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Due Process Rights of Putative Fathers-Lehr v. Robertson

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COMMENT

DUE PROCESS RIGHTS OF PUTATIVE FATHERS—*Lehr v. Robertson* — The traditional family relationship has undergone a drastic, if not revolutionary, change in recent years. The phenomenon of the single-parent household, once rare, is now commonplace. Families headed by single parents presently constitute a substantial minority in comparison to families headed by the traditional parental team of mother and father.[1] The rise in illegitimate births has been dramatic and unprecedented, causing reverberations throughout society.[2] As this situation pervades society, the constitutional rights of unwed parents in relation to their illegitimate children must be analyzed, defined, and implemented.

The United States Supreme Court attempted to define some of these rights in *Lehr v. Robertson*.[3] In *Lehr*, a daughter, Jessica, was born out of wedlock to Lorraine Robertson on November 9, 1976. Eight months after Jessica was born, Lorraine Robertson married Richard Robertson. On December 21, 1978, when Jessica was just over two years old, the Robertsons filed an adoption petition in the Family Court of Ulster County, New York. The court heard testimony from the Robertsons and received a favorable report from the Ulster County Department of Social Services. On March 7, 1979, the Family Court entered an

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1. The rise of single parent households has been dramatic over the past decade. In 1970, .8% of children under 18 lived with a single parent who had never married. By 1980, this figure increased to 2.8%. Moreover, in 1970 16.5% of children under 18 years of age lived in a household headed by only one parent. By 1980, this figure jumped to 25.4%. (Figures include households headed by mothers only, married but spouse absent, and father only). U.S. Bureau of the Census, Statistical Abstract of the United States, 1983-84 at 53 (104 ed. 1983).

2. There were 665,700 illegitimate births in the United States in 1980. This figure accounted for approximately 18.4% of the total births in that year. In contrast, there were 398,000 illegitimate births in 1970, representing 10.7% of the total births in that year. In 1960, there were only 224,300 illegitimate births which represented 5.3% of the total births for that year. *Id.* at 70.

3. 103 S. Ct. 2985 (1983).

order of adoption for young Jessica.[4]

Jonathan Lehr, appellant in the present case, is assumed to be Jessica's natural father.[5] He had lived with Lorraine Robertson prior to Jessica's birth, and had visited both mother and daughter at the hospital after the delivery. Nonetheless, Lehr's name does not appear on Jessica's birth certificate. In addition, Lehr did not resume his residence with the mother after Jessica's birth. According to the Court, appellant has provided neither mother nor daughter with any financial support. Also, he has never offered to marry the mother.[6]

In New York, a "putative father registry" is maintained in an effort to provide notice to men who claim paternity of a child born out of wedlock.[7] Putative fathers must voluntarily enter their names in this "registry." It provides this class of putative fathers with notice of any adoption proceedings initiated with respect to their children. Before signing the adoption order in the present case, the Ulster County Family Court examined this registry. It found that Lehr had not entered his name on the list.[8]

In addition to providing this putative father registry, New

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4. *Id.* at 2987.

5. *Id.* at 2987 n.3.

6. *Id.* at 2988.

7. At the time Jessica's adoption order was entered, § 372-c of the New York Social Services Law provided in pertinent part:

> (1). The department shall establish a putative father registry which shall record the names and addresses of . . .
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> (b) 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; . . .
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> (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.
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> (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.
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> (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.

N.Y. SOC. SERV. LAW § 372-c (McKINNEY 1978).

8. 103 S. Ct. at 2988.

York also required that notice of an adoption proceeding be given to several other classes of unwed fathers. These classes included those men who had been adjudicated to be the father, those who had been identified as the father on the child's birth certificate, those who lived openly with the child and the child's mother and who held themselves out to be the father, those who had been identified as the father by the mother in a sworn, written statement, and those who were married to the child's mother before the child was six months old.[9] Lehr admittedly did not belong to any of these classes.[10] Consequently, he did not receive notice from either of these two possible statutory alternatives.

On January 30, 1979, approximately a month after the Robertsons had filed their adoption petition, Lehr filed a "visitation and paternity petition" in the Family Court of Westchester County. In this petition he asked for a determination of paternity, an order of support, and reasonable visitation rights. Notice of this proceeding was served on the Robertsons in late Feb-

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9. At the time Jessica's adoption order was entered, subdivisions 2-4 of § 111-a of the New York Domestic Relations Law provided in pertinent part:

> (2). Persons entitled to notice, pursuant to subdivision one of this section, shall include:
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> (a) any person adjudicated by a court of this state to be the father of the child;
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> (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;
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> (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-c of the social services law;
>
> (d) any person who is recorded on the child's birth certificate as the child's father;
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> (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;
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> (f) any person who has been identified as the child's father by the mother in written, sworn statement; and
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> (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.
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> (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 interest of the child.

N.Y. DOM. REL. LAW § 111-a (2-3) (McKinney 1978).

10. 103 S. Ct. at 2988.

ruary. Four days later the Robertsons' attorney notified the Ulster County Family Court that Lehr had commenced a paternity proceeding in Westchester County. The Ulster County judge subsequently entered an order staying Lehr's paternity proceeding until the judge could rule on a motion to change the venue of that proceeding to Ulster County. On March 3, 1979, Lehr received notice of the change of venue motion and, for the first time, learned that an adoption proceeding was pending in Ulster County.[11]

On March 7, 1979, the Ulster County Family Court signed and entered the Robertsons' adoption order.[12] Subsequently the Westchester Family Court granted their motion to dismiss the paternity petition of Lehr. He did not appeal from this dismissal.[13] Rather, on June 22, 1979, he filed a petition to vacate the order of adoption on the grounds that it was obtained by fraud and in violation of his constitutional rights. The Ulster County Family Court received written and oral argument on the question of whether it had acted properly by ordering the adoption without first providing Lehr with notice. After deliberating for several months, the court denied the petition.[14]

The Appellate Division of the Supreme Court of New York affirmed, with one justice dissenting, the decision of the Ulster County Family Court.[15] The New York Court of Appeals affirmed by a divided vote.[16] After oral orgument on the merits, the United States Supreme Court held that it had jurisdiction to hear the matter.[17]

Lehr presented on appeal two alternative constitutional grounds upon which New York's statutory scheme could be found flawed. First, he contended that a putative father's relationship with his child born out of wedlock is an interest in lib-

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11. *Id.* at 2988-89.
12. *Id.* at 2987.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 2990 n.9. The Court postponed consideration of its jurisdiction until after hearing argument on the merits. The Court concluded Lehr did draw into question the validity of the New York statutory scheme on the ground of its being repugnant to the federal Constitution, that the New York Court of Appeals upheld that scheme and therefore the court had jurisdiction pursuant to 28 U.S.C. § 1257 (2). *Id.* at 2990.

erty which may not be deprived without due process of law; he thus argued that he had a constitutional right to prior notice and an opportunity to be heard in his daughter's adoption proceeding before he was deprived of that interest.[18] Secondly, Lehr asserted that the gender-based classification in the statute, which denied him the right to consent to Jessica's adoption and accorded him fewer procedural rights than her mother, violated the equal protection clause of the fourteenth amendment.[19]

This comment will focus almost entirely on a discussion of the Court's analysis of Lehr's due process challenge. Although the equal protection issue is significant in the present case, Lehr's due process argument appeared in a "novel context" before the Court.[20] An examination of the Court's opinion in the present case will show that the great majority of the decision is devoted to assessing the due process question. Therefore, this comment will relate the major points of the Court's equal protection reasoning, but will focus primarily on a discussion of the constitutional rights of a putative father under the due process clause.

The fourteenth amendment provides that no state shall deprive any person of life, liberty, or property without due process of law.[21] Initially, the Court began its analysis by stating that the due process clause was being invoked in a "novel context" in *Lehr*.[22] Therefore, said the Court, the "precise nature of the private interest" that is threatened by state intervention must be examined.[23]

Most parent-child relationships in formal families, where the parents are married and the children are a product of this marriage, are afforded constitutional protection in appropriate cases.[24] In some cases, moreover, the Court noted that the Con-

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18. *Id.* at 2990.

19. *Id.*

20. *Id.*

21. U.S. CONST. amend. XIV, § 1.

22. 103 S. Ct. at 2990.

23. *Id. See* Cafeteria Workers v. McElroy, 367 U.S. 886, 895-896 (1961).

24. 103 S. Ct. at 2990. Justice Stevens, writing for the majority, stated 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.*

stitution supersedes state family law and provides even greater protection for certain formal family relationships.[25] However, the Court stated that it had always emphasized that the rights of parents were to be a "counterpart of the responsibilities they have assumed."[26] The link between parental duty and parental right was stressed most forcefully in the past when the Court declared it a "cardinal principle 'that the custody, care, and nurture of the child reside first in the parents.' "[27] Accordingly, the Court held that the relationship of "love and duty" in a family is an interest in liberty entitled to constitutional protection.[28]

This line of reasoning, espousing the values of "love and duty" and "responsibilities," was chiefly limited to formal family relationships.[29] The Court distinguished the present case from past decisions, because here it was the father of a child born out of wedlock who claimed that he had been deprived of a constitutionally protected interest in liberty.[30] Since the appellant in the present case is the father of a child born out of wedlock, the Court reviewed three previous cases which examined the extent "to which a natural father's biological relationship with his illegitimate child receives protection under the Due Process Clause."[31]

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25. *Id.* at 2991.

26. *Id.* In addition, the Court stated that it always emphasized the "paramount interest in the welfare of the children" when examining the rights of parents with respect to their offspring. *Id.*

27. *Id.* (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

28. *Id.* It must be noted, however, that the Court stated that the relationship of love and duty "in a *recognized* family unit" is an interest entitled to constitutional protection. (emphasis added). *Id.*

29. *Id.*

30. *Id.* at 2991-92.

31. *Id.* at 2992. The first of these cases was Stanley v. Illinois, 405 U.S. 645 (1972). *Stanley* involved the constitutionality of an Illinois statute that conclusively presumed every father of a child born out of wedlock to be an unfit parent. The Illinois statute provided that, upon the death of the mother, the children born out of wedlock would automatically become wards of the state. Consequently, a determination of the father's fitness as a parent was completely usurped and held irrelevant by the Illinois procedures. In *Stanley*, the father of the children born out of wedlock had lived with and supported them throughout their lives and had lived with the mother "intermittently" for eighteen years. When the mother died, the children automatically became wards of Illinois. The father was given no opportunity to present evidence as to his fitness as a parent. The Court held that the Illinois procedure violated the due process clause by destroying the father-child relationship without granting the father an opportunity to present his side.

Quilloin v. Walcott, 434 U.S. 246 (1978), was the second case cited by the Court

Following an examination of these three cases, the Court concluded that only when an unwed father demonstrates a "full commitment" to the responsibilities of parenthood can it be said that his interest in personal contact with his illegitimate child acquires substantial protection under the due process clause.[32] The mere existence of a biological link does not merit equivalent constitutional protection.[33] If the natural father grasps the opportunity his biological connection to a child provides and accepts "some measure of responsibility for the child's future," he may enjoy both the "blessings" of the parent-child relationship and constitutional protection against any arbitrary dissolution of this relationship.[34] However, if he fails to act in such a responsible manner, the "Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie."[35]

Significantly, the Court stated that this was not a case

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which dealt with the constitutional rights of a putative father. According to the Court, *Quilloin* involved the constitutionality of a Georgia statute which authorized the adoption of a child born out of wedlock over the objection of the natural father. The father in *Quilloin* had never legitimated the child, attempting to do so only after the mother and her new husband had filed the adoption petition. The Court unanimously agreed with the trial court that the adoption of the child by the new husband was in the "best interests of the child," and that the state's actions were consistent with the due process clause.

A third case dealing with a similar problem was Caban v. Mohammed, 441 U.S. 380 (1979). *Caban* involved the conflicting claims of two natural parents who had maintained joint custody of their children until they were two and four years old, respectively. The natural father challenged the validity of an order authorizing the mother's new husband to adopt the children. The father posited that he was denied his rights under both the equal protection clause and the due process clause. A majority of the Court upheld his equal protection claim, finding it unnecessary to address his due process claim.

The Court in *Lehr* noted, however, that the comments of the dissent in *Caban* concerning the natural father's due process challenge were "instructive." 103 S. Ct. at 2992. This was because the four dissenting justices clearly identified the "distinction between a mere biological relationship and an actual relationship of parental responsibility." *Id.* The Court quoted Justice Stewart's dissent in *Caban*, which stated that "parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." 441 U.S. at 397. Furthermore, the Court noted that the other three dissenters in *Caban* were prepared to "assume that, if and when one develops, the relationship between a father and his natural child is entitled to protection against arbitrary state action as a matter of due process." *Id.* at 2993.

32. *Id.* at 2993.

33. *Id.*

34. *Id.*

35. *Id.* at 2994.

where the issue involved assessing the constitutional adequacy of a state's procedures for terminating a "developed relationship."[36] The Court therefore stressed that Lehr had "never had any significant custodial, personal, or financial relationship" with his daughter.[37] The Court stated that it was concerned solely with the question of whether New York had adequately protected Lehr's opportunity to form such a relationship.[38]

The Court then addressed the question of the adequacy of the New York statutes to provide putative fathers with the means to establish a "significant custodial, personal, or financial relationship" with their children.[39] The statutory scheme provided by New York, that of a "putative father registry," adequately provided "interested putative fathers" with notice.[40] The Court stressed that all the lower New York courts had observed that the matter of notice was entirely within Lehr's voluntary control.[41] By availing himself of the "putative father registry," Lehr could have guaranteed that he would have received notice of any adoption proceedings concerning his daughter.[42] The possibility that he was ignorant of the law, according to the Court, "cannot be sufficient reason for criticizing the law itself."[43] The Court held that the law adequately protected the interests of putative fathers who voluntarily took advantage of its notice provisions. The Court concluded that it could not

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36. *Id.*

37. *Id.*

38. *Id.* The Court emphasized that it was concerned only with whether the New York statutory scheme adequately protected Lehr's opportunity to form a significant and developed relationship with his daughter. According to the Court, Lehr had not substantiated or pursued his relationship with his daughter so as to have developed a protected interest which would automatically compel procedural due process protection. The Court concluded that the statutory scheme was adequate to protect Lehr's opportunity, if he so desired, to form a relationship with his daughter. *Id.* at 2995.

39. *Id.* at 2994. The adequacy of New York's attempt to provide fathers with the opportunity to establish a "significant" relationship with their illegitimate children was seen by the Court to be embodied in § 111-a of the Domestic Relations Law. *See supra* note 9 and accompanying text.

40. *Id.* The Court made reference to the New York statutory scheme, which provided putative fathers with a "putative fathers registry." This "registry," its purpose, and its provisions are discussed *supra* note 7 and accompanying text.

41. 103 S. Ct. at 2995.

42. *Id.*

43. *Id.*

"characterize the state's conclusion as arbitrary."[44]

Lehr further argued that, even if the New York statutes adequately protected his opportunity to form a relationship with his daughter, he was nevertheless entitled to "special notice," because the trial court and the mother knew that he had filed an affiliation proceeding in another court.[45] The Court answered this claim by flatly stating that "this argument amounts to nothing more than an indirect attack on the notice provisions of the New York statute."[46] The Court declared that the Constitution does not require either a trial judge or a litigant to give "special notice" to nonparties who are capable of asserting and protecting their own rights.[47] Therefore, no merit was found in Lehr's contention that his constitutional rights were violated because the family court "strictly complied" with the notice provisions of the statute.[48]

After analyzing and dismissing Lehr's due process challenge, the Court addressed his equal protection claim. In a significantly briefer exposition of its views, the Court first stated that the concept of equal justice requires the states to govern impartially.[49] In addition, it asserted that a state may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective.[50] The procedures adopted by New York were specifically designed to promote the best interests of the child, protect the rights of interested third parties, and ensure promptness and finality.[51] The majority noted that Lehr did not contest the importance of

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44. *Id.* The Court concluded that the statutes adopted by New York were reasonable and non-arbitrary in carrying out the intent of the Legislature. The Court refused to place itself in the position of the legislators, stating that "regardless of whether we would have done likewise if we were legislators instead of judges, we cannot characterize the state's conclusion as arbitrary." *Id.*

45. *Id.*

46. *Id.*

47. *Id.* In support of this proposition, the Court stated: "The legitimate state interests in facilitating the adoption of young children and having the adoption proceeding completed expeditiously that underlie the entire statutory scheme also justify a trial judge's determination to require all interested parties to adhere precisely to the procedural requirements of the statute." *Id.*

48. *Id.*

49. *Id. See also* New York Transit Authority v. Beazer, 440 U.S. 568, 587 (1979).

50. 103 S. Ct. at 2995. *See also* Reed v. Reed, 404 U.S. 71, 76 (1971).

51. 103 S. Ct. at 2996. The Court noted that appellant did not contest the vital importance of these ends to the people of New York. *Id.* at 2996 n.25.

these objectives. He did highlight, however, certain statutory provisions which provided the mother of an illegitimate child the right to veto an adoption, while denying that right to certain classes of putative fathers. Lehr contended that this procedure, based solely on gender-classification, was "invidious."[52]

The existence or nonexistence of a substantial relationship between a parent and child is a relevant factor in evaluating the rights of a parent.[53] The Court reiterated its rationale from *Quilloin v. Walcott*[54] that the natural fathers in both that case and the case at bar "had never shouldered any significant responsibility" with respect to the daily care and supervision of the children."[55] The Court found that since, like the father in *Quilloin*, the appellant in this case never established a substantial relationship with his daughter, the New York statutory scheme was not "invidious" and did not deny Lehr equal protection of the law.[56] In conclusion, the Court declared that "if one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a state from according the two parents different legal rights."[57]

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52. *Id.* at 2996.

53. *Id.*

54. 434 U.S. at 256; *see supra* note 31 and accompanying text.

55. 103 S. Ct. at 2996. The Court quoted from its opinion in *Quilloin* to the effect that the putative father in that case, like the appellant in the present case, "never shouldered any significant responsibility with respect to the daily supervision, education, protection or care of the child." 434 U.S. at 256.

56. 103 S. Ct. at 2996.

57. *Id.* at 2996-97. The Court distinguished its decision in Caban v. Mohammed, 441 U.S. 380 (1979). The Court stated that, in *Caban*, it had held unconstitutional the New York statutes involved in the present case as applied in certain classes of cases in which the mother and father were in fact similarly situated with regard to their relationship with the child. *Caban*, according to Justice Stevens, posited that the equal protection clause was violated when a mother was granted a veto over the adoption of her children, but did not grant such a power to a father who had admitted paternity and had participated in the rearing of the children. Justice Stevens believed that, in *Caban*, "the Court made it clear . . . that if the father had not 'come forward to participate in the rearing of his child, nothing in the Equal Protection Clause [would] preclude the State from withholding from him the privilege of vetoing the adoption of that child.' " 103 S. Ct. at 2996, quoting from Caban v. Mohammed, 441 U.S. 380, 392 (1979).

In Justice Stevens' opinion, the parents in the present case were not like the parents in *Caban*. In the present case, "appellant never established any custodial, personal, or financial relationship" with his daughter. 103 S. Ct. at 2996. Therefore, the parents in both cases were not "similarly situated," and could constitutionally be accorded different legal rights. *Id.*

A strong dissent was filed by Justice White, which was joined by Justices Marshall and Blackmun. The dissent stated that the question in the case was whether New York could constitutionally deny the natural father, Lehr, notice and an opportunity to be heard when New York, in reality, had actual notice of his existence, whereabouts, and interest in his daughter, Jessica.[58] Justice White stated that "if the entry of an adoption order in this case deprived Lehr of a constitutionally protected interest," he is entitled to "notice and an opportunity to be heard."[59]

There is a divergence between the facts as related by the majority and by the dissent. The dissent prefaces its recitation of the facts by declaring that they are "according to Lehr."[60] The opinion then states that Lehr contends that he lived with appellee Lorraine Robertson for approximately two years immediately prior to the birth of Jessica. Appellant also stated that, after Jessica's birth, he visited mother and daughter each day in the hospital during their stay. After this the mother, Lorraine Robertson, allegedly concealed her whereabouts from appellant. According to the dissent, Lehr never ceased in his efforts to locate Lorraine Robertson.[61] On those sporadic occasions when he did find the mother, he visited with her and his daughter to the "extent she was willing to permit."[62]

Between August, 1977, and August, 1978, Lehr was unable to locate Lorraine Robertson. During that time she married Richard Robertson. Lehr, with the aid of a detective agency,[63] located the mother and his daughter in August, 1978. At that time he allegedly offered to provide financial support and set up a trust fund for Jessica, but her mother refused. Lehr then retained counsel, who wrote to appellee in early December, 1978, requesting that she permit Lehr to visit Jessica and, in the alter-

58. 103 S. Ct. at 2997.

59. *Id.*

60. *Id.*

61. *Id.* Throughout the dissent, the divergence between what the majority and what the dissenters viewed as relevant facts was substantial. In an effort to convey this divergence, this comment will discuss the points where the emphasis and view of the dissent disagrees with the majority.

62. *Id.* at 2997.

63. *Id.*

native, threatening legal action on his behalf.[64] In a footnote, the dissent found it "noteworthy" that the mother has never denied that Lehr is the father.[65]

Justice White's dissent initially postulated that, to determine what constitutes a protected liberty interest, the Court must look not to the "weight" but to the "nature" of the interest at stake.[66] Consequently, the dissent stressed that the "nature of the interest at stake" in the present case is that of a natural parent in his child, an interest that "has long been recognized and accorded constitutional protection."[67] Furthermore, it is "beyond dispute" that both a putative father and his child have a "compelling interest" in the outcome of an adoption proceeding that may result in the termination of their relationship.[68]

The dissent contends that Lehr's version of the facts "paints a far different picture than that portrayed by the majority . . . [which] obviously does not tell the whole story."[69] Accordingly, appellant has never been afforded "an opportunity to present his case."[70] Therefore, Lehr could not establish his interest during the adoption proceeding, a proceeding which could conclusively terminate all his rights in relation to his daughter. The dissent stressed that it could not make such a judgment based on the quality or substance of a relationship without a complete and developed factual record.[71]

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64. *Id.*

65. *Id.* n.1. Justice White stated that "[t]he majority correctly assumes that Lehr is in fact Jessica's father." *Id.*

66. *Id.* at 2998. The dissent quoted from Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972). The dissent argued that "to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake . . . to see if the interest is within the Fourteenth Amendment's protection. . . ." *Id.* (emphasis in original).

67. 103 S. Ct. at 2998.

68. *Id.* The dissent supported this position by quoting from Lassiter v. Department of Social Services, 452 U.S. 18, 27 (1981), which stated that "[a] parent's interest in the accuracy and justice of the decision to terminate his or her parental status is . . . a commanding one." *Id.*

69. 103 S. Ct. at 2998.

70. *Id.* The dissent takes specific umbrage at the fact that the majority's recitation of the facts, of the case, as well as its opinion, relied on its view that Lehr did not seek to establish a legal tie with his daughter until after she was two years old.

71. *Id.* at 2998. The dissent noted that it could not "fairly make a judgment" based on the record that was before it. Lehr could not "establish his interest during the adoption proceedings, for it is the failure to provide Lehr notice and an opportunity to be heard there that is at issue here." *Id.* As a result, there exists, in the dissent's opinion, an

Justice White additionally argued that a "mere biological relationship is not as unimportant as the majority suggests."[72] In fact, the "biological connection" is of itself a relationship that creates a protected liberty interest.[73] The nature of the interest at issue is a parent-child relationship; how well-developed that relationship is goes to its "weight," not its "nature."[74] All that is required to create a liberty interest is a "determination" of the "fact" that the parent-child relationship exists, a fact which, stated the dissent, "even the majority agrees must be assumed to be established."[75]

The dissent concedes that due process does not require actual notice to every putative father.[76] The procedures of a state, however, must represent at least a "reasonable effort" to determine the identity of the putative father and give him notice.[77] In the present case, according to the dissent, there can be no doubt that New York knew the identity and location of Lehr.[78] Because of this fact, Lehr was entitled to due process, which inher-

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inadequately developed and incomplete factual record upon which a judgment on the quality and substance of the parent-child relationship must be based.

This divergence of opinion concerning the factual background of the case is where the majority and dissent become diametrically opposed. The majority concluded that Lehr, according to the sufficient record before it, had not tried to develop any type of significant relationship with his daughter. As a result, the majority held that Lehr had not substantiated his relationship with his daughter in such a way as to guarantee procedural due process protection. The dissent, in contrast, argued that the record before it was too scant and undeveloped to provide a background upon which a fair decision regarding Lehr's relationship to his daughter could be reached. *Id.*

72. *Id.* at 2999.

73. *Id.*

74. *Id.* The dissent supported this proposition in a footnote, stating:

> The majority's citation of *Quilloin* and *Caban* as examples that the Constitution does not require the same procedural protections for the interests of all unwed fathers is disingenuous. Neither case involved notice and opportunity to be heard. In both, the unwed fathers were notified and participated as parties in the adoption proceedings. *See Quilloin v. Walcott,* 434 U.S. [at] 253 . . . ; *Caban v. Mohammed,* 441 U.S. [at] 385 n.3.

Id. at 2999 n.4.

75. *Id.* at 2999.

76. *Id.* In addition, Justice White stated that due process does not require that adoptive parents or a state conduct an "exhaustive search of records or an intensive investigation before a final adoption order may be entered." *Id.*

77. *Id.*

78. *Id.* Justice White also pointed out that both the mother and the court entering the adoption order knew "precisely where [the father] was and how to give him actual notice." *Id.*

ently provides the "right to be heard" as fundamental.[79] By filing a "paternity and visitation petition," Lehr made himself known to the state as an interested party. Justice White stated that "[i]t makes little sense to me to deny notice to a father who has not placed his name [on the putative father registry] but who has unmistakably identified himself by filing suit to establish his paternity and has notified the adoption court of his action and his interest."[80] Lehr, according to the dissent, made himself known by legitimate means, and therefore it is the "sheerest formalism to deny him a hearing because he informed the state in the wrong manner."[81] Justice White thereupon deemed it unnecessary to address appellant's equal protection claim, for he felt that Lehr's rights as "guaranteed by the Due Process Clause" had been violated.[82]

Perhaps the best way to examine *Lehr* is by viewing it as the culmination of a comparatively short line of cases addressing the extent of a putative father's due process rights. One of the first cases dealing with the rights of a putative father was *Stanley v. Illinois*,[83] which was cited by the Court in *Lehr*. Before examining *Stanley*, however, we must first clarify what is meant by due process.

The Supreme Court stated in *Mullane v. Central Hanover Trust Company*,[84] that "there can be no doubt that at a minimum [the words of the due process clause] require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of

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79. *Id.*

80. *Id.* at 3000. The state contends that Lehr was not entitled to notice because he did not take advantage of the "putative father register" and did not fall into any of the other classes of putative fathers entitled to notice. Justice White argued that this contention is without merit, for New York did know Lehr's "identity, location and interest" before the final adoption order was signed. As such, New York's approach to the situation "represents a grudging and crabbed approach to due process." *Id.*

81. *Id.*

82. *Id.* at 3001. In conclusion, Justice White noted that New York's undoubted interest in the finality of adoption orders and the expediency with which they are reached is not "well served by a procedure that will deny notice and a hearing to a father whose identity and location are known." *Id.* Additionally, this case illustrates that denying such fathers notice and a hearing may "result in years of additional litigation." *Id.* These results thus would detract from the state's interest in finality and expediency.

83. 405 U.S. 645 (1972).

84. 339 U.S. 306 (1950).

the case."[85] Therefore, it would seem elementary that one must first have a life, liberty or property interest sufficient to compel due process protection. A review of this progression of cases will examine the Supreme Court's definitions of what constitutes a liberty interest of a putative father in relation to his illegitimate child.

In *Stanley,* the petitioner, the father of three children, never married the mother but had lived with her "intermittently" for eighteen years and with the children throughout their lives.[86] When the children were in their teens, their mother died. An Illinois statute provided that, in the case of children born out of wedlock, when the mother died, they were to become wards of the state automatically.[87] The father had no say in the proceeding, nor was he even informed of the proceeding. He was conclusively presumed to be an unfit parent, simply because of the fact that he had not married the mother.[88] In fact, Stanley's actual fitness as a parent was wholly irrelevant to the state.[89]

Justice White delivered the majority opinion in *Stanley.* He also wrote the dissent in *Lehr.* The *Stanley* Court felt that the "precise nature of the private interest" affected by governmental intervention must be examined.[90] In *Stanley,* the private interest affected was that "of a man in the children he has sired and raised."[91] Justice White reiterated that the Court had always held that it is a "cardinal principle" that the "custody, care, and nurture of the child reside first in the parents."[92] According to the Court, the law had not refused to recognize family relationships not formally legitimated by marriage.[93] The *Stanley* Court

85. *Id.* at 313.

86. 405 U.S. at 646.

87. *Id.*

88. *Id.* at 647.

89. *Id.*

90. *Id.* at 650-51. The Court quoted from Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961), which stated that "what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Id.*

91. 405 U.S. at 651.

92. *Id.* The Court incorporated this quote from Prince v. Massachusetts, 321 U.S. 158, 166 (1944), into its opinion and noted that it has frequently emphasized the importance of the family. 405 U.S. at 651.

93. *Id.*

conceded that it may be that "most unwed fathers are unsuitable and neglectful fathers," but stressed that the record did not indicate in any way that Stanley was or had been a neglectful father who did not accept the responsibility of caring for and supporting his children.[94] The Illinois procedure assumed that Stanley was unfit as a parent. The Court found that this assumption could not stand under the weight of the due process clause because the liberty interest involved "the dismemberment of [Stanley's] family."[95] In addition, the Court held that it had "concluded that all Illinois parents are constitutionally entitled to a hearing on their fitness as parents *before their children are removed from their custody.*"[96]

It seems fairly clear that, in the *Stanley* Court's opinion, it is most significant that Stanley, though he never married the mother, had "sired and raised" his children. He obviously supported, nurtured, and cared for them. There is also evidence that he was never "neglectful" of his children. Also, the state was engaged in a process of the "dismemberment" of his family and the taking of his children from his custody.

Evidently, Stanley did take substantial responsibility for his children. He did, in essence, establish a formal family relationship outside of the traditional family structure. On the facts, the fathers in *Stanley* and *Lehr* can be distinguished. Lehr, apparently, never stepped forward to accept any parental responsibility. In comparison to Stanley, he never "raised" his daughter. There were no emotional or financial ties between Lehr and his daughter that arose out of any connection other than their biological link. It seemed paramount to the Court in *Stanley* that the unwed father had actually shouldered a significant portion of the parental responsibility.[97]

The situation that the Court confronted in *Quilloin v. Walcott*[98] more closely resembled the relationship in *Lehr*. In *Quilloin*, the father of an illegitimate child never married the

94. *Id.* at 654-55.

95. *Id.* at 658.

96. *Id.* (emphasis added). This portion of the Court's opinion is emphasized because it is important to recognize how carefully the Court qualified its holding. The point is that this holding seems to apply to parents who already have custody of their children. In *Stanley*, the father had and sought to retain custody of his children. *Id.* at 650 n.4.

97. *See supra* notes 91-96 and accompanying text.

98. 434 U.S. 246 (1978).

mother or established a home with her.[99] The mother later married and her husband subsequently attempted to adopt the illegitimate child. The Georgia statute in question[100] provided that the consent of the mother alone was required for adoption of an illegitimate child. To acquire this same veto power, a putative father had to either marry the mother,[101] or obtain a court order declaring the child legitimate and capable of inheriting from the father.[102] The father in *Quilloin* did not petition for legitimation of his child at any time during the eleven years between her birth and the filing of the adoption petition.[103] After the adoption proceeding was commenced, the father filed an application seeking visitation rights, a petition for legitimation, and an objection to the adoption.[104]

In his opinion, Justice Marshall spoke for a unanimous Court when he stated that he had "little doubt that the Due Process Clause would be offended 'if a State were to attempt to force the breakup of a natural family . . . without some showing of unfitness . . . .' "[105] In addition, Justice Marshall concluded that *Quilloin* was not a case in which the unwed father at any time "had, or sought, actual or legal custody of his child."[106] Furthermore, the result of the adoption in this case would give "full recognition to a family unit already in existence, a result desired by all concerned, except appellant."[107] Since the natural father in *Quilloin* had never "exercised actual or legal custody over his child," it was consequently determined that he "never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."[108] For these reasons, the Court was of the opinion that Quilloin

99. *Id.* at 247.

100. Section 74-403(3) of the Georgia Code provided in relevant part, "Illegitimate children—If the child be illegitimate, the consent of the mother alone shall suffice [in order to permit an adoption]." *Id.* at 248-49.

101. 434 U.S. at 249 n.3.

102. *Id.* at 249 n.4.

103. *Id.* at 249.

104. *Id.* at 249-50.

105. *Id.* at 255. The Court quoted from Justice Stewart's concurrence in Smith v. Organization of Foster Families, 431 U.S. 816, 862-863 (1977).

106. 434 U.S. at 255.

107. *Id.*

108. *Id.* at 256.

had not been substantively denied any corresponding due process protection.

The Court stressed the fact that the father in *Quilloin* never "shouldered any significant responsibility with respect [to his] . . . child."[109] This is clearly in contrast to the father in *Stanley* but similar to the father in *Lehr*. It must also be noted that appellant in *Quilloin* did not object to the notice that he received, but rather to the substantial nature of the interest being deprived.[110] However, the Court noted that the father never sought custody of his child, never undertook any significant responsibility for raising the child, and eventually attempted to alter an already existing formal family relationship. As can be seen, many of the important facts granting Stanley due process protection are the same facts that, in their absence, deny Quilloin the same.

The last case in this short progression is *Caban v. Mohammed*.[111] In *Caban*, the natural father had lived with the mother for nearly five years, during which time she gave birth to two children. Throughout this five-year period the couple never married, though they held themselves out to be husband and wife.[112] Appellant was identified as the father on both children's birth certificates.[113] At the time he left the mother, he had contributed a significant amount of support throughout this period.[114] After the father left, he was allowed to visit the children approximately once a week for nine months.[115]

The mother of the children subsequently married another man and, two years after leaving appellant, the married couple filed an adoption petition.[116] Two months later the natural father, also newly married, filed a cross-petition for adoption.[117] The statute involved in *Caban* set forth the classes of parents

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109. *Id.*

110. *Id.* at 253; *see id.* at 250 n.7, which states that the father had been notified by Georgia's Department of Human Resources that an adoption petition had been filed.

111. 441 U.S. 380 (1979).

112. *Id.* at 382.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 383.

117. *Id.*

whose consent was required for adoption.[118] At the time, appellant, as the natural father, did not belong to any of these classes. By contrast, a natural mother's consent was always required. The Court, in an opinion by Justice Powell, noted that the natural father in *Caban* was given sufficient notice and was permitted to participate as a party in the adoption proceedings, and therefore could not contend that he was denied the procedural due process held to be requisite in *Stanley*.[119] Consequently, the Court's discussion addressed primarily the appellant's equal protection claim. Nevertheless, the majority opinion, as well as the dissent, shed light on the *Lehr* analysis.

In *Caban*, the Court placed significance on the fact that the father had "established a substantial relationship" with his children and had admitted his paternity.[120] In fact, reference was made to the Court's decision in *Quilloin*, where it was felt that the Court specifically "emphasized the importance of the appellant's failure to act as a father towards his children."[121] The Court also recognized the presumptive quality of the New York statute, especially when it affects unwed fathers, like Caban, who have "manifested a significant paternal interest" in their children.[122]

In attempting to analyze the progression from *Caban* to *Lehr*, it may be, as Justice Stevens stated in *Lehr*, more "in-

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118. At the time of the adoption proceeding, Section 111 of the New York Domestic Relations Law provided, in relevant part:

> Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:
>
> 1. Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with consent;
>
> 2. Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;
>
> 3. Of the mother, whether adult or infant, of a child born out of wedlock.

N.Y. DOM. REL. LAW § 111 (McKINNEY 1977).

119. Justice Powell explained in a footnote:

> 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 the procedural due process held to be requisite in *Stanley v. Illinois*, 405 U.S. 645 (1972).

441 U.S. at 385 n.3.

120. *Id.* at 393.

121. *Id.* at 389 n.7.

122. In addition to discriminating against fathers who have "manifested a significant paternal interest in the child," the Court concluded that the New York statutes also discriminated against unwed fathers "even when their identity is known." *Id.* at 394.

structive" to examine the dissenting opinions in *Caban*. Justice Stewart filed a dissent which reflected his view that "parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."[123] Justice Stewart also stated that "an unwed father who has not come forward and who has established no relationship with [his] child is plainly not in a [position] similar to the mother's."[124] He did recognize, however, that in *Caban* the Court was examining the situation of an "unwed father who [had] established a paternal relationship with his children."[125]

Justice Stevens, who wrote the other dissenting opinion in *Caban*, was joined by Chief Justice Burger and Justice Rehnquist. He found the due process issue raised by the appellant to be more troublesome than his equal protection challenge.[126] This dissent espoused the view that a relationship between a father and his natural child, "if and when one develops," is entitled to constitutional protection against state interference.[127] As support for this proposition, Justice Stevens cited to a recent Court decision[128] which held that biological relationships are not an exclusive determination of a family.[129] Finally, the dissent recognized that the Court had indicated that "an adoption decree that terminates the relationship is constitutionally justified by a finding that the father has abandoned or mistreated the child."[130]

A lineal examination of the above cases leads to the conclusion that the Supreme Court may very well require that a puta-

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123. In contrast to his opinion that parental rights require that relationships between parent and child be more than biological, Justice Stewart felt that "the mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures." *Id.* at 397.

124. *Id.* at 399. Justice Stewart further expounded that "New York's consent distinctions have clearly been made on this basis, and in my view they do not violate the Equal Protection Clause of the Fourteenth Amendment." *Id.* This line of reasoning seems to have been wholly adopted by the Court in *Lehr*. *See supra* note 71 and accompanying text.

125. *Caban*, 441 U.S. at 399.

126. *Id.* at 414.

127. *Id.* This passage was quoted by Justice Stevens in his majority opinion in *Lehr*. *See* 103 S. Ct. at 2993.

128. Smith v. Organization of Foster Families, 431 U.S. 816 (1977).

129. *Id.* at 843.

130. 441 U.S. at 414.

tive father must establish a "significant relationship" and take "substantial responsibility" for the care, custody, and supervision of his child before he is entitled to constitutional protection and recognition. This proposition is supported by commentators who have reflected that "the unwed father's interest springs not from his biological tie with his illegitimate child, but rather, from the relationship he has established with and the responsibility he has shouldered for the child."[131] Additionally, it has been noted that a father's failure to show a substantial interest in his child will remove from him the full constitutional protection afforded the parental rights of other, more responsible, classes of parents.[132] The Court itself noted in *Smith v. Organization of Foster Families*[133] that, at least where the protection afforded by the due process clause is involved, biological relationships alone are not sufficient to create a constitutionally protected "family."[134]

The *Lehr* Court appears to adhere strictly to these principles. Concepts of "love and duty," "full recognition of the responsibilities of parenthood," "an actual relationship of parental responsibility," and "significant custodial, personal, or financial relationship[s]" with respect to illegitimate children are prominent in *Lehr*. These concepts are a direct outgrowth of the lineal progression of *Stanley–Quilloin–Caban*. An overview of these cases almost compels the judicial determination in *Lehr*. It would seem that the Court has taken a large step in ultimately defining the constitutional rights of putative fathers. Unless an unwed father of an illegitimate child accepts some sort of "significant responsibility" or nurtures a "substantial relationship" with his child, the Supreme Court would be reluctant to recognize that his position as a biological father is so substantial or fundamental that it constitutes a liberty interest guaranteed procedural due process protection.

John J. Brogan

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131. Comment, *Caban v. Mohammed: Extending the Rights of Unwed Fathers*, 46 BROOKLYN L. REV. 95, 115-16 (1979).

132. *See* Note, *The Putative Father's Parental Rights: A Focus on "Family"*, 58 NEB. L. REV. 610, 617 (1979).

133. 431 U.S. 816 (1977).

134. *Id.* at 843 n.50.