shoecraft did not offer financial support to meet the costs of Davis' outstate residence nor any of the pregnancy-related medical costs.\textsuperscript{234}
Shoecraft was notified on the date of the child's birth and visited Davis shortly thereafter. Shoecraft then filed a petition acknowledging his paternity, demanding custody of Justin, seeking a writ a habeas corpus to secure custody, and challenging the constitutionality of Nebraska's adoption statutes. The district court found that Shoecraft did have a constitutionally protected right to form and maintain a relationship with his son. The court further found that the five-day statute of limitations was "absurdly short" and did not adequately protect Shoecraft's "opportunity to form" a relationship with his son.

In outlining its approach to the case, the Nebraska Supreme Court observed that "disparate treatment of an unwed father and of an unwed mother in child adoption proceedings is a suspect classification." The Court then stated that a statute involving suspect classification must pass a strict scrutiny analysis. It continued: "Under this test, strict congruence must exist between the classification and the statute's purpose. The end the legislature seeks to effectuate must be a compelling state interest, and the means employed in the statute must be such that no less restrictive alternative exists."

In its analysis, the court first noted that the statute's failure to provide notice to the father of the birth of the child might render it violative of the Due Process Clause. It found, however, that because Shoecraft knew of the pregnancy, knew the mother's whereabouts, and was advised of the birth on the date of its occurrence, the lack of notice, as applied to Shoecraft, was not an unconstitutional deprivation of his due process rights.

Noting that the five-day notice statute's disparate treatment between an unwed father and an unwed mother is "[i]fairly obvious[ ]",

235. Id.
236. Id. at 575, 385 N.W.2d at 450.
237. Id.
238. See supra note 15.
241. Id. ¶¶ 11, 13.
243. Id.
244. Id. (quoting State v. Michalski, 221 Neb. 380, 385, 377 N.W.2d 510, 515 (1985)).
245. Id. at 578, 385 N.W.2d at 451.
246. Id.
the court then began its analysis of Shoecraft's equal protection claim. The court flatly stated that "the state has a compelling interest in the well-being of all children, whether born in or out of wedlock. . . ." It then gave its endorsement to the judgment of the Legislature that "the placement of the child in a home with persons anxious to have, love, and rear the child is to be preferred over a battleground;" [that prospective adoptive parents would assume custody of a newborn with the prospect of later having to surrender the child is questionable;] and that it is "clear that the problems of unwed births and adoptions are legitimate concerns of the Legislature." The court, however, failed to provide support for these assertions and failed to address whether any less restrictive alternative to the one challenged existed, as part of its previously defined strict scrutiny analysis. Finally, in discounting Shoecraft's interest, the court proclaimed that Shoecraft had exhibited no responsibility for mother or child, had not established a relationship with the child, and therefore, could rightly be treated differently by the Nebraska adoption law.

In his dissent, Chief Justice Krivosha recognized the issues that would only later be tackled by Baby Jessica, Baby Richard, and other cases. He questioned the reasonableness of the statute in that it does not require financial or emotional support, only the timely filing of the prescribed form. Then, echoing the district court's concern and the Lehr Court's discussion regarding the protection of an opportunity to develop a relationship, Chief Justice Krivosha queried:

But how can this father, or any father, under [section] 43-104.02 live with the child, nurture it, and support it if his rights to the child can be terminated during the time that the mother and child are in the hospital and before he is afforded any opportunity to establish those necessary ties?

He further recognized that the Caban court had specifically rejected the arguments that subjecting the rights of the father in favor of the mother or supporting speedy adoptions are necessary, as the Shoecraft

247. Id.
248. Id. at 577, 385 N.W.2d at 451.
249. Id. at 579, 385 N.W.2d at 452.
250. Id.
251. Id. at 580, 385 N.W.2d at 452.
252. See id.
253. Id. at 580, 385 N.W.2d at 452. In dismissing Shoecraft's claim, the court also noted that ignorance of the notice requirement is no excuse, as Shoecraft "is presumed, as are all citizens, to know the law." Id.
254. See supra notes 170-86 and accompanying text.
255. See supra notes 187-203 and accompanying text.
256. See supra note 203.
258. Id. at 585, 385 N.W.2d at 455 (Krivosha, C.J., dissenting).
majority had reasoned.259 Nonetheless, the majority would yield only so far as to admit that, under a different set of facts, it may find the challenged statutes unconstitutional.260 Such facts presented themselves just one year later.

b. In re S.R.S. and M.B.S.261

For 19 months after the birth of their child, the natural mother and father, though unmarried, lived together with the child as a family.262 The father provided for their support, assisted in household chores, and assisted in caring for the child.263 Ultimately, although the two had planned to marry, the relationship dissolved, and the mother moved in with another man.264 Over subsequent months, the mother left the child with various relatives, and the father took that opportunity to visit his child.265 He provided money, diapers, and medication for the child while it was staying with the mother's family, and he offered other financial assistance, but it was not accepted.266

Nearly two years after the child's birth, the mother again took custody of the child, while living with the other man.267 She again kept her whereabouts hidden from the father, who had made it clear he wanted the child.268 One month later, the mother placed the child for adoption and did not tell the father.269 During the next few months, the father repeatedly contacted the mother's family in a search for information about the child.270 He learned about the adoption four months after the child had been placed in an adoptive home.271 The father then filed an intent to claim paternity, asserting that he had never consented to the adoption, that he had not intended to relinquish his parental rights, and that he wanted custody of his son.272

The trial court dismissed his claim, finding that he had abandoned the child and his parental rights, and that he was barred from assert-


262. Id. at 760, 408 N.W.2d at 274.

263. Id. at 760-61, 408 N.W.2d at 274.

264. Id.

265. Id. at 761, 408 N.W.2d at 274. The child's mother, while living with the other man, had kept their location secret from the father, which had prevented any contact with the child. Id.

266. Id.

267. Id. at 762, 408 N.W.2d at 275.

268. Id.

269. Id.

270. Id. at 762-63, 408 N.W.2d at 275.

271. Id.

272. Id.
ing his rights by his failure to comply with section 43-104.02. On appeal, the Nebraska Supreme Court reversed, holding that the natural father's constitutionally protected interest in his relationship with his child had been violated. It distinguished the facts from those of Shoecraft, stating that "[i]n this case the [father] had a familial bond with the child which afforded his rights substantial protection." Resting its decision on Lehr, the court agreed that a biological link alone may not merit constitutional protection, but when combined with full commitment by the father, "his interest in personal contact with his child acquires substantial protection. . . ."

Chief Justice Krivosha again wrote separately concurring in the result. Reiterating his position that Shoecraft was wrongly decided and that the statutes are facially unconstitutional, he stated:

[T]his court has now ruled, in effect, that if the child is removed from the natural mother while in the hospital, thereby making it impossible for the natural father to establish a relationship with the child, the act will be held constitutional; but, if the natural mother delays placing the child out for adoption so that the natural father has the opportunity to develop a relationship with the child, the act will be declared unconstitutional. Such a holding is not, in my view, based upon any sound legal principals. Such uncertainty is bound to create much distress, as evidenced by the instant case. The scenario which I feared our decision in Shoecraft would ultimately bring about has, in my view, come to pass in the instant case, and will continue to repeat itself in future cases.

III. ANALYSIS

A. Applying Supreme Court's Standards to the Nebraska Statutes

There is more to the Nebraska adoption statutes than a five-day statute of limitations for the unwed father to file a notice of intent to claim paternity. While that is where it starts, that is not where it ends. As before mentioned, if the father fails to comply with the notice provision, his parental rights are terminated. If the form is filed, the statutes then provide that a certified copy of the notice must be sent to the mother or the agency of her direction, so that the father's

273. Id. at 763, 766, 408 N.W.2d at 275, 277.
274. Id. at 768-69, 408 N.W.2d at 278.
275. Id. at 769, 408 N.W.2d at 278.
276. Id. at 768, 408 N.W.2d at 278 (quoting Lehr v. Robertson, 463 U.S. 248, 261 (1983)).
277. Id. at 770, 408 N.W.2d at 279. (Krivosha, C.J., concurring).
278. Id. (Krivosha, C.J., concurring). In light of the Scovell v. Scheele conflict and others like it, Chief Justice Krivosha's statement has proven to be quite prophetic.
279. See supra notes 222-27 and accompanying text.
parental interests are made known.280 After that, either the father, the mother, or an agent specified by the mother may file a petition to adjudicate the paternity claim.281 Upon a successful determination of paternity, the unwed father may oppose relinquishment by the mother and seek custody of the child.282 To successfully do so, however, the father must show that he is a fit person and is able to care for the child.283 He must further show that the child's best interests will be served by granting custody to the father.284 If the mother has already relinquished the child, even if the father has asserted his rights by filing a timely notice, the only way he can defeat the adoption is by showing that the child's best interests would not be served by the adoption.285 If he fails to make this showing, his parental rights will be terminated.286

Standing alone, the five day notice requirement in the statutes comports with the holdings of the Supreme Court. The Supreme Court stated in *Lehr* that "the mere existence of a biological link does not merit equivalent constitutional protection."287 The Court required that a father step forward to participate in the rearing of the child and demonstrate commitment to the child's future.288 Until he does so, there is no constitutional protection. Certainly, from a public policy standpoint, only a father stepping forward and demonstrating interest in and commitment to his future child would be viewed to merit any protection, constitutional or otherwise.

Section 43-104.02 may create a short filing deadline only five days after the child's birth, but it also allows the father to file notice any time prior to the birth.289 It is not what the statute does, but what it fails to do, that makes the entire scheme constitutionally defective. This statute would not unfairly deprive an unwed father of due process if, as in *Lehr*, the father's ability to guarantee that he receive notice was entirely within his control.290 However, filing the required notice does not secure the father's rights completely, it merely pre-
vents the mother from unilaterally terminating his rights by relinquishing the child for adoption. Section 43-104.02 does not guarantee the father the right to withhold his consent to an adoption, nor does it guarantee that he receive notice of the birth or a relinquishment by the mother.

Other states have implemented putative fathers’ registries similar to Nebraska’s. The key difference is that these registration schemes mandate that any putative father who has filed a timely notice of parental intent is entitled to notice of any hearing to determine the identity of the child’s father and any hearing to determine or terminate his parental rights. The Nebraska statutory scheme lacks such mandatory notice. Strict enforcement of the Nebraska statutory scheme would appear much less harsh if, as in Lehr and these other states, the ability to guarantee the receipt of notice was entirely within the unwed father’s control.

Instead, Nebraska’s scheme forces the father to remain on constant guard, protecting his parental interests. Even after he has satisfied the notice requirement, the father must swiftly file a petition seeking custody of the child to prevent a relinquishment by the mother. Obviously, such a petition would be premature before the baby’s birth, and would be dismissed for lack of ripeness of the claim. Therefore, the father must remain ever vigilant to discover on his own the date of the child’s birth so that he may then assert his rights. These additional hurdles placed before the father are fundamentally unfair and would be remedied by mandatory notice to all registered fathers. If he has met the requirements of section 43-104.02, the state has in its records the father’s identity and location. The state’s failure to notify a father who has asserted his parental rights as required by the statute violates his constitutionally protected right of due process of law.


292. The Utah Supreme Court has held that “[i]t is not too harsh to require that those responsible for bringing children into the world outside the established institution of marriage should be required either to comply with those statutes that accord them the opportunity to assert their parental rights or to yield to the method established by society to raise children in a manner best suited to promote their welfare.” Sachez v. L.D.S. Social Servs., 680 P.2d 753, 756 (Utah 1984).


The Nebraska Supreme Court has set forth the analysis it employs when examining a claimed deprivation of a liberty interest without due process of law. In *State v. Cook* it held:

"The question in the first stage is whether there is a protected liberty interest at stake. If so, the analysis proceeds to the second stage, in which it is determined what procedural protections are required. Upon the resolution of that issue, the analysis moves on to the third and final stage, in which the facts of the case are examined to ascertain whether there was a denial of that process which was due."

Even in *Shoecraft*, the court recognized that the relationship between a parent and his child is constitutionally protected. The court earlier had held that "[t]here is no doubt that among the fundamental rights retained by the people under Article IX of the Bill of Rights of the Constitution of the United States is that of integrity of the family." Clearly, then, the answer to the first stage of the court's analysis must be yes.

At the second stage of the analysis, the Nebraska Supreme Court has specified the three factors it must consider to determine what process is due. The first is "the private interest that will be affected by the official action." The second is "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." The final factor is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Regarding the first factor, the United States Supreme Court has made it clear that a parent's desire for and right to "the companionship, care, custody and management of his or her children" is an important interest that "undeniably warrants deference and absent a powerful countervailing interest, protection." The private interest to be affected here is a substantial one.

Regarding the second factor, the Supreme Court held that "[a] parent's interest in the accuracy . . . of the decision to terminate his or her parental status is . . . a commanding one." It also noted the seriousness of any potentially erroneous determination when it stated: "When the state initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to..."
end it."304 While the stakes are obviously high, the risks of error are also necessarily high when any interested party is excluded from the procedure. An additional procedural safeguard, not only effectively used in other states but mandated by the United States Supreme Court,305 is providing notice to fathers who have registered their notice of parental intent.

Because the State already has all the necessary information to effect such notice, the third factor to be considered, fiscal or administrative burden, provides no cause to reject the proposed additional procedural safeguard. No research or tracking of putative fathers is necessary, as they have presented themselves to the state already. These fathers are eager to seize their parental rights and responsibilities and only the state's failure to provide notice prevents them from doing so. Under the "what process is due" determination advanced by the Nebraska Supreme Court itself, it is clear that more process is due than has been given. An examination of the facts in addressing the third stage of the analysis is unnecessary as it has already been determined that there is a procedural deficiency.306

Addressing the issue of notice, the Supreme Court has said: "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision-making when it acts to deprive a person of his possessions."307 The Court has further stated that "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' "308 The Court also noted that "[t]he requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking...[b]ut the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation..."309 The emphasis placed on notice and opportunity to be heard by the Supreme Court, when compared to the absence of any substan-

306. In response to the State’s argument that in certain emergency circumstances it may act without recognizing the requirements of due process, the Nebraska Supreme Court stated: "This may be true for those who live in some societies, but it is not true for those who live under the flag of the United States of America." In re R.G., 238 Neb. 405, 419, 470 N.W.2d 780, 790 (1991). Given the court’s position regarding the Nebraska adoption statutes, as represented in Shoecraft, apparently unwed fathers are not allowed to fly or pledge their allegiance to that same flag.
307. Fuentes v. Shevin, 407 U.S. 67, 80 (1972). Admittedly, children are not possessions, but it has been said that the rights to conceive and raise one's children are "[r]ights far more precious...than property rights." May v. Anderson, 345 U.S. 528, 533 (1953).
309. Id. at 81.
tial burden created by mandatory notice to registered fathers, makes it clear that the Nebraska statute is procedurally deficient and must be amended to include a notice requirement.

The provisions of section 43-104.06 are equally violative of the father's rights. No such hurdles regarding a showing of fitness and best interests of the child face the unwed mother when she seeks custody of her child. The Supreme Court held that "[g]ender-based distinctions must serve important governmental objectives and must be substantially related to achievement of those objectives. . . ."\(^{310}\) Although recognizing that a state's interest in providing for the well-being of children born out of wedlock is an important one, the Court held that such a reason "is not in itself sufficient to justify the gender-based distinction" of an adoption statute.\(^{311}\) It held that a statutory classification of that type "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."\(^{312}\) Nevertheless, the Nebraska Supreme Court held that the state's interest in speedy finalization of adoptions and placing children in stable homes as soon as possible justified the gender-based distinction.\(^{313}\)

An unwed mother and father, though similarly situated, are not treated alike by the Nebraska adoption statutes. Where the father has complied with the notice requirement, he should be viewed in the law as similarly circumstanced to the mother. While the mother may carry and bear the child, that is a fact of physical nature, not the emotional nature of her relationship with the child nor the nature of her rights under the law. The Supreme Court's comment in Caban regarding a New York statute may be equally applied here: "The facts of this case illustrate the harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children."\(^{314}\)

The Nebraska Supreme Court has failed to provide a cogent argument that this disparate treatment bears a substantial relation to the State's interest.\(^{315}\) As noted before, in Shoecraft the court makes an

---

311. Id. at 391.
312. Id. (quoting Reed v. Reed, 404 U.S. 71, 76 (1971), and Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).
unsupported assertion that the State has a compelling interest in: 1) the well-being of all children, 2) the proper nurture and care of these children, 3) the transfer of the children from unwed mothers by relinquishment, and 4) the adoption of these children.\textsuperscript{316} It then continued by rationalizing the approach taken by the Legislature, but failed completely to provide any precedent or legal reasoning that could support the approach enacted by the Legislature.\textsuperscript{317} The court also abandoned its proposed strict scrutiny analysis when it failed to consider whether a less restrictive statutory scheme could meet the ends intended by the Legislature.\textsuperscript{318} Certainly, such a scheme exists. Failure of others to act responsibly, though, is no reason to allow these statutes to ignore or strip in the name of percentages and efficiency, the rights of those who are courageous enough to step forward. For those fathers that do comply with Nebraska's registration requirement, the state should afford them notice of the child's birth in order to prevent the potential unconstitutional application of the adoption statutes.\textsuperscript{319} Further, fathers that comply with Nebraska's statutory scheme should not face burdens that the unwed mother is not also required to face. Rather than burden the father with a showing of his fitness and ability, the adverse party should have the burden of showing the father's unfitness and his inability to be a father.\textsuperscript{320} Likewise, rather than burden the father with a showing that the child's best interests would be served by granting him custody, the adverse party should have the burden of showing that the best interests of the child would not be served by placing the child in the father's custody.\textsuperscript{321} Finally, where the mother has already relinquished the child, the adverse party should again have the burden of showing the father's unfitness, for to not do so would allow the mother to still unilaterally destroy some of the unwed father's rights.\textsuperscript{322} While the Supreme Court cases have not been ultimately clear, they have made it clear that such a result as that will not withstand judicial scrutiny.\textsuperscript{323}

\textbf{B. Impact on Scovell}

Although unconstitutional for its failure to provide notice to fathers who have registered their notice of intent to claim paternity, its requirement that such fathers must establish their fitness and ability

\textsuperscript{316} Id. at 577, 385 N.W.2d at 451.
\textsuperscript{317} See id.
\textsuperscript{318} See id. at 577, 385 N.W.2d at 451, where the court states that under a strict scrutiny analysis it must determine whether a less restrictive alternative to the means employed by the Legislature will produce the same desired effect.
\textsuperscript{319} See supra notes 279-309 and accompanying text.
\textsuperscript{320} Neb. Rev. Stat. § 43-104.06(1) (Reissue 1988).
\textsuperscript{321} Id.
\textsuperscript{322} Neb. Rev. Stat. § 43-104.06(2) (Reissue 1988).
\textsuperscript{323} See supra notes 48-134 and accompanying text.
to parent, and its requirement that the father prevail in a best inter-
ests analysis, while requiring nothing of the mother, the Nebraska adoption statutes did not deprive Ronald Scovell of any constitutional rights. Scovell failed to take advantage of the protections that the Nebraska statutes do afford. How, then, can he complain that the statutes provided him too little protection? As the district court found:

Mr. Scovell has never asked to see Jorie Lyn, never requested visitation, and has never offered to help pay for the medical bills incurred by her birth, or to support her.324

Further, upon notice that Ms. Babb was pregnant, Scovell failed to assert his parental rights in Nebraska or in any other state. He made no inquiries about Babb’s whereabouts and made no attempts to contact her in anticipation of the child’s birth. Clearly, this is no father who has grasped his opportunity to establish a relationship with his child. His complaint that Ms. Babb told him that she was going to abort the pregnancy and that her family refused to assist him in contacting her325 would carry more weight if he had, indeed, made efforts to maintain contact with Ms. Babb, assert his rights, and show a commitment to Jorie Lyn’s future, rather than blame others for his failure to make such attempts.

Because of Scovell’s acts, or failure to act, his parental rights were fairly terminated by the Nebraska courts. Although he failed to comply with the statutory requirements, the Scheeles’ adoption proceeding was stayed while the court heard Scovell’s plea. He was heard, he was allowed to present his case, and the court determined that he had failed to manifest sufficient interest in his child to merit protection by the Constitution.

Developing a statutory scheme that will withstand constitutional challenge, still, does not wholly resolve the problems presented. To be effective, the availability and impact of the statutes must be publicized.326 Because most courts will not hesitate to hold that ignorance

325. See supra notes 1-25 and accompanying text.
326. See, for example, OKLA. STAT. ANN. tit. 10, § 55.1(G)(1-2) (West 1987), which specifically provides that the Department of Human Services shall provide for the statewide publication and distribution of information regarding the existence of the registry, the proper procedures for entry and registration, and the consequences of the failure to register.

Nebraska could learn a valuable lesson from Oklahoma’s efforts to publicize the existence of the registry. Upon visiting the Nebraska Department of Social Services’ Lincoln headquarters, not a single informational item regarding or even mentioning the putative father registry was found among the Department’s two literature displays.
of the law is no excuse, it is important that those affected by these statutes be made aware of them. The statistics shown below provide evidence that there are a frighteningly high number of people in Nebraska who are ignorant of the putative father registry, and therefore, are likely to unwittingly forfeit their parental rights.

<table>
<thead>
<tr>
<th>Year</th>
<th># Births in Nebr.</th>
<th># Out-of-Wedlock</th>
<th># Adoptions</th>
<th>Timely Notices</th>
<th>Late Notices</th>
</tr>
</thead>
<tbody>
<tr>
<td>1993</td>
<td>23,196</td>
<td>5,431</td>
<td>977</td>
<td>19</td>
<td>4</td>
</tr>
<tr>
<td>1992</td>
<td>23,336</td>
<td>5,260</td>
<td>991</td>
<td>13</td>
<td>7</td>
</tr>
<tr>
<td>1991</td>
<td>23,947</td>
<td>5,144</td>
<td>973</td>
<td>12</td>
<td>6</td>
</tr>
</tbody>
</table>

IV. CONCLUSION

The nature of the family and the protection to which its many aspects are entitled have continued to evolve and expand, while the courts wrestle with the issues discussed within this Note. Because state law still controls when the issue of family relationships is presented, a great responsibility falls on the state to establish efficient and effective means to protect all members of and all relationships within the family. As the Supreme Court and state court cases have shown, the area of adoption law, and specifically, the area of unwed fathers' rights is still unsettled. Nevertheless, it is well-settled that notice to those who have taken affirmative steps to protect themselves must be afforded before any liberty interest is taken. Nebraska argues that unwed father's rights will delay adoption proceedings and insert instability and uncertainty into the adoptive home. However, quite to the contrary, it is precisely because an unwed father is not given notice in Nebraska that such instability and uncertainty is created. This instability and uncertainty manifests itself in the potential for future challenges to the adoption, based on denials of due process and equal protection. Guaranteeing notice, rather than statutory procedural complexity, will ensure certainty, stability, and constitutionality in the Nebraska adoption statutes.

Kevin T. Lytle '96


328. Statistics provided by the Nebraska State Court Administrator's Office and the Nebraska Bureau of Health Data Services.

329. Notices filed after the five-day limit are also forwarded to the mother, so that she is aware of the unwed father's interest in asserting his parental rights.

330. See Lehr v. Robertson, 463 U.S. 248 (1983). The Lehr Court observed that the "intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases." Id. at 256.